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THE GENERAL STATUTES OF NORTH CAROLINA

CONTAINING GENERAL LAWS OF NORTH CAROLINA THROUGH
THE SESSION LAWS OF 1979, SECOND SESSION

APR 23 1981

Prepared under the Supervision of the Department of Justice
of the State of North Carolina

**Annotated, under the Supervision of the Department of Justice,
by the Editorial Staff of the Publishers**

UNDER THE DIRECTION OF
D. P. HARRIMAN, S. C. WILLARD AND SYLVIA FAULKNER

Volume 2C

1981 Replacement Volume

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Scope of Volume

Statutes:

Full text of Chapters 63 through 96 of the General Statutes of North Carolina, including all enactments through the Session Laws of 1979, First and Second Sessions, heretofore contained in 1975 Replacement Volume 2C of the General Statutes and the 1979 Cumulative Supplement and 1980 Interim Supplement thereto.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 299, p. 546.
North Carolina Court of Appeals Reports through Volume 44, p. 732.
Federal Reporter 2nd Series through Volume 617, p. 295.
Federal Supplement through Volume 485, p. 1061.
Federal Rules Decisions through Volume 85, p. 486.
United States Reports through Volume 443.
Supreme Court Reporter through Volume 100, p. 1609.
North Carolina Law Review.
Wake Forest Intramural Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P. R.	Potter's Revisal (1821, 1827)
R. S.	Revised Statutes (1837)
R. C.	Revised Code (1854)
C. C. P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C. S.	Consolidated Statutes (1919, 1924)

Preface

Replacement Volume 2C, published in 1975, accumulated a supplement equalling more than one half the bound volume in size. This 1981 replacement volume is issued to incorporate the new material in the bound volume and to eliminate what is obsolete.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, such opinions which construe a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

RUFUS L. EDMISTEN
Attorney General

March 15, 1981

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Article 1.

Municipal Airports.

§ 63-1. Definitions; singular and plural.

(a) Definitions. — For the purpose of this Chapter the following words, terms, and phrases shall have the meanings herein given, unless otherwise specifically defined, or unless another intention clearly appears, or the context otherwise requires:

(1) "Aeronautics" means transportation by aircraft; the operation, construction, repair, or maintenance of aircraft, aircraft power plants and accessories, including the repair, packing, and maintenance of parachutes; the design, establishment, construction, extension, operation, improvement, repair, or maintenance of airports, restricted landing areas, or other air navigation facilities, and air instruction.

(2) "Aeronautics instructor" means any individual engaged in giving instruction or offering to give instruction in aeronautics, either in flying or ground subjects, or both, for hire or reward, without advertising such occupation, without calling his facilities an "air school" or anything equivalent thereto, and without employing or using other instructors. It does not include any instructor in any public school or university of this State, or any institution of higher learning duly accredited and approved for carrying on collegiate work, while engaged in his duties as such instructor.

(3) "Aircraft" means any contrivance now known, or hereafter invented, used or designed for navigation of or flight in the air.

(4) "Air instruction" means the imparting of aeronautical information by any aeronautics instructor or in or by any air school or flying club.

(5) "Airman" means any individual who engages, as the person in command, or as pilot, mechanic, or member of the crew, in the navigation of aircraft while underway and (excepting individuals employed outside the United States, any individual employed by a manufacturer of aircraft, aircraft engines, propellers, or appliances to perform duties as inspector or mechanic in connection therewith, and any individual performing inspection or mechanical duties in connection with aircraft owned or operated by him) any individual who

is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air traffic control tower operator.

(6) "Air navigation" means the operation or navigation of aircraft in the air space over this State, or upon any airport or restricted landing area within this State.

(7) "Air navigation facility" means any facility other than one owned or controlled by the federal government, used in, available for use in, or designed for use in aid of air navigation, including airports, restricted landing areas, and any structures, mechanisms, lights, beacons, marks, communicating systems, or other instrumentalities or devices used or useful as an aid, or constituting an advantage or convenience to the safe taking off, navigation, and landing of aircraft, or the safe and efficient operation or maintenance of an airport or restricted landing area, and any combination of any or all of such facilities.

(8) "Airport" means any area of land or water, except a restricted landing area, which is designed for the landing and take off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo, and all appurtenant areas used or suitable for airport buildings or other airport facilities, and all appurtenant rights-of-way, whether heretofore or hereafter established.

(9) "Airport hazard" means any structure, object of natural growth, or use of land, which obstructs the air space required for the flight of aircraft in landing or taking off at any airport or restricted landing area or is otherwise hazardous to such landing or taking off.

(10) "Airport protection privileges" means easements through, or other interests in, air space over land or water, interests in airport hazards outside the boundaries of airports or restricted landing areas, and other protection privileges, the acquisition or control of which is necessary to insure safe approaches to the landing areas of airports and restricted landing areas and the safe and efficient operation thereof.

(11) "Air school" means any person engaged in giving or offering to give instruction in aeronautics, either in flying or ground subjects, or both, for or without hire or reward, and advertising, representing, or holding himself out as giving or offering to give such instruction. It does not include any public school or university of this State, or any institution of higher learning duly accredited and approved for carrying on collegiate work.

(12) "Civil aircraft" means any aircraft other than a public aircraft.

(13) "Flying club" means any person other than an individual which, neither for profit nor reward, owns, leases, or uses one or more aircraft for the purpose of instruction or pleasure, or both.

(14) "Municipality" means any county, city, or town of this State, and any other political subdivision, public corporation, authority, or district in this State, which is or may be authorized by law to acquire, establish, construct, maintain, improve, and operate airports and other air navigation facilities.

(15) "Navigable air space" means air space above the minimum altitudes of flight prescribed by the laws of this State, or by regulations of the Commission consistent therewith.

(16) "Operation of aircraft" or "operation aircraft" means the use of aircraft for the purpose of air navigation and includes the navigation or piloting of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be

deemed to be engaged in the operation of aircraft within the meaning of the statutes of this State.

(17) "Person" means any individual, firm, partnership, corporation, company, association, joint stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(18) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any state, territory, or possession of the United States, or the District of Columbia, but not including any government owned aircraft engaged in carrying persons or property for commercial purposes.

(19) "Restricted area" means any area of land, water, or both, which is used or is made available for the landing and take off of aircraft, the use of which shall, except in case of emergency, be only as provided from time to time by the Commission.

(20) "State" or "this State" means the State of North Carolina.

(21) "State airway" means a route in the navigable air space over and above the lands or water of this State designated by the Commission as a route suitable for air navigation.

(b) Singular and Plural. — The singular shall include the plural, and the plural the singular. (1945, c. 490, s. 1; 1949, c. 865, s. 3; 1971, c. 936, s. 2.)

Cross References. For other provisions as to municipal airports, see §§ 63-49 to 63-58.

CASE NOTES

This Chapter contemplates full cooperation and compliance with federal statutes and rules and regulations of appropriate federal agencies. City of Charlotte v. Spratt, 263 N.C. 656, 140 S.E.2d 341 (1965); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970).

"Operation of Aircraft". — Subdivision (16) of this section merely says that the owner is "engaged in the operation of aircraft." It does not make it unlawful to operate an aircraft so as to cause harm nor does it deem a pilot to automatically be an agent of the owner. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

Strict Liability Not Imposed. — The North Carolina legislature has not expressed a clear intent to impose strict liability on an owner-lessor in the field of aviation. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

The law in North Carolina concerning the liability of an owner-lessor of an aircraft is governed by the common law of bailments. There is no strict or vicarious liability imposed upon the owner-lessor by the enactment of subdivision (16) of this section. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

North Carolina's aviation statute is copied from the model Federal Act. Broadway v. Webb, 462 F. Supp. 429 (W.D.N.C. 1977).

Applied in Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975).

§ 63-2. Cities and towns authorized to establish airports.

The governing body of any city or town in this State is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft, either within or without the limits of such cities and towns and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city or town. (1929, c. 87, s. 2.)

Cross References. — See §§ 63-49 to 63-58. As to power of eminent domain, see §§ 63-5 and 63-6. As to airport zoning regulations, see § 63-31 et seq.

CASE NOTES

Franchise for Limousine Service to Airport. — The provisions of former § 160-1 and §§ 63-2, 63-49, 63-50, 63-53 and 62-260 authorize a municipal corporation to award a franchise contract granting the right to provide limousine service to a municipal airport upon certain terms and conditions set forth in the franchise ordinance. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

Quoted in Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Cited in Turner v. City of Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944).

§ 63-3. Counties authorized to establish airports.

The governing body of any county in this State is hereby authorized to acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such county. (1929, c. 87, s. 3.)

CASE NOTES

Proprietary Function. — The operation of an airport by a county is a proprietary function. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 63-4. Joint airports established by cities, towns and counties.

The governing bodies of any city, town and county in this State are hereby authorized to jointly acquire, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate airports or landing fields for the use of airplanes and other aircraft within or without the limits of such cities, towns and counties, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be jointly owned or controlled by such city, town and county. (1929, c. 87, s. 4.)

Local Modification. — City of Laurinburg and Town of Maxton: 1977 (2nd Sess.), c. 1166.

CASE NOTES

The legislature has power to create a municipal authority to construct, maintain and operate an airport, and county and cities located therein may lawfully join in the construction, maintenance and operation of an airport if each of them is benefited by it. Greensboro-High Point Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946).

Section Not Repealed or Modified by Supplementary Acts. — This section, permitting municipalities to act jointly in the creation of an airport authority, is not repealed or modified or its authority in any way affected by the supplementary public-local and private acts under which the purpose and policy of this section are carried out in the creation of a single airport authority to serve three municipalities. Greensboro-High Point Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946).

Applied in Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967), commented on in 46 N.C.L. Rev. 188 (1967).

§ 63-5. Airport declared public purpose; eminent domain.

Any lands acquired, owned, controlled, or occupied by such cities, towns, and/or counties, for the purposes enumerated in G.S. 63-2, 63-3 and 63-4, shall and are hereby declared to be acquired, owned, controlled and occupied for a public purpose, and such cities, towns and/or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public purpose. (1929, c. 87, s. 5.)

Legal Periodicals. — Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967), cited in the note below, was commented on in 46 N.C.L. Rev. 188 (1967).

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

CASE NOTES

City or County May Appropriate and Expend Public Funds for Acquisition or Construction. — The acquisition of land for, and the construction and operation of, an airport for use by the public is a purpose for which a city or a county or both may appropriate and expend public funds and for which it or they may acquire land by the exercise of the power of eminent domain. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

Materiality of Amount of Use in Immediate Future. — In a taking of land for the construction of an airport, as in the case of a taking for the construction of a road, if the taking is, in reality, for the purpose of making the property available for use by the public, it is immaterial that, in the immediate future, only a small segment of the public will be likely to make actual use of it. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

The fact that at the time of the taking of land by eminent domain for the purpose of building an airport there are no commitments from commercial air lines and the immediate prospect is for use only by a small number of private planes, is irrelevant where there is no suggestion that the airport would not be available and eventually used as a public facility. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

Taking of Land to Provide Clear Approach to Runway. — The taking of land so as to provide for airplanes an approach to the runway of the airport free from trees and structures of considerable height is reasonably incidental to the construction of such an airport. Vance County v. Royster, 271 N.C. 53, 155 S.E.2d 790 (1967).

Operation of Airport Is Proprietary and Nongovernmental Function. — The operation and maintenance of a municipal airport and its facilities is a proprietary or nongovernmental function or undertaking of the city for a public purpose, and for which the municipality may be held liable in tort for negligence in the operation thereof. Jewell Ridge Coal Corp. v. City of Charlotte, 204 F. Supp. 256 (W.D.N.C. 1962).

Quoted in Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Cited in Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); Greensboro-High Point Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390 (1978).

§ 63-6. Acquisition of sites; appropriation of moneys.

Private property needed by a city, town and/or county for an airport or landing field may be acquired by gift or devise or shall be acquired by purchase if the city, town and/or county is or are able to agree with the owners on the terms thereof, and otherwise by condemnation, in the manner provided by law under which the city, town and/or county is or are authorized to acquire real property for public purposes, other than street purposes, or if there be no such law, in the manner provided for and subject to the provisions of the condemnation law. The purchase price, or award for property acquired for an airport or landing field may be paid for by appropriation of moneys available therefor, or wholly or partly from the proceeds of the sale of bonds of the city, town and/or county, as the governing body and/or bodies of such city, town and/or county shall determine. (1929, c. 87, s. 6.)

Cross References. — As to proceedings for eminent domain, see § 40-11 et seq. As to zoning regulations and acquisition of air rights, see §§ 63-31, 63-32 and 63-36.

CASE NOTES

Cited in Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959).

§ 63-7. Airports already established declared public charge; regulations and fees for use of.

The governing body or bodies of a city, town and/or county which has or have established an airport or landing field, and acquired, leased, or set apart real property for such purpose, may construct, improve, equip, maintain, and operate the same. The expenses of such construction, improvement, maintenance, and operation shall be a city, town and/or county charge as the case may be. The governing body or bodies of a city, town and/or county may adopt regulations and establish fees or charges for the use of such airport or landing field. (1929, c. 87, s. 7.)

§ 63-8. Appropriations.

The governing body or bodies of a city, town and/or county to which this Article is applicable, having power to appropriate, individually or jointly, money therein, are hereby authorized to annually appropriate and cause to be raised by taxation in such city, town and/or county or to use from the net proceeds derived from the operation, by such city, town or county, of any public utility a sum sufficient to carry out the provisions of this Article in such proportion and upon such pro-rata basis as may be determined upon by a joint board to be appointed by and from the governing body or bodies of the city, town and/or the county or individually as the case may be. Provided, nothing herein shall be construed to permit the governing bodies of any county, city or town to issue bonds under the provisions of this Article without a vote of the people. (1929, c. 87, s. 8.)

§ 63-8.1: Repealed by Session Laws 1973, c. 803, s. 3.

§ 63-9. Partial invalidity.

If any part or parts of this Article shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this Article. The General Assembly expressly declares that it would have passed the remaining parts of this Article, if it had known that such part or parts thereof would be declared unconstitutional. (1929, c. 87, s. 9.)

ARTICLE 2.

State Regulation.

§ 63-10: Repealed by Session Laws 1971, c. 936, s. 1.

§ 63-11. Sovereignty in space.

Sovereignty in space above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States. (1929, c. 190, s. 2.)

CASE NOTES

Stated in United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

Cited in Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

§ 63-12. Ownership of space.

The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in G.S. 63-13. (1929, c. 190, s. 3.)

CASE NOTES

Flight of Planes over Property as Taking. — Holding that flights by planes at low levels over plaintiff's land deprived plaintiffs of use and enjoyment of their property and constituted "taking" entitling them to compensation was not inconsistent with this section. United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946), discussed in 25 N.C.L. Rev. 64.

Cited in Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

§ 63-13. Lawfulness of flight.

Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable as provided in G.S. 63-14. (1929, c. 190, s. 4; 1947, c. 1001, s. 1.)

Editor's Note. — Section 63-14, referred to at the end of this section, has been repealed.

CASE NOTES

An aircraft can lawfully fly over the land and water of this State, unless done in violation of the provision of this section. Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

And flying a plane over the land or pond of another does not constitute a trespass unless the flight is at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be injurious to the health and happiness, or imminently dangerous to persons or property below. Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

The burden of proof is upon the party asserting a violation of this section, and evidence merely that the plane engaged in crop spraying operations was seen flying over the land of plaintiff at an altitude of 100 feet or more, without evidence that such flight disturbed any person on the ground or was imminently dangerous to persons or property, is insufficient to make out a cause of action for trespass. Wall v. Trogdon, 249 N.C. 747, 107 S.E.2d 757 (1959).

Stated in United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

Cited in Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

§ 63-14: Repealed by Session Laws 1947, c. 1069, s. 3.

§ 63-15. Collision of aircraft.

The liability of the owners of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damages caused by collision on land or in the air shall be determined by the rules of law applicable to torts on land. (1929, c. 190, s. 6.)

CASE NOTES

This section appears merely to declare the common law. Jewell Ridge Coal Corp. v. City of Charlotte, 204 F. Supp. 256 (W.D.N.C. 1962).

Liability of a carrier of passengers by aircraft must be based on negligence. Such carrier is not an insurer of the safety of its passengers. Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

Any recovery for wrongful death must be based on actionable negligence under the general rules of tort liability. Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

Causal Connection between Negligence and Injury. — There must be a causal connection between the negligence complained of and the injury inflicted. Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

Res Ipsa Loquitur Inapplicable. — In a case involving an airplane crash the doctrine of res ipsa loquitur does not apply. Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

In a case involving an airplane crash the doctrine of res ipsa loquitur does not apply, it being common knowledge that airplanes do fall without fault of the pilot. Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

§ 63-16. Jurisdiction over crimes and torts.

All crimes, torts, and other wrongs committed by or against an airman or passenger while in flight over this State shall be governed by the laws of this State; and the question whether damage occasioned by or to an aircraft while in flight over this State constitutes a tort, crime or other wrong by or against the owner of such aircraft shall be determined by the laws of this State. (1929, c. 190, s. 7; 1971, c. 936, s. 3.)

Cross References. — See § 63-24.

CASE NOTES

Jurisdiction Where Crash Occurs in Another State. — A court of this State has jurisdiction of an action between residents to recover for negligent injury and death in an airplane crash occurring in another state while the plane was on a trip under contract made in this State. Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

Cited in Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

§ 63-17. Jurisdiction over contracts.

All contractual and other legal relations entered into by airmen or passengers while in flight over this State shall have the same effect as if entered into on the land or water beneath. (1929, c. 190, s. 8; 1971, c. 936, s. 3.)

§ 63-18. Dangerous flying a misdemeanor.

Any airman or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall except while in landing or taking off, fly at such a low level as to disturb the public peace or the rights of private persons in the enjoyment of their homes, or injure the health, or endanger the persons or property on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than one year, or both. (1929, c. 190, s. 9; 1947, c. 1001, s. 2; 1971, c. 936, s. 3.)

CASE NOTES

Cited in Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

§ 63-19: Repealed by Session Laws 1943, c. 543.

§ 63-20. Qualifications of operator; federal license.

The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that a person engaging within this State in operating aircraft, in any form of aerial navigation for which a license to operate aircraft issued by the United States government would then be required if such aerial navigation were interstate, should have the qualifications necessary for obtaining and holding such a license, it shall be unlawful for any person to engage in operating aircraft within the State, in any such form of aerial navigation, unless he have such federal license. (1929, c. 190, s. 11.)

CASE NOTES

Federal Regulations Specifically Made Applicable to Intrastate Flying. — See Mann v. Henderson, 261 N.C. 338, 134 S.E.2d 626 (1964).

§ 63-21. Possession and exhibition of license certificate.

The certificate of the license, herein required, shall be kept in the personal possession of the licensee when he is operating aircraft within this State and must be presented for inspection upon the demand of any passenger, any peace officer of this State, or any official, manager or person in charge of any airport or landing field in this State upon which he shall land. (1929, c. 190, s. 12.)

§ 63-22. Aircraft; construction, design and airworthiness; federal registration.

The public safety requiring, and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that aircraft to be operated within this State should conform, with respect to design, construction and airworthiness, to standards then prescribed by the United States government with respect to aerial navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to operate an aircraft within this State unless it is registered pursuant to the lawful rules and regulations of the United States government then in force, if the circumstances of such aerial navigation are of a character that such registration would be required in the case of interstate aerial navigation. (1929, c. 190, s. 13.)

§ 63-23. Penalties.

A person who violates any provision of G.S. 63-20, 63-21 or 63-22 of this Article shall be guilty of a misdemeanor and punishable by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than 90 days, or both; provided, however, that acts or omissions made unlawful by G.S. 63-20, 63-21 or 63-22 of this Article shall not be deemed to include any act or omission which violates the laws or lawful regulations of the United States. (1929, c. 190, s. 14.)

§ 63-24. Jurisdiction of State over crimes and torts retained.

Provided that this Article shall not be construed as a waiver of jurisdiction of the courts of the State of North Carolina over any crime or tort committed within the State of North Carolina, and provided, further, that the General Assembly of North Carolina may at any time amend, regulate or control any of the powers which may be assumed by the United States Department of Commerce under this Article. (1929, c. 190, s. 15.)

CASE NOTES

Jurisdiction Where Crash Occurs in Another State. — See same catchline under § 63-16.

ARTICLE 3.

Stealing, Tampering with, or Operating Aircraft While Intoxicated.

§ 63-25. Taking of aircraft made crime of larceny.

Any person who, under circumstances not constituting larceny shall, without the consent of the owner, take, use or operate or cause to be taken, used or operated, an airplane or other aircraft or its equipment, for his own profit, purpose or pleasure, steals the same, is guilty of larceny and is punishable accordingly. (1929, c. 90, s. 1.)

Cross References. — As to larceny generally, see § 14-70 et seq. As to punishment, see § 14-2.

§ 63-26. Tampering with aircraft made crime.

Any person who shall, without the consent of the owner, go upon or enter, tamper with or in any way damage or injure any airplane or other aircraft shall be guilty of a misdemeanor and shall be punishable by fine of not more than one hundred dollars ($100.00) or imprisonment of not more than 60 days, or both, in the discretion of the court and it shall not be necessary to conviction hereunder to show willful or malicious intent. (1929, c. 90, s. 2.)

§ 63-27. Operation of aircraft while intoxicated made crime.

Any person who operates an airplane or other aircraft, whether on the ground or in the air or on water while in an intoxicated condition, shall be guilty of a misdemeanor and punishable by fine not to exceed one hundred dollars ($100.00) or by imprisonment not to exceed 60 days, or both, in the discretion of the court. (1929, c. 90, s. 3; 1953, c. 675, s. 8.)

§ 63-28. Infliction of serious bodily injury by operation of aircraft while intoxicated made felony.

Any person who, operating an airplane or other aircraft whether on the ground or in the air or on water while in an intoxicated condition, does serious bodily injury to another shall be guilty of a felony. (1929, c. 90, s. 4; 1953, c. 675, s. 9.)

Article 4.

Model Airport Zoning Act.

§ 63-29: Repealed by Session Laws 1971, c. 936, s. 1.

§ 63-30. Airport hazards not in public interest.

It is hereby found and declared that an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity, and also, if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein, and is therefore not in the interest of the public health, public safety, or general welfare. (1941, c. 250, s. 2.)

Legal Periodicals. — For comment on this Article, see 19 N.C.L. Rev. 548.

CASE NOTES

Cited in Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

§ 63-31. Adoption of airport zoning regulations.

(a) Every political subdivision may adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations, which regulations shall divide the area surrounding any airport within the jurisdiction of said political subdivision into zones, and, within such zones, specify the land uses permitted, and regulate and restrict the height to which structures and trees may be erected or allowed to grow. In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the federal government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport.

(b) In the event that a political subdivision has adopted, or hereafter adopts, a general zoning ordinance regulating, among other things, the height of buildings, any airport zoning regulations adopted for the same area or portion thereof under this Article may be incorporated in and made a part of such general zoning regulations, and be administered and enforced in connection therewith, but such general zoning regulations shall not limit the effectiveness or scope of the regulations adopted under this Article.

(c) Any two or more political subdivisions may agree, by ordinance duly adopted, to create a joint board and delegate to said board the powers herein conferred to promulgate, administer and enforce airport zoning regulations to protect the aerial approaches of any airport located within the corporate limits of any one or more of said political subdivisions. Such joint board shall have as members two representatives appointed by the chief executive officer of each political subdivision participating in the creation of said board and a chairman elected by a majority of the members so appointed.

(d) The jurisdiction of each political subdivision is hereby extended to the promulgating, adopting, administering and enforcement of airport zoning regulations to protect the approaches of any airport or landing field which is owned by said political subdivision, although the area affected by the zoning regulations may be located outside the corporate limits of said political subdivision. In case of conflict with any airport zoning or other regulations promulgated by any political subdivision, the regulations adopted pursuant to this section shall prevail.

(e) All airport zoning regulations adopted under this Article shall be reasonable, and none shall require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations when adopted or amended, or otherwise interfere with the continuance of any nonconforming use, except as provided in G.S. 63-32, subsection (a). (1941, c. 250, s. 3; 1945, cc. 300, 635.)

CASE NOTES

Cited in Matson v. United States, 171 F. Supp. 283 (Ct. Cl. 1959).

§ 63-32. Permits, new structures, etc., and variances.

(a) Permits. — Where advisable to facilitate the enforcement of zoning regulations adopted pursuant to this Article, a system may be established by any political subdivision for the granting of permits to establish or construct new structures and other uses and to replace existing structures and other uses or make substantial changes therein or substantial repairs thereof. In any event, before any nonconforming structure or tree may be replaced, substantially altered or repaired, rebuilt, allowed to grow higher, or replanted, a permit must be secured from the administrative agency authorized to administer and enforce the regulations, authorizing such replacement, change or repair. No such permit shall be granted that would allow the structure or tree in question to be made higher or become a greater hazard to air navigation than it was when the applicable regulation was adopted; and whenever the administrative agency determines that a nonconforming structure or tree has been abandoned or more than eighty percent (80%) torn down, destroyed, deteriorated, or decayed: (i) no permit shall be granted that would allow said structure or tree to exceed the applicable height limit or otherwise deviate from the zoning regulations; and (ii) whether application is made for a permit under this paragraph or not, the said agency may by appropriate action compel the owner of the nonconforming structure or tree, at his own expense, to lower, remove, reconstruct, or equip such object as may be necessary to conform to the regulations or, if the owner of the nonconforming structure or tree shall neglect or refuse to comply with such order for 10 days after notice thereof, the said agency may proceed to have the object so lowered, removed, reconstructed, or equipped. Except as indicated, all applications for permits for replacement, change or repair of nonconforming uses shall be granted.

(b) Variances. — Any person desiring to erect any structures, or increase the height of any structure, or permit the growth of any tree, or otherwise use his property, in violation of airport zoning regulations adopted under this Article, may apply to the board of appeals, as provided in G.S. 63-33, subsection (c), for a variance from the zoning regulations in question. Such variances shall be allowed where a literal application or enforcement of the regulations would

result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest but do substantial justice and be in accordance with the spirit of the regulations and this Article.

(c) Obstruction Marking and Lighting. — In granting any permit or variance under this section, the administrative agency or board of appeals may, if it deems such action advisable to effectuate the purposes of this Article and reasonable in the circumstances, so condition such permit or variance as to require the owner of the structure or tree in question to permit the political subdivision, at its own expense, to install, operate, and maintain suitable obstruction markers and obstruction lights thereon. (1941, c. 250, s. 4.)

§ 63-33. Procedure.

(a) Adoption of Zoning Regulations. — No airport zoning regulations shall be adopted, amended, or changed under this Article except by action of the legislative body of the political subdivision in question, or the joint board provided for in G.S. 63-31, subsection (c), after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days' notice of the hearing shall be published in an official paper, or a paper of general circulation, in the political subdivision or subdivisions in which the airport is located.

(b) Administration of Zoning Regulations — Administrative Agency. — The legislative body of any political subdivision adopting airport zoning regulations under this Article may delegate the duty of administering and enforcing such regulations to any administrative agency under its jurisdiction, or may create a new administrative agency to perform such duty, but such administrative agency shall not be or include any member of the board of appeals. The duties of such administrative agency shall include that of hearing and deciding all permits under G.S. 63-32, subsection (a), but such agency shall not have or exercise any of the powers delegated to the board of appeals.

(c) Administration of Airport Zoning Regulations — Board of Appeals. — Airport zoning regulations adopted under this Article shall provide for a board of appeals to have and exercise the following powers:

(1) To hear and decide appeals from any order, requirement, decision, or determination made by the administrative agency in the enforcement of this Article or of any ordinance adopted pursuant thereto;

(2) To hear and decide special exceptions to the terms of the ordinance upon which such board may be required to pass under such ordinance;

(3) To hear and decide specific variances under G.S. 63-32, subsection (b).

Where a zoning board of appeals or adjustment already exists, it may be appointed as the board of appeals. Otherwise, the board of appeals shall consist of five members, each to be appointed for a term of three years and to be removable for cause by the appointing authority upon written charges and after public hearing.

The board shall adopt rules in accordance with the provisions of any ordinance adopted under this Article. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. The chairman, or in his absence the acting chairman, may administer oaths and compel the attendance of witnesses. All meetings of the board shall be public. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the board and shall be a public record.

Appeals to the board may be taken by any person aggrieved, or by any officer, department, board, or bureau of the political subdivision affected, by any decision of the administrative agency. An appeal must be taken within a reasonable time, as provided by the rules of the board, by filing with the agency from which the appeal is taken and with the board, a notice of appeal specifying the grounds thereof. The agency from which the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

An appeal shall stay all proceedings in furtherance of the action appealed from, unless the agency from which the appeal is taken certifies to the board, after the notice of appeal has been filed with it, that by reason of the facts stated in the certificate a stay would, in its opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by a court of record on application on notice to the agency from which the appeal is taken and on due cause shown.

The board shall fix a reasonable time for the hearing of the appeal, give public notice and due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing any party may appear in person or by agent or by attorney.

The board may, in conformity with the provisions of this Article, reverse or affirm, wholly or partly, or modify, the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the administrative agency from which the appeal is taken.

The concurring vote of a majority of the members of the board shall be sufficient to reverse any order, requirement, decision, or determination of the administrative agency, or to decide in favor of the applicant on any matter upon which it is required to pass under any such ordinance, or to effect any variation in such ordinance. (1941, c. 250, s. 5.)

Local Modification. — City of Wilson: 1961, c. 635; 1963, c. 151.

§ 63-34. Judicial review.

(a) Any person aggrieved by any decision of the board of appeals, or any taxpayer, or any officer, department, board, or bureau of the political subdivision, may present to the superior court a verified petition setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the decision is filed in the office of the board.

(b) Upon presentation of such petition the court may allow a writ of certiorari directed to the board of appeals to review such decision of the board. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the court may, on application, on notice to the board and on due cause shown, grant a restraining order.

(c) The board of appeals shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof or of such portions thereof as may be called for by the writ. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

(d) The court shall have exclusive jurisdiction to affirm, modify, or set aside the decision brought up for review, in whole or in part, and if need be, to order

further proceedings by the board of appeals. The findings of fact by the board, if supported by substantial evidence, shall be accepted by the court as conclusive, and no objection to a decision of the board shall be considered by the court unless such objection shall have been urged before the board, or if it was not so urged, unless there were reasonable grounds for failure to do so.

(e) Costs shall not be allowed against the board of appeals unless it appears to the court that it acted with gross negligence, in bad faith, or with malice, in making the decision appealed from. (1941, c. 250, s. 6.)

§ 63-35. Enforcement and remedies.

Each violation of this Article or of any regulations, order, or ruling promulgated or made pursuant to this Article, shall constitute a misdemeanor and shall be punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days or by both such fine and imprisonment, and each day a violation continues to exist shall constitute a separate offense. In addition, the political subdivision within which the property is located may institute in any court of competent jurisdiction, an action to prevent, restrain, correct or abate any violation of this Article, or of airport zoning regulations adopted under this Article, or of any order or ruling made in connection with their administration or enforcement, and the court shall adjudge to the plaintiff such relief, by way of injunction (which may be mandatory) or otherwise, as may be proper under all the facts and circumstances of the case, in order fully to effectuate the purposes of this Article and of the regulations adopted and orders and rulings made pursuant thereto. (1941, c. 250, s. 7.)

§ 63-36. Acquisition of air rights.

In any case in which:

(1) It is desired to remove, lower, or otherwise terminate a nonconforming use; or

(2) The approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this Article; or

(3) It appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations,

the political subdivision within which the property or nonconforming use is located or the political subdivision owning the airport or served by it may acquire, in the manner provided by the law under which municipalities are authorized to acquire real property for public purposes, such an air right, easement, or other estate or interest in the property or nonconforming use in question as may be necessary to effectuate the purposes of this Article.

If any political subdivision, or if any board or administrative agency appointed or selected by a political subdivision, shall adopt, administer or enforce any airport zoning regulations which results in the taking of, or in any other injury or damage to any existing structure, such political subdivision shall be liable therefor in damages to the owner or owners of any such property and the liability of the political subdivision shall include any expense which the owners of such property are required to incur in complying with any such zoning regulations. (1941, c. 250, s. 8.)

§ 63-37. Short title.

This Article shall be known and may be cited as the "Model Airport Zoning Act." (1941, c. 250, s. 10.)

Article 5.

Aeronautics Commission; Federal Regulations.

§§ 63-38 to 63-44: Repealed by Session Laws 1949, c. 865, s. 1.

§ 63-45. Enforcement of Article.

It shall be the duty of every State, county and municipal officer charged with the enforcement of State and municipal laws to enforce and assist in the enforcement of this Article. (1945, c. 198, s. 8.)

§ 63-46: Repealed by Session Laws 1949, c. 865, s. 2.

§ 63-47. Enforcement of regulations of Civil Aeronautics Administration.

In the general public interest and safety, the safety of persons receiving instructions concerning or operating, using or traveling in aircraft, and of persons and property on the ground, and in the interest of aeronautical progress, the public officers of the State, counties and cities shall enforce the rules and regulations of the Civil Aeronautics Administration. (1945, c. 198, s. 10.)

Article 6.

Public Airports and Related Facilities.

§ 63-48: Transferred to § 63-1 by Session Laws 1971, c. 936, s. 2.

§ 63-49. Municipalities may acquire airports.

(a) Every municipality is hereby authorized, through its governing body, to acquire property, real or personal, for the purpose of establishing, constructing, and enlarging airports and other air navigation facilities and to acquire, establish, construct, enlarge, improve, maintain, equip, operate, and regulate such airports and other air navigation facilities and structures and other property incidental to their operation, either within and without the territorial limits of such municipality and within or without this State; to make, prior to any such acquisition, investigations, surveys, and plans; to construct, install, and maintain airport facilities for the servicing of aircraft and for the comfort and accommodation of air travelers; and to purchase and sell equipment and supplies as an incident to the operation of its airport properties. It may not, however, acquire or take over any airport or other air navigation facility owned or controlled by any other municipality of the State without the consent of such municipality. It may use for airport purposes any available property that is now or may at any time hereafter be owned or controlled by it. Such air navigation facilities as are established on airports shall be supplementary to

and coordinated in design and operation with those established and operated by the federal government.

(b) All property needed by a municipality for an airport or restricted landing area, or for the enlargement of either, or for other airport purposes, may be acquired by purchase, gift, devise, lease or other means if such municipality is able to agree with the owners of said property on the terms of such acquisition, and otherwise by condemnation in the manner provided by the law under which such municipality is authorized to acquire like property for public purposes, full power to exercise the right of eminent domain for such purposes being hereby granted every municipality both within and without its territorial limits. If but one municipality is involved and the charter of such municipality prescribes a method of acquiring property by condemnation, proceedings shall be had pursuant to the provisions of such charter and may be followed as to property within or without its territorial limits. The fact that the property needed has been acquired by any agency or corporation authorized to institute condemnation proceedings under power of eminent domain shall not prevent its acquisition by the municipality by the exercise of the right of eminent domain herein conferred when such right is exercised on the approach zone or on the airport site. For the purpose of making surveys and examinations relative to any condemnation proceedings, it shall be lawful to enter upon any land, doing no unnecessary damage. Provided that municipalities building airports after the ratification of this article shall not acquire by condemnation any property of any corporation engaged in the operation of a railroad or railroad bridge in this State if such property is used in the business of such corporation.

(c) Where necessary, in order to provide unobstructed air space for the landing and taking off of aircraft utilizing airports or restricted landing areas acquired or operated under the provisions of this Article, every municipality is authorized to acquire, in the same manner as is provided for the acquisition of property for airport purposes, easements through or other interests in air space over land or water, interests in airport hazards, or airport hazards outside the boundaries of the airports or restricted landing areas and such other airport protection privileges as are necessary to insure safe approaches to the landing areas of said airports or restricted landing areas and the safe and efficient operation thereof. It is also hereby authorized to acquire, in the same manner, land for the removal of airport hazards and the right of easement for a term of years or perpetually, to place or maintain suitable marks for the daytime marking and suitable lights for the nighttime marking of airport hazards, including the right of ingress or egress to or from such airport hazards for the purpose of maintaining and repairing such lights and marks. This authority shall not be so construed as to limit any right, power or authority to zone property adjacent to airports and restricted landing areas under the provisions of any law of this State.

(d) It shall be unlawful for anyone to build, rebuild, create, or cause to be built, rebuilt, or created any object, or plant, cause to be planted, or permit to grow higher any tree or trees or other vegetation which shall encroach upon any airport protection privileges acquired pursuant to the provisions of this section. Any such encroachment is declared to be a public nuisance and may be abated in the manner prescribed by law for the abatement of public nuisances, or the municipality in charge of the airport or restricted landing area for which airport protection privileges have been acquired as in this section provided, may go upon the land of others and remove any such encroachment without being liable for damages in so doing. (1945, c. 490, s. 2; c. 810.)

Cross References. — For other provisions as to municipal airports, see §§ 63-1 to 63-9.

CASE NOTES

One purpose of the 1945 act enacting this article was to make uniform the law with reference to public airports. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

Franchise for Limousine Service to Airport. — See same catchline in note to § 63-2.

§ 63-50. Airports a public purpose.

The acquisition of any lands for the purpose of establishing airports or other air navigation facilities; the acquisition of airport protection privileges; the acquisition, establishment, construction, enlargement, improvement, maintenance, equipment and operation of airports and other air navigation facilities, and the exercise of any other powers herein granted to municipalities, are hereby declared to be public, governmental and municipal functions exercised for a public purpose and matters of public necessity, and such lands and other property, easements and privileges acquired and used by such municipalities in the manner and for the purposes enumerated in this Article, shall and are hereby declared to be acquired and used for public, governmental and municipal purposes and as a matter of public necessity. (1945, c. 490, s. 3.)

Legal Periodicals. — For brief comment on this section, see 28 N.C.L. Rev. 332.

CASE NOTES

A municipality is liable for torts committed by it in the operation and maintenance of a municipal airport, since such activity is a proprietary or corporate function of the municipality, and this section, declaring such activity to be a public, governmental and municipal function exercised for a public purpose, does not purport to exempt it from tort liability. Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371, rehearing denied, 230 N.C. 759, 53 S.E.2d 313 (1949).

Franchise for Limousine Service to Airport. — See same catchline in note to § 63-2.

Quoted in Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 63-51. Prior acquisition of airport property validated.

Any acquisition of property within or without the limits of any municipality for airports and other air navigation facilities or of airport protection privileges heretofore made by any such municipality in any manner, together with the conveyance and acceptance thereof, is hereby legalized and made valid and effective. (1945, c. 490, s. 4.)

§§ 63-51.1, 63-52: Repealed by Session Laws 1973, c. 695, s. 10.

§ 63-53. Specific powers of municipalities operating airports.

In addition to the general powers in this Article conferred, and without limitation thereof, a municipality which has established or may hereafter establish airports, restricted landing areas or other air navigation facilities, or which has acquired or set apart or may hereafter acquire or set apart real property for such purpose or purposes is hereby authorized:

(1) To vest authority for the construction, enlargement, improvement, maintenance, equipment, operation and regulation thereof in an offi-

cer, a board or body of such municipality by ordinance or resolution which shall prescribe the powers and duties of such officer, board or body. The expense of such construction, enlargement, improvement, maintenance, equipment, operation and regulation shall be a responsibility of the municipality.

(2) To adopt and amend all needful rules, regulations and ordinances for the management, government and use of any properties under its control whether within or without the territorial limits of the municipality; to appoint airport guards or police with full police powers; to fix by ordinance, penalties for the violation of said ordinances and enforce said penalties in the same manner in which penalties prescribed by other ordinances of the municipality are enforced. It may also adopt ordinances designed to safeguard the public upon or beyond the limits of private airports or landing strips within such municipality or its police jurisdiction against the perils and hazards of instrumentalities used in aerial navigation. Such ordinances shall be published as provided by general law or the charter of the municipality for the publication of similar ordinances. They must conform to and be consistent with the laws of this State and shall be kept in conformity, as nearly as may be, with the then current federal legislation governing aeronautics and the regulations duly promulgated thereunder and rules and standards issued from time to time pursuant thereto.

(3) To lease such airports or other air navigation facilities, or real property acquired or set apart for airport purposes, to private parties, to any municipal or State government or to the national government, or to any department of either thereof, for operation; to lease to private parties, to any municipal or State government or to the national government, or any department of either thereof, for operation or use consistent with the purpose of this Article, space, area, improvements, or equipment on such airports; to sell any part of such airports, other air navigation facilities or real property to any municipal government, or to the United States or to any department or instrumentality thereof, for aeronautical purposes or purposes incidental thereto, and to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; provided that in each case in so doing the public is not deprived of its rightful, equal, and uniform use thereof.

(4) To sell or lease any property, real or personal, acquired for airport purposes and belonging to the municipality, which, in the judgment of its governing body, may not be required for aeronautic purposes in accordance with the laws of this State or the provisions of the charter of the municipality governing the sale or leasing of similar municipally owned property.

(5) To determine the charge or rental for the use of any properties under its control and the charges for any services or accommodations and the terms and conditions under which such properties may be used, provided that in all cases the public is not deprived of its rightful, equal, and uniform use of such property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality. The municipality shall have and may enforce liens as provided by law for liens and enforcement thereof, for repairs to or improvement or storage or care of any personal property, to enforce the payment of any such charges.

(6) To exercise all powers necessarily incidental to the exercise of the general and special powers herein created. (1945, c. 490, s. 6.)

Local Modification. — City of Laurinburg, as to subdivision (4): 1957, c. 1210; town of Maxton, as to subdivision (4): 1957, c. 1210.

CASE NOTES

Constitutionality. — Subdivisions (2), (3) and (5) of this section are not violative of equal protection as being devoid of appropriate standards. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Although the standard set out in subdivision (2) of this section for the enactment of managerial rules and regulations is limited to the word "needful," such a standard is sufficiently definite to serve as a reasonable and workable guide to an administrative body, whose activities require flexibility and a practical approach, without leaving that body to its own unfettered discretion. The standard for municipal action with respect to safety ordinances is definite enough to withstand constitutional scrutiny. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Subdivision (3) of this section is not constitutionally infirm on its face. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

The requirement of some flexibility in landing fees must be considered implicit in the concept of reasonableness which forms the foundation of subsection (5). Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (D.N.C. 1976).

A fee reasonable under subsection (5) will also meet the test of reasonableness under the commerce clause of the United States Constitution. Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (D.N.C. 1976).

There are no constitutional infirmities in the fixing of landing fees and space use charges so long as the municipality complies with the provisions of subsection (5). Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (D.N.C. 1976).

Municipality May Award Franchise for Limousine Service to and from Airport. — The provisions of this section and §§ 63-2, 63-49, 63-50, and 62-260 authorize a municipal corporation to award a franchise contract granting the right to provide limousine service to a municipal airport upon certain terms and conditions set forth in the franchise ordinance. Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967).

A municipal corporation, owning and operating a public airport, is authorized to grant an exclusive franchise for the operation of a common carrier limousine service for the transportation of passengers and their baggage to and from the airport. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

And, in so doing the municipality is acting in a proprietary capacity. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

Under Like Rules and Regulations as Pursued by Private Individuals. — When given authority to do so a governmental entity is expected to perform a proprietary function under like rules and regulations as those pursued by private individuals. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

And a municipality may grant one or more concessions to car rental companies. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

Or Taxicab Concession. — The authority of a municipality extends to the granting of an exclusive taxicab or limousine or car rental concession at the airport. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

And may permit them to enter and remain upon its airport premises for the solicitation of business. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

While Denying Such Privilege to Other Such Companies. — See Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

But it may not forbid the other companies to enter its premises and remain thereon for such time as is reasonably necessary to discharge an outgoing passenger, with his baggage, or to pick up an incoming passenger, with his baggage, pursuant to an actual, previously made contract or a previously received request for such service. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

A municipal corporation, operating a public airport, or other public transportation terminal, has no more extensive authority to exclude persons or vehicles from the terminal grounds than does a privately owned common carrier operating such a terminal for the use and convenience of its passengers. There is no basis for a distinction in this respect between an airport and a railroad or steamship terminal. Raleigh-Durham Airport Auth. v. Stewart, 278 N.C. 227, 179 S.E.2d 424 (1971).

The operation of an airport by a county is a proprietary function. Pinehurst Airlines v.

Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

A municipality operating an airport acts in a proprietary capacity. Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975).

Fixing of Fees Not Administrative Decision. — The fixing by a municipal airport authority of fees it will charge for the use of its property is not an "administrative decision." Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975).

In determining the fee it will charge for the privilege of landing an aircraft upon its runway and the rent it will charge for the use of its properties, a municipal airport authority is acting as the proprietor of the property, not as a regulatory agency. Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975).

Unilateral fixing of fees under subsection (5) is nowhere prohibited in this section, and no set procedure is required or commanded. Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (D.N.C. 1976).

And Notice Not Required. — Nothing in this section requires a municipal airport authority to give notice to present or prospective users of its properties that the authority is contemplating a change in such fees and rental charges. Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975); Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (D.N.C. 1976).

Nor Hearing. — No provision in this section requires that a municipal airport authority conduct a hearing, receive evidence and make findings of fact or that it follow any other procedural course in determining the landing fees or rentals to be charged by it. Piedmont Aviation, Inc. v. Raleigh-Durham Airport Auth., 288 N.C. 98, 215 S.E.2d 552 (1975); Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (D.N.C. 1976).

The proviso at the end of subdivision (3) contemplates that limits of some sort will be placed upon the activities of municipalities while engaged in the proprietary activity of operating a publicly owned airport. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Federal Antitrust Scrutiny of Exclusive Grant. — The legislative intent behind this section was not to direct or authorize a grant by a county of an exclusive fixed base operator status at an airport. Thus federal antitrust scrutiny of such an alleged arrangement would be proper. Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Where a night watchman at a municipal airport kills a person on the property in the nighttime, the question of whether he was acting in his capacity as servant or agent of the airport, or in his capacity as a police officer, is a question of fact to be determined by the jury on an issue raised by proper pleadings. Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371, rehearing denied, 230 N.C. 759, 53 S.E.2d 313 (1949).

Cited in Jackson v. Stancil, 253 N.C. 291, 116 S.E.2d 817 (1960).

§ 63-54. Federal aid.

(a) A municipality is authorized to accept, receive, and receipt for federal moneys and other moneys, either public or private, for the acquisition, construction, enlargement, improvement, maintenance, equipment, or operation of airports and other air navigation facilities and sites therefor, and to comply with the provisions of the laws of the United States and any rules and regulations made thereunder for the expenditures of federal moneys upon such airports and other air navigation facilities.

(b) The governing body of any municipality is authorized, if necessary, to comply with any federal law or regulation of any agency thereof to designate the North Carolina Aeronautics Commission as its agents to accept, receive, and receipt for federal moneys in its behalf for airport purposes. Such moneys as are paid over by the United States government and shall be paid over to said municipality under such terms and conditions as may be imposed by the United States government in making such grant.

(c) All contracts for the acquisition, construction, enlargement, improvement, maintenance, equipment, or operation of airports or other air navigation facilities made by the municipality shall be made pursuant to the laws of this State governing the making of like contracts, provided, however, that where such acquisition, construction, improvement, enlargement, maintenance, equipment or operation is financed wholly or partly with federal moneys the

municipality may let contracts in the manner prescribed by the federal authorities, acting under the laws of the United States and any rules or regulations made thereunder notwithstanding any other State law to the contrary. (1945, c. 490, s. 7.)

§ 63-55. Airports on public waters and reclaimed land.

(a) The powers herein granted to a municipality to establish and maintain airports shall include the power to establish and maintain such airports in, over, and upon any public waters of this State within the limits or jurisdiction of or bordering on the municipality, any submerged land under such public water, and any artificial or reclaimed land which before the artificial making or reclamation thereof constituted a portion of the submerged land under such public waters, and as well the power to construct and maintain terminal buildings, landing floats, causeways, roadways and bridges for approaches to or connecting with the airport, and landing floats and breakwaters for the protection of any such airport.

(b) All the other powers herein granted municipalities with reference to airports on land or granted to them with reference to such airports in, over, and upon public waters, submerged land under public waters, and artificial or reclaimed land. (1945, c. 490, s. 8.)

§ 63-56. Joint operation of airports.

(a) All powers, rights and authority granted to any municipality in this Article may be exercised and enjoyed by two or more municipalities either within or without the territorial limits of either or any of said municipalities and within or without this State, or by any municipality acting jointly with any other municipality therein either within or without this State, provided the laws of such other state permit such joint action.

(b) Any two or more municipalities may enter into agreements with each other, duly authorized by ordinance or resolution, as may be appropriate, for joint action pursuant to the provisions of this section. Concurrent action by the governing bodies of the municipalities involved shall constitute joint action.

(c) Each such agreement shall specify its terms; the proportionate interest which each municipality shall have in the property, facilities and privileges involved, and the proportion of preliminary costs, costs of acquisition, establishment, construction, enlargement, improvement and equipment, and of expenses of maintenance, operation and regulation to be borne by each, and make such other provisions as may be necessary to carry out the provisions of this section. It shall provide for amendments thereof and for conditions and methods of termination; for the disposition of all or any part of the property, facilities and privileges jointly owned if said property, facilities and privileges, or any part thereof, shall cease to be used for the purposes herein provided or if the agreement shall be terminated, and for the distribution of the proceeds received upon any such disposition, and of any funds or other property jointly owned and undisposed of, and the assumption or payment of any indebtedness arising from the joint venture which remains unpaid, upon any such disposition or upon a termination of the agreement.

(d) Municipalities acting jointly as herein authorized may create a board from the inhabitants of such municipalities for the purpose of acquiring property for establishing, constructing, enlarging, improving, maintaining, equipping, operating and regulating the airports and other air navigation facilities and airport protection privileges to be jointly acquired, controlled, and operated. Such board shall consist of members to be appointed by the governing body of each municipality involved, the number to be appointed by each to be provided for by the agreement for the joint venture. Each member

shall serve for such time and upon such terms and as to compensation, if any, as may be provided for in the agreement.

(e) Each such board shall organize, select officers for terms to be fixed by the agreement, and adopt and from time to time amend rules of procedure.

(f) Such board may exercise, on behalf of the municipalities acting jointly by which it is appointed, all the powers of each of such municipalities granted by this Article, except as herein provided, subject, however, to such limitations as may be contained in the agreement between such municipalities. Real property, airports, restricted landing areas, air protection privileges, or personal property costing in excess of a sum to be fixed by the joint agreement, may be acquired, and condemnation proceedings may be instituted, only by authority of the governing bodies of each of the municipalities involved. The total amount of expenditures to be made by the board for any purpose in any calendar year shall be determined by the municipalities involved by the approval by each. No real property and no airport, other air navigation facility, or air protection privilege, owned jointly, shall be disposed of by the board, by sale, or otherwise, except by authority of the appointed governing bodies, but the board may lease space, area or improvements and grant concessions on airports for aeronautical purposes or purposes incidental thereto.

(g) Each municipality is authorized and empowered to enact such ordinances as are provided for by this Article, and to fix by such ordinances penalties for the violation thereof, which ordinances shall have the same force and effect within the municipality which enacted them, and on any property controlled by it, either separately or jointly with another municipality, or adjacent thereto, whether within or without the territorial limits of it, or either or any of them, as ordinances of the municipality involved, and may be enforced in such municipality in like manner as are its other ordinances.

(h) Condemnation proceedings may be instituted in the names of two or more municipalities jointly, and the property acquired by such joint condemnation proceedings shall be held by the municipalities as tenants in common, each municipality being entitled to a pro rata interest in said property as the value of its contribution to the acquisition of said property bears to the total cost of acquiring said property, and in the event one municipality desires to acquire property for expansion of or addition to the facilities, and the other or others do not elect to join in the acquisition of such property, such municipality may institute condemnation proceedings in its name individually, and all property now owned or hereafter acquired by a municipal corporation for additions to or expansions of aeronautical facilities operated jointly shall be and remain the sole property of the municipal corporation acquiring same.

(i) For the purpose of providing funds for necessary expenditures in carrying out the provisions of this section, a joint fund shall be created and maintained, into which each of the municipalities involved shall deposit its proportionate share as provided by the joint agreement, and into which shall be paid the revenues obtained from the ownership, control and operation of the airports and other air navigation facilities jointly controlled.

(j) All disbursements from such fund shall be made by order of the board, subject, however, to such limitations as shall be contained in the agreement between such municipalities.

(k) Specific performance of the provisions of any joint agreement entered into as provided for in this section may be enforced as against any party thereto by the other party or parties thereto.

(l) In the event any property is now held or may hereafter be acquired by two or more municipalities for aeronautical purposes, and such municipalities do not agree upon the terms of an agreement, as heretofore provided, and shall not agree to create a board as heretofore provided, then and in that event a board of not less than five nor more than seven members shall be created from the inhabitants of such municipalities, each municipality being entitled to appoint

as nearly as possible the proportionate number of representatives on said board as the value of its contribution shall bear to the entire amount of money or property so held by such municipalities for aeronautical purposes. In determining the value of the contribution of any municipality, the value of any funds or property used for the development of said property or the building of facilities on said property shall be taken into consideration.

(m) The said board shall have all powers given by this Article to boards created by agreements between municipalities, provided, however, that any funds appropriated by a municipality and turned over to the board for aeronautical purposes shall only be used for these purposes designated by the municipality furnishing such funds.

(n) The actions of such board shall be determined by a majority vote of the members thereof, and a majority of the members shall constitute a quorum for any meeting of the board, and such boards so created shall have full control of all revenues received by reason of the airport or other aeronautical facilities, and shall have power to expend all sums so received for such aeronautical purposes as the board deems proper, and pay over any surplus to municipalities in proportion to their respective interests.

(o) In the event the aeronautical facilities or any part thereof shall cease to be used for aeronautical purposes, such of the facilities as are jointly owned by two or more municipalities shall be sold, and each municipality shall receive its pro rata proportion of the sums realized from the sale of facilities jointly owned.

(p) In the event aeronautical facilities are now owned or hereafter acquired by two or more municipalities, and are operated under a board as hereinabove provided, and one or more of such municipalities deem it advisable to expand or enlarge the facilities or invest more money in such facilities, all of the municipalities then having representation on the board shall be entitled, if they so desire, to contribute their pro rata part of such additional investment and maintain their pro rata representation on said board, provided, however, that if one or more of the municipalities involved shall fail to contribute its or their proportionate part of such additional investment, the representation of such municipality on such board shall be readjusted, to the end that the representation of each municipality on said board shall represent as nearly as possible its pro rata contribution to the entire investment.

Provided further that where one municipality at the time of the passage of this Article shall have invested more than one half of the total investment in a jointly owned airport, then, and in that event the minority owner or owners shall be allowed five years from the date of the passage of this Article in which to pay over to the majority owner a sum sufficient to equalize the amount of ownership of the present minority owner or owners with the total ownership of the majority owner. Provided further that this Article shall not be construed to amend or impair in any respect contracts or agreements in effect at the time of the adoption of this Article. (1945, c. 490, s. 9.)

§ 63-57. Powers specifically granted to counties.

(a) The purposes of this Article are specifically declared to be county purposes as well as generally public, governmental and municipal.

(b) The powers herein granted to all municipalities are specifically declared to be granted to counties in this State, any other statute to the contrary notwithstanding. (1945, c. 490, s. 10.)

CASE NOTES

Operation of Airport Is Proprietary Function. — In operating and maintaining an airport a county engages in a proprietary or corporate function, in the exercise of which it is subject to tort liability. Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371, rehearing denied, 230 N.C. 759, 53 S.E.2d 313 (1949).

§ 63-58. Municipal jurisdiction exclusive.

Every airport and other air navigation facility controlled and operated by any municipality, or jointly controlled and operated pursuant to the provisions of this Article, shall, subject to federal and State laws, rules, and regulations, be under the exclusive jurisdiction and control of the municipality or municipalities controlling and operating it, and no other municipality in which such airport or air navigation facility is located shall have any police jurisdiction of the same. (1945, c. 490, s. 11.)

CASE NOTES

Cited in Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371 (1949).

§§ 63-59 to 63-64: Reserved for future codification purposes.

Article 7.

State and Federal Aid; Authority of Department of Transportation.

§ 63-65. Authority of Department of Transportation generally; "airport" defined.

(a) The Department of Transportation is hereby authorized, subject to the limitations and conditions of this Article, to provide State aid in form of loans and grants to cities, counties, and public airport authorities of North Carolina for the purpose of planning, acquiring, constructing, or improving municipal, county, and other publicly owned or controlled airport facilities, and to authorize related programs of aviation safety, education, promotions, and long-range planning.

(b) Repealed by Session Laws 1979, c. 148, s. 1. (1967, c. 1006, s. 1; 1975, c. 716, s. 3; 1977, 2nd Sess., c. 1219, s. 39; 1979, c. 148, ss. 1, 5.)

Editor's Note. — This section is former § 113-28.5, as amended and recodified by Session Laws 1979, c. 148, ss. 1 and 5. The 1979 act repealed subsection (b), which defined "Airport."

§ 63-66. Administration of Article; powers of Department of Transportation.

The Department of Transportation shall carry out the provisions of this Article. In exercising such power, the Department shall:

(1) Promote the further development and improvement of air routes, airport facilities, seaplane bases, heliports, protect their approaches and stimulate the development of aviation, commerce and air facilities. In exercising this power, the Department shall prepare and develop goals, objectives, standards and policies for the most efficient and economical expenditure of State funds as may be appropriated for the purposes of this Article.
(2) Publish and make available to aviation interests, the Federal Aviation Administration, and the people of the State generally, current information regarding such criteria, standards, and policies.
(3) Prepare and keep current a State airport plan and submit annual revisions of that plan to the Federal Aviation Administration.
(4) Make a detailed and thorough study of all applications for State assistance authorized herein and make specific recommendations regarding applications to the Federal Aviation Administration for federal grants.
(5) Develop a plan of priorities and allocations of State funds to be revised annually.
(6) Represent the State before all federal agencies and elsewhere where the aviation interests of the State may be affected.
(7) Subject to the availability of funds for the purpose, promote aviation safety throughout the State and conduct such promotional, educational and other programs as may be necessary to keep the people of the State properly informed with respect to aviation and to further aeronautics generally throughout the State.

In exercising the powers and performing the duties herein provided for by this section, the Department of Transportation shall consult with and seek the advice of the aeronautics council. (1967, c. 1006, s. 1; 1973, c. 507, s. 5; c. 1262, ss. 28, 86; c. 1443, s. 1; 1975, c. 716, s. 3; 1979, c. 148, ss. 2, 5.)

Editor's Note. — This section is former § 113-28.6, as amended and recodified by Session Laws 1979, c. 148, ss. 2 and 5. The 1979 act inserted "promote aviation safety throughout the State and" near the beginning of subdivision (7).

§ 63-67. Activities eligible for State aid.

Loans and grants of State funds may be made for the planning, acquisition, construction, or improvement of any airport, seaplane base, or heliport owned or controlled, or which will be owned or controlled by any city, county or public airport authority acting by itself or jointly with any other city or county. An airport, seaplane base, or heliport development project or activity eligible for State aid under this Article shall also be deemed to include projects such as air navigation facilities, aviation easements, and the acquisition of land, lighting, marking, security items, terminal improvements, and the elimination of aviation safety hazards. (1967, c. 1006, s. 1; 1973, c. 1443, s. 2; 1977, 2nd Sess., c. 1219, s. 39.1; 1979, c. 148, s. 5.)

Editor's Note. — This section is former § 113-28.7, as recodified by Session Laws 1979, c. 148, s. 5.

§ 63-68. Limitations on State financial aid.

Grants and loans of funds authorized by this Article shall be subject to the following conditions and limitations:

(1) Loans and grants may be for such projects, activities, or facilities as would in general be eligible for approval by the Federal Aviation Administration or its successor agency or agencies with the exception that the requirement that the airport be publicly owned shall not be applicable. Further, airport terminal and security areas, seaplane bases, and heliports are also eligible for State financial aid.

(2) Loans and grants of State funds shall be limited to a maximum of fifty percent (50%) of the nonfederal share of the total cost of any project for which aid is requested, and shall be made only for the purpose of supplementing such other funds, public or private, as may be available from federal or local sources provided, however, using Department of Transportation personnel and one hundred percent (100%) State funding in its discretion, the Department of Transportation may purchase, install, and maintain navigational aids necessary for the safe, efficient use of airspace, mark serviceable runways and taxiways and correct minor safety deficiencies which are determined to be hazardous to the flying public. Further, the Department of Transportation may contract out the maintenance and installation of state-owned navigational aids when necessary and may give or transfer such aids to the Federal Aviation Administration.

(3) Loans and grants of State funds shall be made from General Assembly appropriations specifically designated for aviation improvement, and from no other source.

(4) Notwithstanding the provisions of this section or G.S. 63-67, the Department of Transportation may allow up to ten percent (10%) of State aviation grant funds to be used for maintenance on General Aviation and Air Carrier Airports having a Department of Transportation approved maintenance plan on a seventy-five percent (75%) local — twenty-five percent (25%) State basis. (1967, c. 1006, s. 1; 1969, c. 293; 1973, c. 1262, s. 28; c. 1443, s. 3; 1975, c. 716, s. 3; 1977, 2nd Sess., c. 1219, s. 39.2; 1979, c. 148, ss. 3, 5; c. 149.)

Editor's Note. — This section is former § 113-28.8, as amended and recodified by Session Laws 1979, c. 148, ss. 3 and 5. The amendment in Session Laws 1979, c. 148, s. 3, added the second sentence to subdivision (2).

§ 63-69. Sources of State funds.

State financial assistance under this Article shall be limited to appropriations of funds made for the purpose by the General Assembly to the Department of Transportation, or to private funds which may become available to the Department for such purpose. (1967, c. 1006, s. 1; 1973, c. 1262, s. 86; 1975, c. 716, s. 3; 1979, c. 148, s. 5.)

Editor's Note. — This section is former § 113-28.9, as recodified by Session Laws 1979, c. 148, s. 5.

§ 63-70. Acceptance, receipt, accounting, and expenditure of State and federal funds.

All North Carolina municipalities, counties and public airport authorities are hereby authorized to accept, receive, receipt for, disburse and expend State funds, and other funds, public and private, which may be made available to them to accomplish any purpose of this Article. All federal funds accepted and expended by any municipality or county shall be accepted, accounted for, and expended according to such terms and conditions as may be prescribed by the United States and not inconsistent with State law. All State funds accepted by any municipality, county or public airport authority shall be accepted, accounted for, and expended according to such terms and conditions as may be prescribed by the Department of Transportation. Unless otherwise prescribed by the federal or State agency from which funds were made available, the chief financial officer of the municipality, county or public airport authority shall deposit all funds received and keep the same in separate funds according to the purpose for which they were received. The accounting of all such funds shall be subject to the municipal and county fiscal control acts. (1967, c. 1006, s. 1; 1973, c. 1262, s. 86; 1975, c. 716, s. 3; 1979, c. 148, s. 5.)

Editor's Note. — This section is former § 113-28.10, as recodified by Session Laws 1979, c. 148, s. 5.

§ 63-71. Receipt of federal grants.

(a) The Department of Transportation is hereby designated the State agency to accept grants for public airport development and improvements made by the United States pursuant to federal law. The Department shall have authority to comply with federal-aid provisions, to obtain and to disburse said grants in accordance with applicable federal laws and regulations, and to enter into contracts with the federal government, municipalities, counties, or airport authorities in connection with said grants. The Department shall also have the authority to enter into contracts with the Federal Aviation Administration or its successor agency for aeronautics related purposes.

(b) The Department of Transportation shall have authority to act as an agent of any public agency which, either individually or jointly with one or more other public agencies, submits to the Secretary of Transportation of the United States an application for federal aid in connection with airport development, improvement, or planning. (1969, c. 1109, ss. 1, 2; 1973, c. 1262, s. 86; 1975, c. 716, s. 3; 1979, c. 148, ss. 4, 5.)

Editor's Note. — This section is former § 113-28.11, as amended and recodified by Session Laws 1979, c. 148, ss. 4 and 5. The 1979 act added the third sentence of subsection (a).

§ 63-72. Authority of Department of Transportation to operate airports and expend funds therefor.

The Department is authorized to operate state-owned or leased airports or any airport for which the State has obtained a special use permit to operate. The Department may expend funds appropriated for grants to airports for the purpose of operating, maintaining, and improving state-owned or leased airports, or any airport for which the State has obtained a special use permit to operate and maintain. (1969, c. 1109, s. 3; 1973, c. 1262, s. 86; 1975, c. 716, s. 3; 1979, c. 148, s. 5.)

Editor's Note. — This section is former § 113-28.12, as recodified by Session Laws 1979, c. 148, s. 5.

§§ 63-73 to 63-77: Reserved for future codification purposes.

Article 8.

North Carolina Special Airport Districts Act.

§ 63-78. Short title.

This Article shall be known and may be cited as the "North Carolina Special Airport Districts Act." (1979, c. 689, s. 1.)

§ 63-79. Definitions.

As used in this Article, the following words and terms shall have the following meanings, unless the context shall indicate another or different meaning or intent:

(1) "Aeronautical facilities" means airports, runways, terminals, hangars and other facilities related thereto;

(2) "District" means a special airport district created under the provisions of this Article;

(3) "District board" or "board" means a special airport district board established under the provisions of this Article as the governing body of a district;

(4) "Governing body" means the board, commission, council or other body, by whatever name it may be known, of a unit of local government in which the general legislative powers thereof are vested;

(5) "Unit" or "unit of local government" means counties, cities, towns and incorporated villages. (1979, c. 689, s. 2.)

§ 63-80. Procedure for creation of districts; concurrent resolutions; notice and public hearing; submission of question to voters; publication of notice; actions to set aside proceedings.

(a) Any unit of local government in this State and any one or more other units of local government in this State may, by concurrent resolutions adopted by the governing body of each such unit, create special airport districts under the provisions of this Article which shall be public bodies corporate and politic and political subdivisions of the State. The district shall comprise the territory of the participating units. The district shall be designated "Special Airport District of . . . . . ." and shall be of such duration as the participating units shall determine.

(b) Prior to the adoption of any resolutions creating a special airport district, there shall be held a joint public hearing convened by the governing bodies of each of the participating units of government concerning the creation of the proposed special airport district. The presiding officers of the governing body of the units proposing to create such district shall name a time and place within the proposed district at which the public hearing shall be held. The presiding officers shall give prior notice of such hearing at the courthouse of the county or counties within which the district lies and also by publication at least once

a week for two successive weeks in a newspaper having general circulation in the proposed district, the first publication to be at least 30 days prior to such hearing. In the event all matters pertaining to the creation of such special airport district cannot be concluded at such hearing, such hearing may be continued to a time and place within the proposed district determined by the governing body of each of the respective units of local government.

(c) Following the joint public hearing but prior to the adoption by a unit of local government of any resolution creating a special airport district, the governing body of such unit may submit the question of the unit's participation in a special airport district to the qualified voters of such unit. The form of the question as stated on the ballot shall be in substantially the following words:

"Shall the governing body of . . . . . approve . . . . . 's participation in the proposed . . . . . special airport district?

☐ YES ☐ NO"

If a majority of the qualified voters of the unit who vote thereon approve such participation, the governing body of such unit may adopt a resolution creating the particular special airport district. The election shall be conducted and the results thereof certified, declared and published in the same manner as bond elections within the unit.

(d) Following the adoption of the resolutions creating the district by the governing body of each participating unit, the presiding officer of each such governing body shall cause to be published a single time in a newspaper circulating within the unit a notice in substantially the following form:

The governing body of . . . . . and the governing body of . . . . . passed resolutions on . . . . . , 19. . ., and on . . . . . , 19. . ., respectively, creating the Special Airport District of . . . . . Notice of the creation of such special airport district is hereby given on the date hereof. Any action or proceeding questioning the validity of the resolutions or the creation of the special airport district must be commenced within 30 days after the publication of this notice.

. . . . . .

Presiding Officer

(e) Any action or proceeding in any court to set aside the resolutions or the creation of a special airport district, or to obtain any other relief upon the ground that such resolutions or any proceeding or action taken with respect to the creation of such district is invalid, must be commenced within 60 days after the publication of the foregoing notice. After the expiration of such period of limitation, no right of action or defense founded upon the invalidity of the resolutions or the creation of the special airport district shall be asserted nor shall the validity of the resolutions or the creation of such airport district be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period. (1979, c. 689, s. 3.)

§ 63-81. District board; composition, appointment, terms and oaths; organization; meetings; quorum.

(a) Appointment of Board for District. — The board of the special airport district shall be composed of two representatives from each of the participating units of local government appointed annually by the governing body of each of said units of local government, respectively, from among their members at the first regular meeting thereof in January. Each member of the district board must be a member of the governing body of the unit of local government by which he was appointed. Membership on the district board may be held in addition to the offices authorized by G.S. 128-1 or 128-1.1. Said representatives shall hold office from their appointment until their successors are appointed and qualified, except that when any member of the district board ceases for any

reason to be a member of the governing body of the unit of local government by which he was appointed, he shall simultaneously cease to be a member of said district board. Upon the occurrence of any vacancy on said district board, the vacancy shall be filled within 30 days after notice thereof by the governing body of the participating unit of local government having a vacancy in its representation. Within 30 days after the expiration of the period set forth in G.S. 63-80 hereof, the governing body of each participating unit of local government shall appoint its representatives to hold office until successors shall be appointed in the manner hereinbefore provided. Each member of the district board, before entering upon his duties, shall take and subscribe an oath or affirmation to support the Constitution and laws of the United States and of this State and to discharge faithfully the duties of his office; and a record of each such oath shall be filed in the minutes of the respective participating units of local government.

(b) District Board Procedures. — The district board shall meet regularly at such places and on such dates as are determined by the board. Special meetings may be called by the chairman on his own initiative and shall be called by him upon request of two or more members of the board. All members shall be notified in writing at least 24 hours in advance of such meeting. A majority of the members of the district board shall constitute a quorum. No vacancy in the membership of the district board shall impair the right of a quorum to exercise all the rights and perform all the duties of the district board. No action, other than an action to recess or adjourn, shall be taken except upon a majority vote of the entire authorized membership of said district board. Each member, including the chairman, shall be entitled to vote on any question.

(c) District Board Officers. — The district board shall elect annually in January from among its members a chairman, vice-chairman, secretary and treasurer. (1979, c. 689, s. 4.)

§ 63-82. Procedure for inclusion of additional units of local government; notice and hearing; actions to set aside proceedings.

(a) If, at any time subsequent to the creation of a special airport district, there shall be filed with the district board a resolution of the governing body of a unit of local government requesting inclusion in the district of such unit of local government, and if the district board shall favor the inclusion in the district of such unit of local government, the district board shall notify the governing body of each of the participating units of local government within which the district lies and shall propose to such governing bodies an appropriate amendment of the concurrent resolutions creating the special airport district.

(b) The procedures set forth in G.S. 63-79 regarding the creation of a special airport district shall apply to the inclusion in such special airport district of additional units of local government.

(c) If all of the participating units of local government agree to the amendment of the concurrent resolutions creating the special airport district to include such unit of local government in the special airport district, the presiding officer of the governing body of each of such participating units of local government, including the unit proposed to be included, shall cause to be published in the manner provided in G.S. 63-79, a notice of the inclusion of such unit of local government.

(d) Any action or proceeding in any court to set aside such amendatory resolutions providing for the inclusion of a unit of local government within a special airport district or to obtain any other relief upon the ground that such amendatory resolutions or any proceeding or action taken with respect to the

inclusion of the unit of local government within the district is invalid, must be commenced within 30 days after publication of the notice. After the expiration of such period of limitation, no right of action or defense founded upon the invalidity of the amendatory resolutions or the inclusion of the unit of local government in the district shall be asserted, nor shall the validity of the amendatory resolutions or the inclusion of the unit of local government in the district be open to question in any court upon any ground whatever, except in an action or proceeding commenced within such period. Provided that no such action or proceeding to set aside such amendatory resolutions shall impair or otherwise affect the conclusivity of the concurrent resolutions as provided in G.S. 63-80.

(e) Immediately following the inclusion of any additional unit of local government within an existing district, members representing such additional unit of local government shall be appointed to the district board in the manner provided in G.S. 63-81 hereof.

(f) The annexation by a participating unit of local government of an area lying outside the district shall not be construed as the inclusion within the district of an additional unit of local government within the meaning of the provisions of this section; but any such area so annexed shall become a part of the district and shall be subject to all debts and supplemental tax obligations thereof. (1979, c. 689, s. 5.)

§ 63-83. Powers of districts generally.

Each district shall be deemed to be a public body and body politic and corporate exercising public and essential governmental functions to aid counties, cities, towns, incorporated villages and airport authorities in constructing and financing aeronautical facilities and enhancing the security of airport revenue bonds issued by counties, cities, towns, incorporated villages and airport authorities, and each district is hereby authorized and empowered:

(1) To adopt bylaws for the regulation of its affairs and the conduct of its business not in conflict with this or other laws;

(2) To adopt an official seal and alter the same at pleasure;

(3) To maintain an office at such place or places in the district as it may designate;

(4) To sue and be sued in its own name, plead and be impleaded;

(5) To acquire in the name of the district by gift, purchase or exercise of the power of eminent domain any improved or unimproved lands or rights-in-land and make a conveyance thereof to a county, city, town, incorporated village or airport authority for use as or in connection with aeronautical facilities;

(6) To enter into contracts with any person, firm or corporation, public or private, or any airport authority or other public authority or governmental entity, upon such terms as the district board may determine with respect to aeronautical facilities owned or operated by counties, cities, towns, incorporated villages or airport authorities;

(7) To lend to any airport authority heretofore or hereafter created by statute such sum or sums of money and at such rate of interest and upon such other terms as the district and the airport authority shall contract and agree upon, for the purpose of establishing, enlarging, improving, or maintaining any airport under the control of such airport authority;

(8) To issue bonds or other obligations of the district as hereinafter provided and apply the proceeds thereof to the financing of aeronautical facilities owned or operated by counties, cities, towns, incorporated villages or airport authorities or to the retirement of bonds theretofore issued by such units for such purposes or by the district and to refund,

whether or not in advance of maturity or the earliest redemption date, any such bonds or other obligations;

(9) To levy for the life of airport revenue bonds issued by counties, cities, towns, incorporated villages or airport authorities an annual property tax for operating supplements or debt service reserved supplements as hereinafter provided;

(10) To cause taxes to be levied and collected upon all taxable property within the district sufficient to meet the obligations of the district; and

(11) To do all acts and things necessary or convenient to carry out the powers granted by this Article. (1979, c. 689, s. 6.)

§ 63-84. Bonds and notes authorized.

In addition to the powers hereinbefore granted, a district shall have power to issue bonds and notes pursuant to the provisions of the Local Government Bond Act and the Local Government Revenue Bond Act for the purpose of financing aeronautical facilities and to refund such bonds and notes, whether or not in advance of their maturity or earliest redemption date, and such bond or note issues may include bonds or notes, the proceeds of which are to be applied to the retirement of outstanding bonds or notes of counties, cities, towns, incorporated villages or airport authorities theretofore issued for the purpose of financing aeronautical facilities. (1979, c. 689, s. 7.)

§ 63-85. Taxes for supplementing airport revenue bond projects.

A district shall have power from time to time to levy taxes or cause the levy thereof for operating supplements and debt service reserve supplements with respect to aeronautical facilities under and subject to the Local Government Revenue Bond Act. (1979, c. 689, s. 8.)

§ 63-86. Determination of tax rate by district board; levy and collection of tax; remittance and deposit of funds.

After each assessment for taxes following the creation of the district, the board or boards of commissioners of the county or counties within which the district is located shall file with the district board the valuation of assessable property within the district. The district board shall then determine the amount of funds to be raised by taxation for the ensuing year in excess of available funds to provide for the payment of interest on and principal of all outstanding general obligation bonds as the same shall become due and payable and to pay all obligations incurred by the district in the performance of its lawful undertakings and functions.

The district board shall determine the number of cents per hundred dollars necessary to raise said amount and certify such rate to the appropriate board or boards of commissioners of the appropriate county or counties. The board or boards of commissioners of such county or counties shall include the number of cents per hundred dollars certified by the district board in its next annual levy against all taxable property within the district, which tax shall be collected as other county taxes are collected, and every month the amount of tax so collected shall be remitted to the district board and deposited by the district board in a separate account in a bank in the State. Such levy may include an amount for reimbursing the particular county for the cost to the county of levying and collecting any such taxes. The officer or officers having

charge or custody of the funds of the district shall require security for protection of deposits as provided in the Local Government Budget and Fiscal Control Act. (1979, c. 689, s. 9.)

§ 63-87. Bond elections.

Elections for the purpose of authorizing the levy of taxes for the issuance of bonds shall be called by the district board and shall be conducted and the results canvassed by the boards of elections having jurisdiction within the participating units. Such results shall be certified to the district board and such board shall certify and declare the result of the election and publish a statement of the result once as provided in the Local Government Bond Act. (1979, c. 689, s. 10.)

§ 63-88. Advances.

Any participating unit of local government is hereby authorized to make advances, from any moneys that may be available for such purpose, in connection with the creation of the special airport district and to provide for the preliminary expenses of such district. Any such advances may be repaid to such participating units of local government from the proceeds of the bonds issued by such district or from other available funds of the district. (1979, c. 689, s. 11.)

§ 63-89. Inconsistent laws declared inapplicable.

All general, special or local laws, or parts thereof, inconsistent herewith, are hereby declared to be inapplicable, unless otherwise specified in the provisions of this Article. (1979, c. 689, s. 12.)

Chapter 64.

Aliens.

Sec.
64-1. Rights as to real property.
64-1.1. Secretary of State to collect information as to foreign ownership of real property.
64-2. Contracts validated.
64-3. Nonresident aliens; right to take real or personal property; reciprocity.
64-4. Burden of establishing reciprocal rights.
64-5. Nonresident aliens; absence of reciprocity; escheat.

§ 64-1. Rights as to real property.

It is lawful for aliens to take both by purchase and descent, or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this State can or may do, any law or usage to the contrary notwithstanding. (1870-1, c. 255; Code, s. 7; Rev., s. 182; C. S., s. 192; 1935, c. 243; 1939, c. 19.)

Cross References. — As to Intestate Succession Act, see § 29-1 et seq.

CASE NOTES

Right to Inherit by Intestate Succession. — Except for the reciprocity provisions contained in §§ 64-3, 64-4, and 64-5, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

§ 64-1.1. Secretary of State to collect information as to foreign ownership of real property.

The Secretary of State is authorized and directed to collect all information obtainable from reports by aliens made to agencies of the federal government on ownership of real property interests in North Carolina, to be updated every three months, and to maintain a file on such information which shall be available to the members of the General Assembly and the public. (1979, c. 610.)

§ 64-2. Contracts validated.

All contracts to purchase or sell real estate by or with aliens, heretofore made, shall be deemed and taken as valid to all intents and purposes. (1870-1, c. 255, s. 2; Code, s. 8; Rev., s. 183; C. S., s. 193.)

§ 64-3. Nonresident aliens; right to take real or personal property; reciprocity.

The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States

or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. (1959, c. 1208.)

CASE NOTES

This section is constitutional on its face. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

Right to Inherit by Intestate Succession. — Except for the reciprocity provisions contained in this section and §§ 64-4 and 64-5, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

§ 64-4. Burden of establishing reciprocal rights.

The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in G.S. 64-3. (1959, c. 1208.)

CASE NOTES

Right to Inherit by Intestate Succession. — Except for the reciprocity provisions contained in this section and §§ 64-3 and 64-5, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

§ 64-5. Nonresident aliens; absence of reciprocity; escheat.

If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property. (1959, c. 1208.)

CASE NOTES

Right to Inherit by Intestate Succession. — Except for the reciprocity provisions contained in this section and §§ 64-3 and 64-4, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country. In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972).

Chapter 65.

Cemeteries.

Article 1.

Care of Rural Cemeteries.

Sec.

65-1. County commissioners to provide list of public and abandoned cemeteries.

65-2. Appropriations by county commissioners.

65-3. County commissioners to have control of abandoned cemeteries; trustees.

Article 2.

Care of Confederate Cemetery.

65-4. State Department of Correction to furnish labor.

Article 3.

Cemeteries for Inmates of County Homes.

65-5. County commissioners may establish new cemeteries.

65-6. Removal and reinterment of bodies.

Article 4.

Trust Funds for the Care of Cemeteries.

65-7. Money deposited with clerk of superior court.

65-8. Separate record of accounts to be kept.

65-9. Funds to be kept perpetually.

65-10. Investment of funds.

65-11. Clerk's bond and fees; substitution of bank or trust company as trustee.

65-12. Funds exempt from taxation.

Article 5.

Removal of Graves.

65-13. Removal of graves; who may disinter, move and reinter; notice; certificate filed; reinterment expenses, due care required.

65-14 to 65-15. [Repealed.]

Article 6.

Cemetery Associations.

65-16. Land holdings.

65-17. Change of name of association or corporation.

65-17.1. Quorum at stockholders' meeting of certain nonprofit cemetery corporations; calling meeting; amendment of charter.

Article 7.

Cemeteries Operated for Private Gain.

65-18 to 65-36. [Recodified.]

Article 7A.

Funeral and Burial Trust Funds.

Sec.

65-36.1. Definitions.

65-36.2. Deposit of trust funds.

65-36.3. Refund of deposit.

65-36.4. Deposit within 30 days of receipt.

65-36.5. Application for license.

65-36.6. Licensee's books and records.

65-36.7. Enforcement of Article.

65-36.8. Penalties.

Article 8.

Municipal Cemeteries.

65-37. Authority to take possession of and continue the use of certain lands as cemetery.

65-38. [Repealed.]

65-39. Subdivision into burial plots; sale of lots and use of proceeds.

65-40. Appropriations for improvement and maintenance; application of existing laws.

65-41 to 65-45. [Reserved.]

Article 9.

North Carolina Cemetery Act.

65-46. Short title.

65-47. Scope.

65-48. Definitions.

65-49. The North Carolina Cemetery Commission.

65-50. Cemetery Commission; members, selection, quorum.

65-51. Principal office.

65-52. Regular and special meetings.

65-53. Powers.

65-54. Annual budget of Commission; collection of funds for operation.

65-55. License; cemetery company.

65-56. Existing companies; effect of Article.

65-57. Licenses for sales organizations, management organizations and brokers.

65-58. Licenses for persons selling preneed grave space.

65-59. Application for change of control; filing fee.

65-60. Records.

65-60.1. Trustees; qualifications; examination of records; enforcement.

65-61. Required trust fund for care and maintenance; remedy of Commission for noncompliance.

65-62. Individual contracts for care and maintenance.

Sec.
65-63. Requirements for advertising of perpetual care fund.
65-64. Deposits to perpetual care fund.
65-65. Trust fund; financial reports.
65-66. Receipts from sale of personal property or services; trust account; penalties.
65-67. Applications for license.
65-68. License not assignable or transferable.
65-69. Minimum acreage; sale or disposition of cemetery lands.
65-70. Construction of mausoleums and belowground crypts; trust fund for receipts from sale of preconstruction crypts; compliance requirements.
65-71. Penalties.
65-72. Burial without regard to race or color.
65-73. Validation of certain deeds for cemetery lots executed by suspended corporations.

Article 1.

Care of Rural Cemeteries.

§ 65-1. County commissioners to provide list of public and abandoned cemeteries.

It shall be the duty of the boards of county commissioners of the various counties in the State to prepare and keep on record in the office of the register of deeds a list of all public cemeteries in the counties outside the limits of incorporated towns and cities, and not established and maintained for the use of an incorporated town or city, together with the names and addresses of the persons in possession and control of the same. To such list shall be added a list of the public cemeteries in the rural districts of such counties which have been abandoned, and it shall be the duty of the boards of county commissioners to furnish to the division of publications in the office of the Secretary of State copies of the lists of such public and abandoned cemeteries, to the end that it may furnish to the boards, for the use of the persons in control of such cemeteries, suitable literature, suggesting methods of taking care of such places. (1917, c. 101, s. 1; C. S., s. 5019; 1939, c. 316.)

§ 65-2. Appropriations by county commissioners.

To encourage the persons in possession and control of the public cemeteries referred to in G.S. 65-1 to take proper care of and to beautify such cemeteries, to mark distinctly their boundary line with evergreen hedges or rows of suitable trees, and otherwise to lay out the grounds in an orderly manner, the board of county commissioners of any county, upon being notified that two thirds of the expense necessary for so marking and beautifying any cemetery has been raised by the local governing body of the institution which owns the cemetery, and is actually in hand, is hereby authorized to appropriate from the general fund of the county one third of the expense necessary to pay for such work, the amount appropriated by the board of commissioners in no case to exceed fifty dollars ($50.00) for each cemetery. (1917, c. 101, s. 2; C. S., s. 5020; 1979, c. 735.)

Effect of Amendments. — The 1979 amendment substituted "authorized" for "required" and "fifty dollars ($50.00)" for "fifteen dollars ($15.00)" near the end of the section.

§ 65-3. County commissioners to have control of abandoned cemeteries; trustees.

The county commissioners of the various counties are required to take possession and control of all abandoned public cemeteries in their respective counties, to see that the boundaries and lines are clearly laid out, defined, and marked, and to take proper steps to preserve them from encroachment, and they are hereby authorized to appropriate from the general fund of the county whatever sums may be necessary from time to time for the above purposes.

The board of county commissioners of the various counties may appoint a board of trustees not to exceed five in number and to serve at the will of the board, and may impose upon such trustees the duties required of the board of commissioners by this Article; and such trustees may accept gifts and donations for the purpose of upkeep and beautification of such cemeteries. (1917, c. 101, s. 3; C. S., s. 5021; 1947, c. 236.)

Editor's Note. — As to condemnation of adjoining lands for cemetery purposes in Avery County, see Session Laws 1955, c. 1013.

Article 2.

Care of Confederate Cemetery.

§ 65-4. State Department of Correction to furnish labor.

The State Department of Correction is hereby authorized and directed to furnish at such time, or times, as may be convenient, such prisoner's labor as may be available, to properly care for the Confederate Cemetery situated in the City of Raleigh, such services to be rendered by the State's prisoners without compensation. (1927, c. 224, s. 1; 1933, c. 172; 1957, c. 349, s. 10; 1967, c. 996, s. 13.)

Article 3.

Cemeteries for Inmates of County Homes.

§ 65-5. County commissioners may establish new cemeteries.

The boards of county commissioners of the various counties in the State are authorized and empowered to locate and establish new graveyards or cemeteries upon the lands of their respective counties for the burial of the inmates of the county homes. (1917, c. 151, s. 1; C. S., s. 5022.)

§ 65-6. Removal and reinterment of bodies.

Whenever the county commissioners have established new graveyards or cemeteries, they are authorized and empowered to remove to such graveyards or cemeteries all bodies of deceased inmates of the county homes. (1917, c. 151, s. 2; C. S., s. 5023.)

ARTICLE 4.

Trust Funds for the Care of Cemeteries.

§ 65-7. Money deposited with clerk of superior court.

For the maintenance and preservation of graves, burial plats, graveyards and cemeteries which may be neglected, any person, firm, or corporation may, by will or otherwise place in the hands of the clerk of the superior court of any county in the State where such grave or lot is located any sum of money not less than one hundred dollars ($100.00) nor more than ten thousand dollars ($10,000), the income from which is to be used for keeping in good condition any grave, burial plat, graveyard, or cemetery in the county in which the money is placed, with specific instructions as to the use of the fund. (1917, c. 155, s. 1; C. S., s. 5024; 1979, c. 38.)

Local Modification. — Washington: 1957, c. 1126.

Effect of Amendments. — The 1979 amendment substituted "ten thousand dollars ($10,000)" for "two thousand dollars ($2,000)."

§ 65-8. Separate record of accounts to be kept.

It shall be the duty of the clerk of the superior court to keep a separate record for keeping account of the money deposited as above provided, to keep a perpetual account of the same therein, and to record therein the specific instructions about the use of the income on such money. He shall see that the income is spent according to such specific instructions, and shall make report of the same from year to year in the same manner as if it were guardian funds. (1917, c. 155, s. 1; C. S., s. 5025.)

§ 65-9. Funds to be kept perpetually.

All money placed in the office of the superior court clerk in accordance with this Article shall be held perpetually, and no one shall have authority to withdraw or change the direction of the income on same. (1917, c. 155, s. 2; C. S., s. 5026.)

§ 65-10. Investment of funds.

Such money shall be invested in the same manner as is provided by law for the investment of other trust funds by the clerk of the superior court. (1917, c. 155, s. 3; C. S., s. 5027; 1943, c. 97, s. 1.)

§ 65-11. Clerk's bond and fees; substitution of bank or trust company as trustee.

The official bond of the clerk of the superior court shall be liable for all such sums as shall be paid over to him on account of the provisions of this Article. The clerk shall receive for his services and responsibilities a commission of ten percent (10%) on the net income each year of such money; and the fees or commissions so received by him under this Article shall not be taken into consideration as a part of his salary.

In lieu of the provisions of the first paragraph of this section, the clerk of the superior court may, with the consent and approval of the sheriff and register of deeds, appoint any bank or trust company authorized to do business in this State as trustee for the funds authorized to be paid into his office by virtue of

this Article; provided, that no bank or trust company shall be appointed as such trustee unless such bank or trust company is authorized and licensed to act as fiduciary under the laws of this State.

Before any clerk shall turn over such funds to the trustee so appointed, he shall require that the trustee so named qualify before him as such trustee in the same way and manner and to the same extent as guardians are by law required to so qualify. After such trustee has qualified as herein provided, all such funds coming into his hands may be invested by it only in the securities set out in G.S. 2-55 and the income therefrom invested for the purposes and in the manner heretofore set out in this Article. All trustees appointed under the provisions of this Article shall render and file in the office of the clerk of the superior court all reports that are now required by law of guardians. (1917, c. 155, ss. 3, 4; C. S., s. 5028; 1939, c. 18; 1943, c. 97, s. 2.)

Editor's Note. — Section 2-55, referred to in the third paragraph, was transferred to § 7A-112 by Session Laws 1971, c. 363, s. 9.

§ 65-12. Funds exempt from taxation.

All money referred to in the preceding sections of this Article shall be exempt from all State, county, township, town, and city taxes. (1917, c. 155, s. 4; C. S., s. 5029.)

ARTICLE 5.

Removal of Graves.

§ 65-13. Removal of graves; who may disinter, move and reinter; notice; certificate filed; reinterment expenses, due care required.

(a) The State of North Carolina and any of its agencies, public institutions, or political subdivisions, the United States of America or any agency thereof, any church, electric power or lighting company, or any person, firm, or corporation may effect the disinterment, removal, and reinterment of graves as follows:

(1) By the State of North Carolina and any of its agencies, public institutions, or political subdivisions, the United States of America or any agency thereof, when it shall determine and certify to the board of county commissioners in the county from which the bodies are to be disinterred that such removal is reasonably necessary to perform its governmental functions and the duties delegated to it by law.

(2) By any church authority in order to erect a new church, parish house, parsonage, or any other facility owned and operated exclusively by such church; in order to expand or enlarge an existing church facility; or better to care for and maintain graves not located in a regular cemetery or burying ground for which such church has assumed responsibility of care and custody.

(3) By an electric power or lighting company when it owns land that is to be used as a reservoir on which graves are located.

(4) By any person, firm or corporation, which owns land on which abandoned cemeteries or burying grounds are located after first securing the consent of the governing body of the town, city or county in which such abandoned cemeteries or burying grounds are situated.

(b) The party effecting the disinterment, removal and reinterment of a grave containing a decedent's remains under the provisions of this Chapter shall, before disinterment, give 30 days written notice of such intention to the next of kin of the decedent, if known or subject to being ascertained by reasonable search and inquiry, and shall cause notice of such disinterment, removal and reinterment to be published at least once per week for four successive weeks in a newspaper of general circulation in the county where such grave is situated and the first publication shall be not less than 30 days before disinterment. Any remains disinterred and removed hereunder shall be reinterred in a suitable cemetery or burial ground.

(c) The party removing or causing the removal of all such graves shall, within 30 days after completion of the removal and reinterment, file with the register of deeds of the county from which the graves were removed and with the register of deeds of the county in which reinterment is made, a written certificate of the removal facts. Such certificate shall contain the full name, if known or reasonably ascertainable, of each decedent whose grave is moved, a precise description of the site from which such grave was removed, a precise description of the site and specific location where the decedent's remains have been reinterred, the full and correct name of the party effecting the removal, and a brief description of the statutory basis or bases upon which such removal or reinterment was effected. If the full name of any decedent cannot reasonably be ascertained, the removing party shall set forth all additional reasonably ascertainable facts about the decedent including birth date, death date, and family name.

A fee of one dollar ($1.00) for each page or portion of page of such certificate of removal facts shall be paid to the register of deeds of each county in which such certificate is filed for registration.

(d) All expenses of disinterment, removal, and acquisition of the new burial site and reinterment shall be borne by the party effecting such disinterment, removal, and reinterment, including the actual reasonable expense of one of the next of kin incurred in attending the same, not to exceed the sum of two hundred dollars ($200.00).

(e) The office of vital statistics of North Carolina shall promulgate regulations effecting the registration and indexing of the written certificate of the removal facts, including the form of that certificate.

(f) The party effecting the disinterment, removal, and reinterment of a decedent's remains under the provisions of this Chapter shall ensure that the site in which reinterment is accomplished shall be of such suitable dimensions to accommodate the remains of that decedent only and that such site shall be reasonably accessible to all relatives of that decedent, provided that the remains may be reinterred in a common grave where written consent is obtained from the next of kin. If under the authority of this Chapter disinterment, removal, and reinterment is effected by the State of North Carolina or any of its agencies, public institutions, or political subdivisions, the United States of America or any agency thereof, any electric power or lighting company, then such disinterment, removal, and reinterment shall be performed by a funeral director duly licensed as a "funeral director" or a "funeral service licensee" under the provisions of Article 13A of Chapter 90 of the North Carolina General Statutes.

(g) All disinterment, removal and reinterment under the provisions of this Chapter shall be made under the supervision and direction of the county board of commissioners or other appropriate official, including the local health director, appointed by such board for the county where the disinterment, removal and reinterment take place. If reinterment is effected in a county different from the county of disinterment with the consent of the next of kin of the deceased whose remains are disinterred, then the disinterment and removal shall be made under the supervision and direction of the county board

of commissioners or other appropriate official, including the local health director, appointed by such board for the county of the disinterment, and the reinterment shall be made under the supervision and direction of the county board of commissioners or other appropriate official, including the local health director, appointed by such board for the county of reinterment.

Due care shall be taken to do said work in a proper and decent manner, and, if necessary, to furnish suitable coffins or boxes for reinterring such remains. Due care shall also be taken to remove, protect and replace all tombstones or other markers, so as to leave such tombstones or other markers in as good condition as that prior to disinterment. Provided that in cases where the remains are to be moved to a perpetual care cemetery or other cemetery where upright tombstones are not permitted, a suitable replacement marker shall be provided.

(h) Nothing contained in this Article shall be construed to grant or confer the power or authority of eminent domain, or to impair the right of the next of kin of a decedent to remove or cause the removal, at his or their expense, of the remains or grave of such decedent. (1919, c. 245; C. S., ss. 5030, 5030(a); Ex. Sess. 1920, c. 46; 1927, c. 23, s. 1; c. 175, s. 1; 1937, c. 3; 1947, cc. 168, 576; 1961, c. 457; 1963, c. 915, s. 1; 1965, c. 71; 1971, c. 797, s. 1; 1977, c. 311, s. 1.)

Local Modification. — Orange: 1963, c. 915, s. 1½.

Cross References. — As to condemnation of burial grounds, see § 40-10; as to removal of or interference with monuments and tombstones, see § 14-148; as to interference with graveyards, see §§ 14-144, 14-149; as to disturbance of graves, see § 14-150.

Editor's Note. — Section 130-163, referred to in this section, was repealed by Session Laws 1979, c. 788, s. 2. For present statute relating to the same subject matter, see § 130-166.48.

CASE NOTES

Action for Removal of Grave in Violation of Former Provision. — See King v. Smith, 236 N.C. 170, 72 S.E.2d 425 (1952).

The building of a new vestry room of a church to be used with the one as presently located in relation to the use of the choir, etc., comes within the purview of the statute permitting the removal of the bodies buried in the churchyard by the proper authorities of the church, when necessary of expedient to do so, in carrying out the arrangement. Mayo v. Bragaw, 191 N.C. 427, 132 S.E. 1 (1926).

This section is much broader than older C.S. 5030, and reflects a recognition of the need for broad authority by church authority to meet the needs of a growing membership in relocating graves which would restrict that growth. Singletary v. McCormick, 36 N.C. App. 597, 244 S.E.2d 731 (1978).

The phrase "in order to" in subdivision (a)(2) of this section is synonymous with the phrase "as the means to." Singletary v. McCormick, 36 N.C. App. 597, 244 S.E.2d 731 (1978).

Relocation of Street to Enlarge Church Facility. — Though graves proposed to be relocated were within the area of a relocated street, the street was to be relocated "as the means to" expand or enlarge an existing church facility, and therefore relocation of the graves was permissible. Singletary v. McCormick, 36 N.C. App. 597, 244 S.E.2d 731 (1978).

Section Not Exclusive Grounds for Disinterment. — This statute does not provide the exclusive grounds for the disinterment of a body. The statute speaks to the situation where a body had been properly interred, but for some reason justified by the public interest or by some compelling private interests it is necessary to effect a disinterment, removal, and reinterment. This statute nowhere provides for the situation where there has been an improper interment. Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325, cert. denied, 298 N.C. 304, 259 S.E.2d 917 (1979).

§§ 65-14 to 65-15: Repealed by Session Laws 1971, c. 797, s. 2.

ARTICLE 6.

Cemetery Associations.

§ 65-16. Land holdings.

All cemetery associations or corporations created by any local, private or special act or resolution before January 10, 1917, are authorized and fully empowered to hold amounts of land in excess of the limitation provided in the local, private or special act or resolution incorporating or chartering such cemetery association or corporation. (1923, c. 76, s. 1; C. S., s. 5030(b).)

§ 65-17. Change of name of association or corporation.

Any corporation or association chartered or incorporated by any special act of the legislature, as set forth in G.S. 65-16, is authorized and fully empowered to change the name of such association or corporation by a majority vote of its directors, and upon such change in name it shall be the duty of the officers of the board of directors of such corporation or association to file with the clerk of the superior court a copy of resolution changing the name, which resolution must show the act of the legislature creating or incorporating the same and the reasons for the change thereof. (1923, c. 76, s. 2; C. S., s. 5030(c).)

§ 65-17.1. Quorum at stockholders' meeting of certain nonprofit cemetery corporations; calling meeting; amendment of charter.

Notwithstanding any conflicting provision of law or of the charter or bylaws of any corporation affected by this section, in the case of any nonprofit cemetery corporation chartered prior to the year 1900 whose charter has expired prior to May 18, 1955, a quorum at any meeting of stockholders called for the purpose of electing directors, or of amending the charter of such corporation, or both, shall consist of the holders of ten percent (10%) or more of the outstanding shares of the capital stock of such corporation having voting powers, present in person or represented by proxy; and a meeting of the stockholders of such corporation for such purpose or purposes may be called by any two stockholders after 10 days' notice by registered mail to all stockholders of record at their last known addresses as shown by the stock book of such corporation. The concurrence of a majority of the shares represented at such meeting shall be sufficient to authorize an amendment or amendments to the charter of such corporation in accordance with the provisions of G.S. 55-31. (1955, c. 1084.)

Editor's Note. — This section refers to § 55-31 as it stood prior to the 1955 revision, and which is cited in the historical references to present §§ 55-99 and 55-100.

Article 7.

Cemeteries Operated for Private Gain.

§§ 65-18 to 65-36: Recodified as §§ 65-46 to 65-72.

Editor's Note. — This Article was rewritten by Session Laws 1975, c. 768, s. 1, effective Sept. 1, 1975, and has been recodified as Article 9, § 65-46 et seq., of this Chapter.

Article 7A.

Funeral and Burial Trust Funds.

§ 65-36.1. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Department" means the State Banking Department;

(2) "Financial institution" means a bank, trust company or savings and loan association authorized by law to do business in this State;

(3) "Preneed burial contract" means a contract, which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of, but does not mean the furnishing of a cemetery lot, crypt, niche, mausoleum, grave marker or monument. (1969, c. 187, s. 1.)

§ 65-36.2. Deposit of trust funds.

(a) All payments of money made to any person, partnership, association or corporation upon any agreement or contract, or any series or combination of agreements or contracts, but not including the furnishing of cemetery lots, crypts, niches, mausoleums, grave markers or monuments, which has for a purpose the furnishing or performance of funeral services, or the furnishing or delivery of personal property, merchandise, or services of any nature in connection with the final disposition of a dead human body, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of, are held to be trust funds. The person, partnership, association or corporation receiving the payments is declared to be a trustee thereof, and shall deposit all payments in a financial institution. All of the interest, dividends, increases or accretions of whatever nature earned by the funds deposited in a trust account shall remain with the principal of such account and become a part thereof, subject to all of the regulations concerning the principal of said fund herein contained. The trust fund itself shall be solely liable for all taxes on said fund and its interest, dividends, increases and accretions.

(b) All payments made under the agreement, contract or plan are and shall remain trust funds with the financial institution until the death of the person for whose service the funds were paid and until the delivery of all merchandise and full performance of all services called for by the agreement, contract or plan, except where payment is made pursuant to G.S. 65-36.3.

(c) The funds shall not be paid by the financial institution until a certified statement is furnished to the financial institution setting forth that all of the terms and conditions of the agreement have been fully performed by the person, association, partnership, firm or corporation. Unless otherwise specified in

the agreement, contract or plan, the said person, partnership, association or corporation shall have no obligation to deliver any merchandise or perform any services for which payment in full has not been deposited in the financial institution, and any amounts deposited which do not constitute payment in full shall be refunded to the estate of the deceased beneficiary of the plan or credited against the cost of merchandise or services contracted for by representatives of the deceased. Any balance remaining in the fund after payment for the merchandise and services as set forth in the agreement, contract or plan shall be paid to the estate of the beneficiary of the agreement, contract or plan.

(d) Subsection (a) of this section does not apply to contracts for funeral service or merchandise sold as burial insurance policies which are regulated by Article 24 of Chapter 58 of the General Statutes.

(e) The Department shall approve forms for preneed burial contracts. All such contracts must be in writing, and no contract form shall be used without prior approval of the Department. Any use or attempted use of an oral preneed burial contract or any written preneed burial contract in a form not approved by the Department shall be deemed to be a violation of this Article by the person selling services or merchandise thereunder. (1969, c. 187, s. 2.)

Editor's Note. — Article 24 of Chapter 58, referred to in subsection (d) in this section, has been recodified as Article 24A of Chapter 58.

OPINIONS OF ATTORNEY GENERAL

Prepayment for Burial Services Voluntarily Made. — See opinion of Attorney General to Mr. John R. Tropman, Deputy Commissioner of Banks, 40 N.C.A.G. 51 (1970).

Preneed Sale of "Garden Mausoleums and Interment Crypts" within Provisions of This Article. — See opinion of Attorney General to Mr. John R. Tropman, Deputy Commissioner, State Banking Commission, 40 N.C.A.G. 52 (1970).

§ 65-36.3. Refund of deposit.

Within 30 days of receipt of a written demand for refund by any person, partnership or corporation who has paid funds for a preneed funeral service, the financial institution with which such funds have been deposited shall refund to such person, partnership or corporation the entire amount paid together with all interest, dividends, increases or accretions earned on such fund.

After making refund to the person, partnership or corporation pursuant to the provisions of the preceding paragraph and giving notice to the trustee of such payment, the financial institution shall be relieved from further liability to the trustee. (1969, c. 187, s. 3.)

§ 65-36.4. Deposit within 30 days of receipt.

All trust funds mentioned in this Article shall be deposited in the name of the trustee, as trustee, within 30 days after receipt thereof, with a financial institution and shall be held together with the interest, dividends, or accretions thereon, in trust, subject to the provisions of this Article. The trustee at the time of making deposit shall furnish to the financial institution the name of each payor, and the amount of payment on each account for which the deposit is being made. (1969, c. 187, s. 4.)

§ 65-36.5. Application for license.

(a) No person, firm, partnership, association or corporation may, without first securing from the Department a license, accept and/or hold payments made on preneed burial contracts, except financial institutions as defined in G.S. 65-36.1(2) hereof. Application for a license shall be in writing, signed by the applicant and duly verified on forms furnished by the Department. Each application shall contain at least the following: the full names and address (both residence and place of business) of the applicant, and every member, officer and director thereof if the applicant is a firm, partnership, association or corporation. Any license issued pursuant to the application shall be valid only at the address stated in the application for the applicant or at a new address approved by the Department.

(b) Upon receipt of the application and payment of a license fee of twenty-five dollars ($25.00), the Department shall issue a license unless it determines that the applicant has made false statements or representations in the application, or is insolvent, or has conducted, or is about to conduct, his business in a fraudulent manner, or is not duly authorized to transact business in this State.

(c) Any person selling a preneed funeral service contract shall collect from each purchaser a service charge of two dollars ($2.00), and all of which fees so collected shall be remitted by the person collecting same to the State Banking Department at least once each month, and such funds shall be used by the Department in administering this Article. (1969, c. 187, s. 5.)

§ 65-36.6. Licensee's books and records.

The licensee shall keep accurate accounts, books, and records in this State of all transactions, copies of all agreements, dates and amounts of payments made and accepted thereon, the names and addresses of the contracting parties, the persons for whose benefit funds are accepted, and the names of the depositories of the funds. The licensee shall make all books and records pertaining to the trust funds available to the Department for examination. The Department may at any time investigate the books, records, and accounts of the licensee with respect to its trust funds and for that purpose may require the attendance of and examine under oath all persons whose testimony it may require. (1969, c. 187, s. 6.)

§ 65-36.7. Enforcement of Article.

The Department shall enforce the provisions of this Article and has the power to make investigations, subpoena witnesses, require audits and reports and conduct hearings as to violations of any provisions, and to establish such rules and regulations as are necessary to carry out the provisions of this Article. (1969, c. 187, s. 7.)

§ 65-36.8. Penalties.

Any person willfully violating the provisions of this Article shall be fined not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000), or shall be imprisoned for not less than 10 days nor more than six months, or both. (1969, c. 187, s. 8.)

Article 8.

Municipal Cemeteries.

§ 65-37. Authority to take possession of and continue the use of certain lands as cemetery.

In any case where property not under the control or in the possession of any church or religious organization in any town or municipality has been heretofore set aside or used for cemetery purposes, and the trustees or owners named in the deed or deeds for said property have died, or are unknown, or the deeds of conveyance have been lost or misplaced and no record of title thereto has been found, and said property has been occupied and used for burial purposes for a time sufficient to identify its use as cemetery property, the municipality in which any such cemetery property is located is hereby authorized and empowered in its discretion to appropriate and take possession of all such land within its corporate limits which has heretofore been used for cemetery purposes and such adjoining land not held or owned by known claimants of title, and to cause the same to be surveyed and lines established and to designate and appropriate the said property as a cemetery, or burial ground. (1947, c. 821, s. 1.)

§ 65-38: Repealed by Session Laws 1969, c. 1279.

§ 65-39. Subdivision into burial plots; sale of lots and use of proceeds.

Said town or municipality shall have power and authority in such cases to cause the same to be subdivided and to lay off and allot for family burial plots any property heretofore appropriated or used for burial purposes for or by different families without any charge therefor, and to cause the remainder of said property to be subdivided and laid off into lots; and shall have the power and authority to sell to any person or persons for burial purposes, any of said lots so subdivided and surveyed, except those heretofore appropriated as referred to in this section of this Article, and use the proceeds of such sale for the improvement and upkeep of said cemetery property. (1947, c. 821, s. 3.)

§ 65-40. Appropriations for improvement and maintenance; application of existing laws.

In the event any town or municipality appropriates or takes possession of land used for cemetery purposes as set forth and described herein, it is further authorized and empowered to appropriate and use such funds as may be necessary and proper for the improvement and maintenance of said cemetery; and all statutes and ordinances heretofore enacted and passed relative to cemeteries in said town or municipality, are hereby made applicable to said cemetery property. (1947, c. 821, s. 4.)

§§ 65-41 to 65-45: Reserved for future codification purposes.

Article 9.

North Carolina Cemetery Act.

§ 65-46. Short title.

This Article 9 may be cited as "North Carolina Cemetery Act." (1975, c. 768, s. 1.)

Editor's Note. — This Article is Article 7 of this Chapter as rewritten by Session Laws 1975, c. 768, s. 1, effective Sept. 1, 1975, and recodified. Where appropriate, the historical citations to the sections of the former Article have been added to corresponding sections of the new Article.

CASE NOTES

Cited in Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325 (1979).

§ 65-47. Scope.

(a) The provisions of this Article shall apply to all persons engaged in the business of operating a cemetery as defined herein, except cemeteries owned and operated by governmental agencies or churches.

(b) Any cemetery beneficially owned and operated by a fraternal organization or its corporate agent for at least 50 years prior to September 1, 1975, shall be exempt from the provisions of Article 9 of this Chapter.

(c) The provisions of this Article shall not apply to persons licensed under G.S. 65-36.1 through 65-36.8 when performing services or selling items for which a license is required under G.S. 65-36.1 through 65-36.8. (1975, c. 768, s. 1; 1977, c. 686, s. 1.)

§ 65-48. Definitions.

As used in this Article, unless otherwise stated or unless the context or subject matter clearly indicates otherwise:

(1) "Bank of belowground crypts" means any construction unit of belowground crypts acceptable to the Commission which a cemetery uses to initiate its belowground crypt program or to add to existing belowground crypt structures.

(2) "Belowground crypts" consists of an interment space in preplaced chambers, either side by side or multiple depth, covered by earth and sod and are also known as lawn crypts, westminsters or turf top crypts.

(3) "Cemetery" means any one or a combination of more than one of the following in a place used or to be used and dedicated or designated for cemetery purposes:
   a. A burial park, for earth interment.
   b. A mausoleum.
   c. A columbarium.

(4) "Cemetery broker" means a legal entity engaged in the business of arranging sales of cemetery products between legal entities and which sale does not involve a cemetery company, but does not mean funeral establishments or funeral directors operating under G.S. 90-210.25, when dealing between legal entities wherein one such entity shall be members of the family of a deceased person or other persons authorized by law to arrange for the burial and funeral of such deceased

human being. The North Carolina Cemetery Act shall not apply to any cemetery broker selling less than five grave spaces per year.

(5) "Cemetery company" means any legal entity that owns or controls cemetery lands or property and conducts the business of a cemetery, including all cemeteries owned and operated by governmental agencies, churches and fraternal organizations or their corporate agents for the duration of any sales and management contracts entered into with cemetery sales organizations or cemetery management organizations for cemetery purposes, or with any other legal entity other than direct employees of said governmental agency, church or fraternal organization.

(6) "Cemetery management organization" means any legal entity contracting as an independent contractor with a cemetery company to manage a cemetery but does not mean individual managers employed by and contracting directly with cemetery companies operating under this Article.

(7) "Cemetery sales organization" means any legal entity contracting with a cemetery which is exempt or not exempt under this Article to conduct sales of cemetery products, but does not mean individual salesmen or sales managers employed by and contracting directly with cemetery companies operating under this Article, nor does it mean funeral establishments or funeral directors operating under licenses authorized by G.S. 90-210.25 when dealing directly with a cemetery company and with members of the family of a deceased person or other persons authorized by law to arrange for the burial and funeral of such deceased human being.

(8) "Columbarium" means a structure or building substantially exposed aboveground intended to be used for the interment of the cremated remains of a deceased person.

(9) "Commission" means the North Carolina Cemetery Commission.

(10) "Grave space" means a space of ground in a cemetery intended to be used for the interment in the ground of the remains of a deceased person.

(11) "Human remains" or "remains" means the bodies of deceased persons, and includes the bodies in any stage of decomposition, and cremated remains.

(12) "Mausoleum" means a structure or building substantially exposed aboveground intended to be used for the entombment of remains of a deceased person.

(13) "Mausoleum section" means any construction unit of a mausoleum acceptable to the commission which a cemetery uses to initiate its mausoleum program or to add to its existing mausoleum structures.

(14) "Person" means an individual, corporation, partnership, joint venture, or association.

(15) "Vault" means a crypt or underground receptacle which is used for interment in the ground and which is designed to encase and protect caskets or similar burial devices. For the purposes of this Article, a vault is a preneed item until delivery to the purchaser. (1943, c. 644, s. 2; 1967, c. 1009, s. 2; 1971, c. 1149, s. 1; 1975, c. 768, s. 1; 1977, c. 686, ss. 2, 3.)

§ 65-49. The North Carolina Cemetery Commission.

There is hereby established in the Department of Commerce a North Carolina Cemetery Commission with the power and duty to adopt rules and regulations to be followed in the enforcement of this Article. (1975, c. 768, s. 1.)

CASE NOTES

Duties Quasi-Judicial and Quasi-Legislative. — The duties of the Commission are neither political nor executive. They are predominantly quasi-judicial and quasi-legislative. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

Commission Must Act with Impartiality. — Since it is charged "with the power and duty to adopt rules and regulations to be followed in the enforcement" of the North Carolina Cemeteries Act, including the licensing of cemeteries operating in this State, it must act with entire impartiality. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

Members are required to exercise the judgment of experts in the field appointed by law and informed by experience. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

§ 65-50. Cemetery Commission; members, selection, quorum.

The Cemetery Commission shall consist of seven members appointed by the Governor. Two members shall be owners or managers of cemeteries in North Carolina. Three members shall be selected from six nominees submitted by the North Carolina Cemetery Association. Two members shall be public members who have no financial interest in, and are not involved in management of, any cemetery or funeral related business. Four members of the initial Commission shall be appointed for a term to expire June 30, 1977, and three members shall be appointed for a term to expire June 30, 1976. At the end of the respective terms of office of the initial members of the Commission, their successors shall be nominated in the same manner, selected from the same categories and appointed for terms of four years and until their successors are appointed and qualified. Any appointment to fill a vacancy on the Commission created by the resignation, dismissal, death or disability of a member shall be for the balance of the unexpired term.

The Governor shall have the power to remove any member of the Commission from office for misfeasance, malfeasance and nonfeasance according to the provisions of G.S. 143B-13 of the Executive Organization Act of 1973.

A majority of the Commission shall constitute a quorum for the transaction of business.

At the first meeting of the Commission held after September 1, 1975, the Commission shall elect one of its members as its chairman and another as its vice-chairman, both to serve through June 30 of the next following year. Thereafter, at its first meeting held on or after July 1 of each year, the Commission shall elect from its members a chairman and vice-chairman to serve through June 30 of the next following year. (1975, c. 768, s. 1.)

CASE NOTES

Administrative Procedure Act Not Applicable to Removal. — This section gives the Governor the power to remove a member of the Cemetery Commission for cause "according to the provisions of § 143B-13 of the Executive Organization Act of 1973." There is no reference to the Administrative Procedure Act. Nor does § 143B-13(d), which gives the Governor power to remove for cause any member of a commission, refer to the Administrative Procedure Act. Had the General Assembly intended for the Governor to be bound by the provisions of the Administrative Procedure Act, it could have referred to that act rather than the Executive Organization Act. Absent a specific legislative enactment requiring removals by the Governor to be subject to the Administrative Procedure Act, the act is not applicable to removals by the Governor. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

§ 65-51. Principal office.

The principal office of the Commission shall be in the City of Raleigh, North Carolina. Notice of all regular and special meetings of the Commission shall be advertised 10 or more days in advance in at least three newspapers in North Carolina having inter-county circulation in the State. Each member of the Commission shall receive per diem and allowances in accordance with G.S. 138-5. The administrator of the Commission, other employees required to attend and legal counsel to the Commission shall be entitled to actual expenses while attending regular or special meetings of the Commission held other than in Raleigh, North Carolina. All expenses of the Commission shall be paid from funds coming to the Commission pursuant to this Article. (1975, c. 768, s. 1.)

§ 65-52. Regular and special meetings.

The Cemetery Commission shall meet at least once in each quarter and may hold special meetings at any time and place within the State at the call of the chairman or upon the written request of at least four members. (1975, c. 768, s. 1.)

§ 65-53. Powers.

In addition to other powers conferred by this Article, the Cemetery Commission shall have the following powers and duties:

(1) The administrator shall be appointed by the Governor upon recommendation of the Cemetery Commission. The Cemetery Commission shall set the compensation of the administrator and such other personnel as are necessary to operate the Commission.

(2) Prior to the change of control of any cemetery company, an examination of the licensee's records may be required, and if so, the fees provided in subdivision (3) hereof would apply thereto.

(3) Investigate, upon its own initiative or upon a verified complaint in writing, the actions of any person engaged in the business or acting in the capacity of a licensee under this Article. The license of a licensee may be revoked or suspended for a period not exceeding two years, or until compliance with a lawful order imposed in the final order of suspension, or both, where the licensee in performing or attempting to perform any of the acts specified in this Article has been guilty of:
   a. Failing to pay the fees required herein;
   b. Failing to make any reports required by this Article;
   c. Failing to remit to the care and maintenance trust fund, merchandise trust fund, or preconstruction trust fund the required amounts;
   d. Making any substantial misrepresentation;
   e. Making any false statement of a character likely to influence or persuade;
   f. A continued and flagrant course of misrepresentation or making of false promises through cemetery agents or salesmen;
   g. Violating any provision of this Article or rule promulgated by the Commission; or
   h. Any other conduct, whether of the same or a different character than specified in this section, which constitutes fraud or dishonest dealing.

(4) In all proceedings under this Article for the revocation or suspension of licenses, the provisions of Chapter 150A of the General Statutes shall be applicable.

(5) At such time as the Commission finds it necessary it may bring an action in the name of the State in the court of the county in which the place of business is located against such person to enjoin such person from engaging in or continuing such violation or doing any act or acts in furtherance thereof. In any such action, an order or judgment may be entered awarding such temporary or permanent injunction as may be deemed proper; provided, that before any such action is brought the Commission shall give the cemetery at least 20 days' notice in writing, stating the alleged violation and giving the cemetery an opportunity within the 20-day period to cure the violation. In addition to all other means provided by law for the enforcement of a temporary restraining order, temporary injunction, or permanent injunction, the court shall have the power and jurisdiction to impound and to appoint a receiver for the property and business of the defendant, including books, papers, documents, and records appertaining thereto or so much thereof as the court may deem reasonably necessary to prevent further violation of this Article through or by means of the use of said property and business. The Commission may institute proceedings against the cemetery or its officers, whereafter an examination, pursuant to this Article, a shortage in the care and maintenance trust fund, merchandise trust fund or mausoleum and belowground crypts preconstruction trust fund is discovered, to recover said shortage.

(6) Whenever any special additional audit or examination of a licensee's premises, facilities, books or records is necessary because of the failure of the licensee to comply with the requirements imposed in this Article or by the rules and regulations of the Commission, to charge a fee based on the cost of the special examination or audit, taking into consideration the salary of any employees involved in the special audit or examination and any expenses incurred.

(7) Promulgate rules and regulations requiring licensees to file with the Commission plans and specifications for the minimum quality of any product sold. The sale of any product for which plans and specifications required by the rules and regulations have not been filed or sale of any product of a lesser quality than the plans and specifications filed with the Commission is a violation of this Article.

(8) When the Commission finds that failure by a licensee to maintain a cemetery properly has caused that cemetery to be a public nuisance or a health or safety hazard, the Commission may bring an action for injunctive relief, against the responsible licensee, in the superior court of the county in which the cemetery or any part thereof is located. (1943, c. 644, s. 17; 1971, c. 1149, s. 8; 1973, c. 732, s. 2; 1975, c. 768, s. 1; 1977, c. 686, ss. 4-6; 1979, c. 888, ss. 1-3.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added subdivisions (6), (7), and (8).

Session Laws 1979, c. 888, s. 10, contains a severability clause.

§ 65-54. Annual budget of Commission; collection of funds for operation.

The Commission shall prepare an annual budget and shall collect the sums of money required for this budget from yearly fees and any other source provided in this Article. On or before July 1 of each year, each licensed cemetery will pay a license fee of one hundred dollars ($100.00) per year; and in addition, a fee for each grave space, niche, mausoleum crypt deeded, and preneed cemetery merchandise contract for vaults, preconstructed belowground crypts,

preconstructed mausoleum crypts, and memorials to be set by the Commission each year in order to defray the expenses of the Commission as set forth in the budget. Said additional fees shall not exceed seventy-five cents (75¢) per grave space, niche, and mausoleum crypt deeded, and three dollars ($3.00) per item in each preneed cemetery merchandise contract for vaults, preconstructed belowground crypts, preconstructed mausoleum crypts and memorials. (1975, c. 768, s. 1; 1977, c. 686, s. 7.)

§ 65-55. License; cemetery company.

(a) No legal entity shall engage in the business of operating a cemetery company except as authorized by this Article and without first obtaining a license from the Commission.

(b) Any legal entity wishing to establish a cemetery shall file a written application for authority with the Commission on forms provided by the Commission.

(c) Upon receipt of the application and filing fee of four hundred dollars ($400.00), the Commission shall cause an investigation to be made to establish the following criteria for approval of such application:

(1) The creation of a legal entity to conduct cemetery business, and the proposed financial structure.

(2) A perpetual care trust fund agreement, with an initial deposit of not less than fifteen thousand dollars ($15,000) and with bank cashier's check or certified check attached for such amount and payable to such trustee, with said trust executed by applicant and accepted by the trustee, conditioned only upon whether the application is approved.

(3) A plat of the land to be used for a cemetery, showing county, city and/or township, and names of roads and access streets or ways.

(4) Designation by the legal entity wishing to establish a cemetery of a general manager who shall be a person of good moral character, having had no less than one year's experience in cemeteries.

(5) Development plans sufficient to insure the community that the cemetery will provide adequate cemetery services, and the property is suitable for use as a cemetery.

(d) The Commission, after receipt of the investigating report, shall grant or refuse to grant the authority to organize a cemetery based upon the criteria set forth in G.S. 65-55(c).

(e) If the Commission intends to deny an application, it shall give written notice to the applicant of its intention to deny. The notice shall state a time and a place for a hearing before the Commission and a summary statement of the reasons for the proposed denial. The notice of intent shall be mailed by certified mail to the applicant at the address stated in the application at least 15 days prior to the scheduled hearing date. The applicant shall pay the costs of this hearing as assessed by the Commission unless the applicant notifies the Commission by certified mail at least five days prior to the scheduled hearing date that a hearing is waived. Any appeals from the Commission's decision shall be to the court having jurisdiction of the applicant or the Commission.

(f) If the Commission intends to grant the authority, it shall give written notice that the authority to organize a cemetery has been granted and that a license to operate will be issued upon the completion of the following:

(1) Establishment of the care and maintenance trust fund and receipt by the Commission of a certificate from the trust company, certifying receipt of the initial deposit required under this Article.

(2) Full development, ready for burial, of not less than two acres including a completed paved road from a public roadway to said developed section, certified by inspection of the Commission or its representative.

(3) A description, by metes and bounds, of the acreage tract of such proposed cemetery, together with evidence, by title insurance policy or by certificate of an attorney-at-law, certifying that the applicant is the owner in fee simple of such tract of land, which must contain not less than 30 acres, and that the title to not less than 30 acres is free and clear of all encumbrances. In counties with a population of less than 35,000 population according to the latest federal decennial census the tract need be only 15 acres.

(4) A plat of the cemetery showing the number and location of all lots surveyed and permanently staked for sale. (1943, c. 644, s. 9; 1957, c. 529, s. 3; 1967, c. 1009, s. 9; 1975, c. 768, s. 1; 1977, c. 686, s. 8.)

§ 65-56. Existing companies; effect of Article.

Existing cemetery companies at the time of the adoption of this Chapter shall continue in full force and effect and be granted a license but shall hereafter be operated in accordance with the provisions of Article 9 of this Chapter. (1975, c. 768, s. 1.)

§ 65-57. Licenses for sales organizations, management organizations and brokers.

(a) No legal entity shall engage in the business of a cemetery sales organization, a cemetery management organization or a cemetery broker except as authorized by this Article, and without first obtaining a license from the Commission.

(b) Any legal entity wishing to establish and operate the business of a cemetery sales organization, a cemetery management organization or a cemetery broker shall file a written application for authority with the Commission on forms provided by the Commission which must contain such of the following documents and information as may be required by the Commission:

(1) The appointment of a North Carolina resident to receive service of any lawful process in any noncriminal proceedings arising under this Chapter against the applicant, its principal owners, principal stockholders, directors and general manager or their personal representatives.

(2) The states or other jurisdictions in which the applicant presently is conducting the business activity applied for or other similar businesses and any adverse order, judgment or decree entered against the applicant in each jurisdiction or by any court.

(3) The applicant's name, address and the form, date and jurisdiction of the organization and the address of each of its offices within or without this State.

(4) The name, address, principal occupation for the past five years of every director and officer of the applicant or person occupying a similar status or performing similar functions.

(5) Copies of the articles of incorporation or articles of partnership or joint venture agreement or other instrument establishing the legal entity of the applicant.

(c) The application shall be accompanied by an initial filing fee of four hundred dollars ($400.00) for cemetery sales organization and cemetery management organization and an initial filing fee of two hundred dollars ($200.00) for a cemetery broker. If ninety percent (90%) or more of the applicant is owned by an existing cemetery company operating under the North Carolina Cemetery Act, then the initial filing fee shall be one half of the sums set out herein. On or before July 1 of each year, each licensed cemetery sales organization,

cemetery management organization, or cemetery broker shall pay a license renewal fee of one hundred dollars ($100.00) per year.

(d) Upon receipt of the application and filing fee, the Commission shall cause an investigation to be made of the legal entity to conduct the business applied for and the qualification of said legal entity to do business in North Carolina.

(e) The Commission, after receipt of the investigation report, shall grant or refuse to grant the authority to organize the organization applied for after it determines that the applicant possesses good character and general fitness or, in the case of a business association, employs and is directed by personnel of good character and general fitness.

(f) If the Commission intends to deny an application, it shall give written notice to the applicant of its intention to deny. The notice shall state a time and a place for hearing before the Commission and a summary statement of the reasons for the proposed denial. The notice of intent shall be mailed by certified mail to the applicant at the address stated in the application at least 15 days prior to the scheduled hearing date. Any appeals from the Commission's decision shall be to the court having jurisdiction of the applicant, or in the event of an out-of-state applicant, then to the court having jurisdiction of the Commission.

(g) If the Commission intends to grant the authority, it shall give written notice that the authority to organize the business applied for has been granted and that a license to operate will be issued upon presentment to the Commission of a statement of employment between the applicant and the cemetery or cemeteries to be serviced thereby.

(h) Any person or any cemetery sales organization or any cemetery management organization or any cemetery broker violating the provisions of this section is guilty of a misdemeanor, punishable as provided in G.S. 14-3 and shall be subject to revocation of the license to operate. (1975, c. 768, s. 1; 1977, c. 686, ss. 9, 10.)

§ 65-58. Licenses for persons selling preneed grave space.

(a) No person shall offer to sell preneed grave spaces, mausoleum crypts, niches, memorials, vaults or any other preneed cemetery merchandise or services under any plan authorized for any cemetery, cemetery sales group, or cemetery management group, before obtaining a license from the Commission.

(b) Persons wishing to obtain a license shall file a written application with the Commission on forms provided by the Commission. The Commission may require such information and documents as it deems necessary to protect the public interest.

(c) The application shall be accompanied by a filing fee of fifteen dollars ($15.00) to cover the expenses of processing and investigation. After processing and investigation the Commission shall grant, or refuse to grant, the license applied for. The annual license fee shall be set by the Commission but shall not exceed ten dollars ($10.00).

(d) If the Commission refuses to grant the license applied for, it shall give written notice to the applicant. The notice shall state a time and a place for hearing before the Commission, and a summary statement of the reasons for the refusal to grant the license. The notice shall be mailed by registered mail or certified mail to the applicant at the address stated in the application at least 30 days prior to the scheduled hearing date.

(e) If the Commission intends to grant the license, it shall give written notice that the license will be issued upon presentment to the Commission of a duly executed statement of employment between the applicant and the cemetery or cemeteries to be serviced thereby.

(f) The provisions of Article 4 of Chapter 150A of the General Statutes of North Carolina relating to "Judicial Review" shall apply to appeals or petitions for judicial review by any person or persons aggrieved by an order or decision of the Commission.

(g) Repealed by Session Laws 1977, c. 686, s. 12. (1943, c. 644, s. 15; 1967, c. 1009, s. 14; 1975, c. 768, s. 1; 1977, c. 686, ss. 11, 12.)

§ 65-59. Application for change of control; filing fee.

In any case where a person, a group of persons, or a corporation proposes to purchase or acquire control of an existing cemetery company either by purchasing the outstanding capital stock of any cemetery company, or the interest of the owner or owners, and thereby to change the control of said cemetery company, such person shall first make application on [a] form supplied by the Commission for a certificate of approval of such proposed change of control of said cemetery company. The application shall contain the name and address of the proposed new owners and the said Commission shall issue said certificate of approval only after it has become satisfied that the proposed new owners are qualified by character, experience and financial responsibility to control and operate the said cemetery in a legal and proper manner, and that the interest of the public generally will not be jeopardized by the proposed change in ownership and management. Such application for a purchase or change of control must be completed and accompanied by an initial filing fee of one hundred dollars ($100.00) to cover examination provided in G.S. 65-53(2) if required, and if records are in order, certificate of approval shall be issued. (1975, c. 768, s. 1.)

§ 65-60. Records.

A record shall be kept of every burial in the cemetery of a cemetery company, showing the date of burial, name of the person buried, together with lot, plot, and space in which such burial was made therein. All sales, trust funds, accounting records, and all other records of the licensee shall be available at the licensee's principal place of business in this State and shall be readily available at all reasonable times for examination by an authorized representative of the Commission. (1975, c. 768, s. 1.)

§ 65-60.1. Trustees; qualifications; examination of records; enforcement.

(a) The term "corporate trustee" as used in this Article shall mean either a bank or trust company authorized to do business in North Carolina under the supervision of the Commissioner of Banks or any other corporate entity; provided that any corporate entity other than a bank or trust company which acts as trustee under this Article shall first be approved by the Cemetery Commission and shall be subject to supervision by the Cemetery Commission as provided herein.

(b) Any corporate entity, other than a bank or trust company, which desires to act as trustee for cemetery funds under this Article shall make application to the Commission for approval. The Commission shall approve the trustee when it has become satisfied that:

(1) The applicant employs and is directed by persons who are qualified by character, experience, and financial responsibility to care for and invest the funds of others.

(2) The applicant will perform its duties in a proper and legal manner and the trust funds and interest of the public generally will not be jeopardized.

(3) The applicant will act as trustee for cemetery funds which will exceed five hundred thousand dollars ($500,000) in the aggregate.

(4) The applicant is authorized to do business in North Carolina and has adequate facilities to perform its duties as trustee.

(c) Any trustee under this Article, other than a bank or trust company under the supervision of the Commissioner of Banks, shall maintain records relative to cemetery trust funds as the Commission may by regulation prescribe. The records shall be available at the trustee's place of business in North Carolina and shall be available at all reasonable times for examination by a representative of the Commission. The records shall be audited annually, within 90 days from the end of the trust fund's fiscal year, by an independent certified public accountant, and a copy of the audit report shall be promptly forwarded to the Commission.

(d) Whenever it appears that an officer, director, or employee of a trustee, other than a bank or trust company, is dishonest, incompetent, or reckless in the management of a cemetery trust fund, the Commission may bring an action in the courts to remove the trustee and to impound the property and business of the trustee as may be reasonably necessary to protect the trust funds.

(e) Any trustee shall invest and reinvest cemetery trust funds in the same manner as provided by law for the investment of trust funds by the clerk of the superior court. (1977, c. 686, s. 15; 1979, c. 888, s. 9.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "shall be audited annually by the State Auditor and" following "North Carolina and" in the second sentence of subsection (c) and added the last sentence of subsection (c).

Session Laws 1979, c. 888, s. 10, contains a severability clause.

§ 65-61. Required trust fund for care and maintenance; remedy of Commission for noncompliance.

No cemetery company shall be permitted to establish, or operate if already established, a cemetery unless provision is made for the future care and maintenance of such cemetery by establishing a trust fund and designating a corporate trustee to administer said fund in accordance with a written trust agreement. If any cemetery company refuses or otherwise fails to provide or maintain an adequate care and maintenance trust fund in accordance with the provisions of this Article, the Commission, after reasonable notice, shall proceed to enforce compliance under the powers vested in it under this Article; provided any nonprofit cemetery corporation, incorporated and engaged in the cemetery business continuously since and prior to 1915 and whose current trust assets exceed seven hundred fifty thousand dollars ($750,000) shall not be required to designate a corporate trustee. The trust fund agreement shall contain and include the following: name, location, and address of both the licensee and the trustee showing the date of agreement together with the amounts required deposited as stated in this Article. No person shall withdraw or transfer any portion of the corpus of the care and maintenance trust fund without first obtaining written consent from the Commission. (1943, c. 644, s. 9; 1957, c. 529, s. 3; 1967, c. 1009, s. 9; 1975, c. 768, s. 1; 1977, c. 686, s. 13.)

§ 65-62. Individual contracts for care and maintenance.

At the time of making a sale or receiving the initial deposit hereunder, the cemetery company shall deliver to the person to whom such sale is made, or who makes such deposit, an instrument in writing which shall specifically state that the net income of the care and maintenance trust fund shall be used solely for the care and maintenance of the cemetery, for reasonable costs of

administering such care and maintenance and for reasonable costs of administering the trust fund. (1975, c. 768, s. 1.)

§ 65-63. Requirements for advertising of perpetual care fund.

No such cemetery shall hereafter cause or permit advertising of perpetual care fund in connection with the sale or offer for sale of its property unless the amount deposited in said funds shall be equal to not less than twenty-five dollars ($25.00) per grave space and niche and forty-five dollars ($45.00) per mausoleum crypt sold, said sum to be deposited in perpetual care fund as provided in G.S. 65-61 except as provided in G.S. 65-64. (1943, c. 644, s. 5; 1957, c. 529, s. 1; 1967, c. 1009, s. 3; 1971, c. 1149, s. 3; 1975, c. 768, s. 1; 1979, c. 888, s. 4.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "twenty-five dollars ($25.00)" for "twenty dollars ($20.00)" and substituted "forty-five dollars ($45.00)" for "forty dollars ($40.00)."

Session Laws 1979, c. 888, s. 10, contains a severability clause.

§ 65-64. Deposits to perpetual care fund.

(a) Deposits to the care and maintenance trust fund must be made by the cemetery company holding title to the subject cemetery lands on or before the last day of the calendar month following the calendar month in which final payment is received as provided herein; however the entire amount required to be deposited into the fund shall be paid within four years from the date of any contract requiring such payment regardless of whether all amounts have been received by the cemetery company. If the cemetery company fails to make timely deposit, the Commission may levy and collect a penalty of one dollar ($1.00) per day for each day the deposit is delinquent on each grave space, niche or mausoleum crypt sold. The care and maintenance trust fund shall be invested and reinvested by the trustee in the same manner as provided by law for the investment of other trust funds by the clerk of the superior court except that such investments may be made through means of a common trust fund as described in G.S. 36-47. The fees and other expenses of the trust fund shall be paid by the trustee from the net income thereof and may not be paid from the corpus. To the extent that the said net income is not sufficient to pay such fees and other expenses, the same shall be paid by the cemetery company.

(b) When a municipal, church-owned or fraternal cemetery converts to a private cemetery as defined in G.S. 65-48, then said cemetery shall establish and maintain a care and maintenance trust fund pursuant to this section; provided, however, the initial deposit for establishment of this trust fund shall be an amount equal to ten dollars ($10.00) per space for all spaces either previously sold or contracted for sale in said cemetery at the time of conversion or twenty-five thousand dollars ($25,000), whichever sum is greater.

(c) Each cemetery hereinafter established shall create a care and maintenance trust fund depositing therein an initial deposit of not less than fifteen thousand dollars ($15,000) and submit proof thereof to the Commission prior to offering for sale any burial rights in grave spaces, niches or crypts.

(d) In each sales contract, reservation or agreement wherein burial rights are priced separately, the purchase price of said burial rights shall be the only item subject to care and maintenance trust fund deposits; but if the burial rights are not priced separately therein, the full amount of the contract, reservations or agreement shall be subject to care and maintenance trust fund

deposits as provided herein, unless the purchase price of said burial rights can be determined from the accounting records of the cemetery company.

(e) When the amount deposited in the perpetual care fund required by this Article of any cemetery heretofore or hereafter established shall amount to one hundred fifty thousand dollars ($150,000), anything in this Article to the contrary notwithstanding, the cemetery may make all deposits thereafter either into the original perpetual care trust fund or into a separate fund which shall be an irrevocable trust and designated as Perpetual Care Trust Fund "A" and invested by trustee as directed by the cemetery, but may not be invested in another cemetery, and said deposits shall be not less than twenty-five dollars ($25.00) per grave space and niche and forty-five dollars ($45.00) per mausoleum crypt space.

(f) For special endowments for a specific lot, grave, or a family mausoleum, memorial, marker, or monument, the cemetery may set aside the full amounts received for this individual special care in a separate trust or by a deposit to a savings account in a bank or savings and loan association located within and authorized to do business in the State; provided, however, if the licensee does not set up a separate trust or savings account for the special endowment the full amount thereof shall be deposited in Perpetual Care Trust Fund "A." (1943, c. 644, s. 10; 1957, c. 529, s. 4; 1967, c. 1009, s. 10; 1971, c. 1149, s. 5; 1975, c. 768, s. 1; 1977, c. 686, s. 14; 1979, c. 888, ss. 5, 6.)

Editor's Note. — Section 36-47, referred to in subsection (a) of this section, has been repealed. See now § 36A-90.

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "on or before the last day of the calendar month following" for "not later than 10 days following the close of" in the first sentence of subsection (a) and substituted "twenty-five dollars ($25.00)" for "twenty dollars ($20.00)" and "forty-five dollars ($45.00)" for "forty dollars ($40.00)" in subsection (e).

Session Laws 1979, c. 888, s. 10, contains a severability clause.

§ 65-65. Trust fund; financial reports.

Within 60 days after the end of the calendar or fiscal year of the cemetery company, the trustee shall furnish adequate financial reports with respect to the care fund on forms provided by the Commission. However, the Commission may require the trustee to make such additional financial reports as it may deem advisable. (1975, c. 768, s. 1.)

§ 65-66. Receipts from sale of personal property or services; trust account; penalties.

(a) It shall be deemed contrary to public policy if any person or legal entity receives, holds, controls or manages funds or proceeds received from the sale of, or from a contract to sell, personal property or services which may be used in a cemetery in connection with the burial of or the commemoration of the memory of a deceased human being, where payments for the same are made either outright or on an installment basis prior to the demise of the person or persons so purchasing them or for whom they are so purchased, unless such person or legal entity holds, controls or manages said funds, subject to the limitations and regulations prescribed in this section. This section shall apply to all cemetery companies or other legal entities that offer for sale or sell personal property or services which may be used in a cemetery in connection with the burial of, or the commemoration of the memory of, a deceased human being, but shall exclude persons holding a certificate under G.S. 65-36.1 through 65-36.8.

(b) Any cemetery company or other entity entering into a contract for the sale of personal property or services, to be used in a cemetery in connection with disposing of, or commemorating the memory of a deceased human being wherein the use of the personal property or the furnishing of services is not immediately requested or required, shall comply with the following requirements and conditions:

(1) The cemetery company or other entity shall deposit an amount equal to sixty percent (60%) of all proceeds received on such contracts into a trust account, either in the form of an account governed by a trust agreement and handled by a corporate trustee or in the form of a passbook savings account, certificates of deposit for time certificates, and/or money-market certificates with a licensed and insured bank or savings institution located in the State of North Carolina until the amount deposited equals sixty percent (60%) of the actual sale price of the property or services sold. Such accounts and/or deposits shall be in the name of the cemetery company or other entity in a form which will permit withdrawals only with the participation and consent of the Cemetery Commission as required by subdivision (4) of this subsection.

(2) All funds received on account of a contract for the sale of such personal property or services, whether the funds be received directly from the purchaser or from the sale or assignment of notes entered into by the purchase or otherwise, shall be deposited into the trust account as required by subdivision (1) of this section.

(3) All deposits required herein shall be made into the trust account so established on or before the last day of the month following receipt of the funds by the cemetery company or other entity.

(4) Withdrawals from a trust account may be made by the depositor, but only with the written approval of the Commission or officer or employee of the Commission authorized to act for the Commission. Withdrawals may be made only upon delivery of the merchandise or services for which the funds were deposited, cancellation of a contract, the presence of excess funds in the trust account, or under other circumstances deemed appropriate by the Commission. The Commission shall promulgate rules and regulations governing withdrawals from trust accounts, including time and frequency of withdrawals, notice to the Commission prior to withdrawals, the number and identity of persons other than the owner who are authorized by the owner to make withdrawals, the officers and employees of the Commission authorized to approve withdrawals, and any other matters necessary to implement the provisions of this subdivision. Withdrawals will not be allowed if the amount remaining in the trust account would fall below sixty percent (60%) of all proceeds received on account of contracts for the sale of such personal property or services.

(5) If for any reason a cemetery company or other entity who has entered into a contract for the sale of personal property or services cannot or does not provide the personal property or perform the services called for by the contract after request in writing to do so, the purchaser or his heirs or assigns or duly authorized representative shall be entitled to receive the entire amount paid on the contract and any income if any, earned thereon by the trust account.

(6) Every year after September 1, 1975, the cemetery company, the trustee or other entity shall within 75 days after the end of the calendar year, file a financial report of the trust funds with the Commission, setting forth the principal thereof, the investments and payments made, the income earned and disbursed; provided, however, that the Commission may require the cemetery, trustee, or other entity to make such additional financial reports as it may deem advisable.

(c) Whenever a contract for the sale of personal property and/or services allocates payments to apply to one item at a time under a specific schedule, the contract shall be considered divisible. Title to each item of personal property or the right to each item of services shall pass to the purchaser upon full payment for that item regardless of the remaining balance on other items under the same contract.

(d) Any contract for the sale of personal property and/or services shall state separate costs for each item of personal property, for each act of installation required by the contract, and for each other item of services included in the contract.

(e) All contracts for the sale of personal property and/or services must be printed in type size as required by the Truth in Lending Act, 15 U.S.C. § 1601 et seq., and regulations adopted pursuant to that act.

(f) In the event of prepayment, interest charged shall be no more than the interest earned on the unpaid balance computed on a percent per month basis for each month or part of a month up to the date of final payment. Any excess interest which has been paid by the purchaser must be refunded to him, his assigns, or his representative within 30 days after the final payment. No penalty or additional charge for prepayment may be required.

(g) In lieu of the deposits required under subsection (b) of this section, the cemetery company or other entity may post with the Commission a good and sufficient performance bond by surety company licensed to do business in North Carolina and in an amount sufficient to cover all payments made directly or indirectly by or on account of purchasers who have not received the purchased property and services. Money received from the sale or assignment of notes entered into by the purchasers, or otherwise, shall be treated as payments made by the purchasers.

(h) The Commission shall have the power and is required from time to time as it may deem necessary to examine the business of any cemetery company or other entity writing contracts for the sale of the property or services as herein contemplated. The written report of such examination shall be filed in the office of the Commission. Any person or entity being examined shall produce the records of the company needed for such examination.

(i) Any provision of any contract for the sale of the personal property or the performance of services herein contemplated under which the purchaser or beneficiary waives any of the provisions of this section shall be void.

(j) Any cemetery company or other entity, as defined in this section, failing to make contributions required by subsection (b) of this section shall be guilty of a misdemeanor punishable as provided in G.S. 14-3, and each violation of this section shall constitute a separate offense.

(k) Nothing in G.S. 65-66 and subsections thereunder shall apply to persons or legal entities holding licenses or certificates under G.S. 65-36.1 and 65-36.8 when performing services or selling items authorized by said sections.

(l) If any report is not received within the time stipulated by the Commission or herein, the Commission may levy and collect a penalty of twenty-five dollars ($25.00) per day for each day of delinquency.

(m) At any time prior to delivery of personal property or performance of services, a purchaser may cancel his contract by giving written notice to the seller. The seller may cancel the contract, upon default by purchaser, by giving written notice to the purchaser. Within 30 days of notice of cancellation, the cemetery company or other entity shall refund to purchaser the principal amount on deposit in the trust account for his benefit on any undelivered merchandise or services. This amount (no other obligations owed the purchaser by the seller) shall constitute the purchaser's entire entitlements under the contract. The seller may not terminate the contract without complying with this subsection. (1975, c. 768, s. 1; 1979, c. 888, s. 7.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "licensed under this Chapter," which previously followed "legal entities" in the second sentence of subsection (a), rewrote subsections (b) through (j), and added subsections (k), (l), and (m).

Session Laws 1979, c. 888, s. 10, contains a severability clause.

§ 65-67. Applications for license.

Applications for renewal license must be submitted on or before July 1 each and every year in the case of an existing cemetery company. Before any sale of cemetery property in the case of a new cemetery company or a change of ownership or control as indicated in G.S. 65-59, an application for license must be submitted and license issued. (1975, c. 768, s. 1.)

§ 65-68. License not assignable or transferable.

No license issued under G.S. 65-67 shall be transferable or assignable and no licensee shall develop or operate any cemetery authorized by this Article under any name or at any location other than that contained in the application for such license. (1975, c. 768, s. 1.)

§ 65-69. Minimum acreage; sale or disposition of cemetery lands.

(a) Each licensee shall set aside a minimum of 30 acres of land for use by said licensee as a cemetery, and shall not sell, mortgage, lease or encumber the same.

(b) The fee simple title, or lesser estate, in any lands owned by licensee and dedicated for use by it as a cemetery, which are contiguous, adjoining, or adjacent to the minimum of 30 acres described in subsection (a), may be sold, conveyed, or disposed of, or any part thereof, by the licensee, for use by the new owner for other purposes than as a cemetery; provided that no bodies have been previously interred therein; and provided further, that any and all titles, interests, or burial rights which may have been sold or contracted to be sold in such lands which are the subject of such sale shall be conveyed to and revested in the licensee prior to consummation of any such sale, conveyance or disposition.

(c) Any licensee may convey and transfer to a municipality or county its real and personal property together with moneys deposited with the trustee; provided said municipality or county will accept responsibility for maintenance thereof and prior written approval of the Commission is first obtained.

(d) The provisions of subsections (a) and (b) relating to a requirement for minimum acreage shall not apply to those cemeteries licensed by the Commission on or before July 1, 1967, which own or control a total of less than 30 acres of land; provided that such cemeteries shall not dispose of any of such lands. (1975, c. 768, s. 1.)

§ 65-70. Construction of mausoleums and belowground crypts; trust fund for receipts from sale of preconstruction crypts; compliance requirements.

(a) A cemetery company shall be required to start construction of that section of a mausoleum or bank of belowground crypts in which sales, contracts for sale, reservations for sales or agreements for sales are being made, within 48 months after the date of the first such sale. The construction of such mausoleum section or bank of belowground crypts shall be completed within

five years after the date of the first sale made; provided, however, extensions for completion, not to exceed one year, may be granted by the Commission for good reasons shown.

(b) A cemetery company which plans to offer for sale space in a section of a mausoleum or bank of underground crypts prior to its construction shall establish a preconstruction trust account. The trust account shall be administered and operated in the same manner as the merchandise trust account provided for in G.S. 65-66 and shall be exclusive of the merchandise trust account or such other trust accounts or funds that may be required by law. The personal representative of any purchaser of such space who dies before completion of construction shall be entitled to a refund of all moneys paid for such space including any income earned thereon.

(c) Before a sale, contract for sale, reservation for sale or agreement for sale in the first mausoleum section or bank of underground crypts in each cemetery may be made the funds (one hundred twenty percent (120%) of construction cost) to be deposited to the preconstruction trust account shall be computed as to said section or bank of crypts and such trust account payments must be made on or before the last day of the calendar month following receipt by the cemetery company or its agent of each payment. The trust account portion of each such payment shall be computed by dividing the cost of the project plus twenty percent (20%) of said cost, as computed by a licensed contractor, engineer or architect by the number of crypts in the section or bank of crypts to ascertain the cost per unit. The unit cost shall be divided by the contract sales price of each unit to obtain a percentage which shall be multiplied by the amount of each payment. The formula shall be computed as follows:

Cost plus twenty percent (20%) divided by number of crypts = cost per unit

Cost per unit divided by contract sales price = percentage

Percentage x payment received = deposit required to preconstruction trust account.

(d) The cemetery company shall be entitled to withdraw the funds from said preconstruction trust account only after the Commission has become satisfied that construction has been completed; provided, however, that during construction of the mausoleum or bank of belowground crypts the Commission may, in its discretion, authorize a specific percentage of the funds to be withdrawn when it appears that at least an equivalent percentage of construction has been completed.

(e) If a mausoleum section or bank of underground crypts is not completed within the time limits set out in this section the corporate trustee, if any, shall contract for and cause said project to be completed and paid therefor from the trust account funds deposited to the project's account paying any balance, less cost and expenses, to the cemetery company. In the event there is no corporate trustee, the Commission shall appoint a committee to serve as trustees to contract for and cause said project to be completed and paid therefor from the trust account funds deposited to the project's account paying any balance, less cost and expenses, to the cemetery company.

(f) In lieu of the payments outlined hereunder to the preconstruction trust account the cemetery company may deliver to the Commission a good and sufficient completion or performance bond in an amount and by surety companies acceptable to the Commission. (1975, c. 768, s. 1; 1977, c. 686, ss. 16, 17; 1979, c. 888, s. 8.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "if a section of a mausoleum or a bank of belowground crypts shall contain more than 500 crypts" at the end of the second sentence of subsection (a) and substituted "trust account" for "trust fund" and "trust accounts" for "trust funds" throughout subsections (b), (c), and (d). In subsection (c) the amendment also substituted "trust account payments must be made on or before the last day of the calendar month following" for "fund payments must be made

within 30 days of" in the first sentence; in subsection (e) the amendment substituted "a" for "said" preceding "mausoleum" and "corporate trustee, if any" for "trustee" in the first sentence, inserted "account" preceding "funds deposited" in the first sentence, and added the second sentence; and in subsection (f) the amendment substituted "trust account" for "fund" following "preconstruction."

Session Laws 1979, c. 888, s. 10, contains a severability clause.

§ 65-71. Penalties.

(a) A person violating any provisions of this Article, or order or rule promulgated under the provisions thereof, or of any license issued by the Commission, shall be guilty of a misdemeanor and fined and imprisoned, or both, in the discretion of the court.

(b) The officers and directors or persons occupying similar status or performing similar functions of any cemetery company, cemetery sales organization, cemetery management organization or cemetery broker, as defined in this Chapter, failing to make required contributions to the care and maintenance trust fund and any other trust fund of escrow account provided herein, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished in the manner prescribed by law. (1943, c. 644, s. 14; 1967, c. 1009, s. 13; 1975, c. 768, s. 1.)

§ 65-72. Burial without regard to race or color.

(a) It shall be the public policy of the State that all cemetery companies or other legal entities conducting or maintaining public or private cemeteries shall sell to all applicants and bury all deceased human beings on equal terms without regard to race or color. Anything contrary hereto is void and of no legal effect. Bylaws, rules and regulations, contracts, deeds, etc., may permit designation of parts of cemeteries or burial grounds for the specific use of persons whose religious code required isolation. Any program offering free burial rights to veterans or any other person or group of persons shall not be conditioned by any requirement to purchase additional burial rights or merchandise.

(b) Any cemetery company or other legal entity violating the provisions of this section shall be guilty of a misdemeanor, punishable as provided in G.S. 14-3, and each violation of this section shall constitute a separate offense. (1975, c. 768, s. 1.)

§ 65-73. Validation of certain deeds for cemetery lots executed by suspended corporations.

Any deed for a cemetery lot or lots which was executed prior to January 1, 1979, and which would have been valid if the charter of the grantor corporation had not been suspended at the time the deed was executed, is hereby validated. (1979, c. 225, s. 1.)

Editor's Note. — Session Laws 1979, c. 225, s. 2, provides: "This act shall become effective on July 1, 1979, and shall not affect litigation completed or pending on that date."

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Article 1.

Regulation and Inspection.

§ 66-1. County commissioners to appoint inspectors.

The board of county commissioners may appoint for their county or any township thereof inspectors for any article of commerce the inspection of which is not otherwise provided for by law, who shall hold office for the term of five years after their employment. (Rev., ss. 4637, 4669; C. S., s. 5068.)

§ 66-2: Repealed by Session Laws 1973, c. 108, s. 22.

§ 66-3. Bond of inspector; fees.

The said inspector shall enter into bond in the sum of five hundred dollars ($500.00), payable to the State of North Carolina, conditioned for the faithful performance of the duties of his office, which bond the board shall take; and he shall be entitled to such fees as may be prescribed by the board. (1848, c. 43, s. 3; R. C., c. 60, s. 76; Code, s. 3053; Rev., s. 4671; C. S., s. 5071.)

§ 66-4. Falsely acting as inspector.

If any person, who is not a legal or sworn inspector of lumber or other articles, presume to act as such, he shall forfeit and pay one hundred dollars ($100.00), and be guilty of a misdemeanor. (1824, c. 1254, s. 3; R. C., c. 60, s. 69; Code, s. 3046; Rev., s. 3580; C. S., s. 5072.)

§ 66-5. Penalty for sale without inspection.

If any person shall sell any article of forage or provision, of which inspection is required in accordance with this Article, without the same having been inspected as required, he shall, for every offense, forfeit and pay one hundred dollars ($100.00). (1850, c. 74, s. 2; R.C., c. 60, s. 77; Code, s. 3054; Rev., s. 4672; C. S., s. 5073.)

§ 66-6. Penalty on master receiving without inspection.

No master or commander of any vessel shall take on board any cask or barrel or other commodity, liable to inspection as aforesaid, without its being inspected and branded as required, under the penalty of two hundred dollars ($200.00) for each offense. (1784, c. 206, s. 6; R. C., c. 60, s. 59; Code, ss. 3036, 3037; Rev., ss. 4657, 4658; C. S., s. 5074.)

Local Modification. — Town of New Bern: C. S., § 5074.

§ 66-7. Who to pay inspectors' fees; penalty for extortion.

The fees of inspectors shall be paid by the purchaser or exporter of the articles inspected, and if any inspector shall receive any greater fees than are by law allowed, he shall forfeit and pay ten dollars ($10.00) for every offense to any person suing for the same. (1824, c. 1254, ss. 1, 2; R. C., c. 60, s. 79; Code, s. 3055; Rev., s. 4673; C. S., s. 5075.)

§ 66-8. Firewood in towns.

All firewood sold in incorporated towns shall be sold by the cord and not otherwise; and each cord shall contain eight feet in length, four feet in height and four feet in breadth; and shall be corded by the seller, under the penalty of two dollars ($2.00) for each offense, to the use of the informer. (1784, c. 211; R. C., c. 60, s. 72; 1880, c. 401; Code, s. 3049; Rev., s. 4667; C. S., s. 5081.)

§ 66-9. Gas and electric light bills to show reading of meter.

It shall be the duty of all gas companies and electric light companies selling gas and electricity to the public to show, among other things, on all statements or bills rendered to consumers, the reading of the meter at the end of the preceding month, and the reading of the meter at the end of the current month, and the amount of electricity, in kilowatt hours, and of gas, in feet, consumed for the current month; provided, however, that nothing herein contained shall be construed to prohibit any gas or electric company from adopting any method of and times of reading meters and rendering bills that may be approved by the North Carolina Utilities Commission.

Any gas or electric light company failing to render bills or statements, as provided for in this section, shall be subject to a penalty of ten dollars ($10.00) for each violation of this section or failure to render such statements, recoverable in the district court by any person suing for the same; but this section shall not apply to bills and accounts rendered customers on flat rate contracts. (1915, c. 259; C. S., s. 5082; 1959, c. 987; 1973, c. 108, s. 23.)

§ 66-10. Failure of junk dealers to keep record of purchases misdemeanor.

Every person, firm, or corporation buying brass or copper, or any other metal, or any rubber, or leather and rubber belts and belting, as junk, shall keep a register and shall keep therein a true and accurate record of each purchase, showing the description of the article purchased, the name from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon said metal, rubber, or leather and rubber belts and belting. The said register and the metal and rubber, and leather and rubber belts and belting purchased shall be at all times open to the inspection of the public. A failure to comply with these requirements or the making of a false entry concerning such metals, rubber, or leather, or rubber belts, or belting shall constitute a misdemeanor.

Every person, firm or corporation engaged in the business of buying or dealing in what is commonly known as "junk," including scrap metal of every kind, nature or description, glass, waste paper, burlap, cloth, cordage, rubber, leather, belting of every kind, or brass, in addition to the above requirements, shall make and keep a record of the name and address of the person from whom such junk is purchased and the license number, if any, and if there is no license, a description of the vehicle in which such junk is delivered. Any person, firm or corporation who or which fails to comply with the requirements of this paragraph shall be guilty of a misdemeanor and upon conviction shall be fined not in excess of fifty dollars ($50.00) in the discretion of the court. (1917, c. 46; C. S., s. 5090; 1957, c. 791.)

Local Modification. — Anson, Caldwell, Davidson, Randolph, Robeson: C. S., § 5090; Beaufort, Bertie, Harnett, Martin, Perquimans and Washington: 1953, c. 1154; Stanly: 1939, c. 154.

§ 66-11. Dealing in certain metals regulated; purchasing from minors; violations of section misdemeanor.

Every person, firm, or corporation buying railroad brasses or any composition metal specially used in the operation of trains, or brasses, composition metals, or copper or aluminum of the kind or quality used by manufacturing

or power plants or by the communication or electric utility industry, or any copper, brass or bronze of whatever kind or description, shall keep a register and shall insert therein a true and accurate record of each purchase, showing the name, address and driver's license number, the make and type of vehicle hauling said scrap, together with the license plate number thereon, of the person from whom purchased, the amount paid for the same, the date thereof, and also any and all marks or brands upon such metal. Such records shall be kept at the place of business of the person, firm or corporation and shall be open to inspection by any law officer. The register shall be at all times open to the inspection of the public. Any person or dealer buying or selling metals without complying with this section shall be guilty of a misdemeanor; and any person making a false entry in such register shall be guilty of a misdemeanor. Every person, firm, or corporation who shall buy or receive any such metals from persons under 18 years old, or who shall buy or receive any such metals after the same have been broken up and the marks or brands obliterated, shall be guilty of a misdemeanor; and every person buying, receiving or selling, or offering for sale metals broken into small pieces, or so broken as to obliterate the marks or brands, shall be prima facie presumed to have received such metals knowing the same to have been stolen. (1907, c. 464; 1909, c. 855, s. 1; C.S., s. 5091; 1967, c. 792; 1971, c. 1231, s. 1; 1975, c. 182, s. 2.)

§ 66-11.1. Transportation of copper.

It shall be unlawful for any person to transport or have in his possession on highways of this State, in any vehicle other than a vehicle used in the ordinary course of business for the purpose of transporting such copper, an amount of such copper of an aggregate weight of more than 25 pounds, unless such person shall have in his possession

(1) A bill of sale pertaining to such copper signed by (i) a holder of a sales and use tax registration number from the North Carolina Department of Revenue; or (ii) an authorized wholesaler engaged in the sale of such copper; or (iii) a registered dealer in scrap metals; or (iv) a seller of antiques or objects of art; or

(2) In the event the person from whom such copper was purchased was other than one of the above enumerated persons or firms, a certificate of origin signed by the sheriff, or his designated representative, of the county in which the purchase was made.

Such bill of sale or certificate of origin shall clearly identify the material to which it applies and show thereon the name and address of the seller, license plate of the vehicle in which such material is delivered to the purchaser, identified by license number, year and state of issue, the name and address of the purchaser, the date of sale, and the type and amount of such copper purchased.

Any person violating the provisions of this subsection [section] shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars ($500.00) or be imprisoned for not more than six months. (1975, c. 182, s. 1.)

Article 2.

Manufacture and Sale of Matches.

§ 66-12. Requirements for matches permitted to be sold.

No person, association, or corporation shall manufacture, store, offer for sale, sell or otherwise dispose of or distribute white phosphorous, single-dipped, strike-anywhere matches of the type popularly known as "parlor matches"; nor manufacture, store, sell, offer for sale, or otherwise dispose of, or distribute,

white phosphorous, double-dipped, strike-anywhere matches or any other type of double-dipped matches, unless the bulb or first dip of such match is composed of a so-called safety or inert composition, nonignitible as an abrasive surface; nor manufacture, store, sell, or offer for sale, or otherwise dispose of or distribute matches which when packed in a carton of 500 approximate capacity and placed in an oven maintained at a constant temperature of 200 degrees F., will ignite in eight hours; nor manufacture, store, offer for sale, sell or otherwise dispose of, or distribute, blazer, or so-called wind matches, whether of the so-called safety or strike-anywhere type. (1915, c. 109, s. 12, I; C. S., s. 5113.)

§ 66-13. Packages to be marked.

No person, association, or corporation shall offer for sale, sell or otherwise dispose of, or distribute, any matches, unless the package or container in which such matches are packed bears, plainly marked on the outside thereof, the name of the manufacturer and the brand or trademark under which the matches are sold, disposed of, or distributed. (1915, c. 109, s. 12, II; C. S., s. 5114.)

§ 66-14. Storage and packing regulated.

No more than one case of each brand of matches of any type or manufacture shall be opened at any one time in the retail store where matches are sold or otherwise disposed of; nor shall loose boxes or paper-wrapped packages of matches be kept on shelves or stored in such retail stores at a height exceeding five feet from the floor; all matches when stored in warehouses must be kept only in properly secured cases, and not piled to a height exceeding 10 feet from the floor; nor be stored within a horizontal distance of 10 feet from any boiler, furnace, stove, or other like heating apparatus; nor within a horizontal distance of 25 feet from any explosive material kept or stored on the same floor. All matches shall be packed in boxes or suitable packages, containing not more than 700 matches in any one box or package: Provided, however, that when more than 300 matches are packed in any one box or package the said matches shall be arranged in two nearly equal portions, the heads of the matches in the two portions shall be placed in opposite directions, and all boxes containing 350 or more matches shall have placed over the matches a center-holding or protecting strip, made of chip board, not less than one and one-quarter inches wide; said strip shall be flanged down to hold the matches in position when the box is nested into the shuck or withdrawn from it. (1915, c. 109, s. 12, II; C. S., s. 5115.)

§ 66-15. Shipping containers regulated.

All match boxes or packages shall be packed in strong shipping containers or cases; maximum number of match boxes or packages contained in any one shipping container or case shall not exceed the following number:

Number of Boxes	Nominal Number of Matches per Box
½ gross	700
1 gross	500
2 gross	400
3 gross	300
5 gross	200
12 gross	100
20 gross over 50 and under	100
25 gross under	50

No shipping container or case constructed of fiber board, corrugated fiber board, or wood, nailed or wirebound, shall exceed a weight, including its contents, of 75 pounds; and no lock-cornered wooden case containing matches shall have a weight, including its contents, exceeding 85 pounds; nor shall any other article or commodity be packed with matches in any such container or case; and all such containers and cases in which matches are packed shall have plainly marked on the outside of the container or case the words "Strike-Anywhere Matches" or "Strike-on-the-Box Matches." (1915, c. 109, s. 12, III; C. S., s. 5116.)

§ 66-16. Violation of Article a misdemeanor.

Any person, association, or corporation violating any of the provisions of this Article shall be fined for the first offense not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00), and for each subsequent violation not less than twenty-five dollars ($25.00). (1915, c. 109, s. 12, IV; C. S., s. 5117.)

Article 3.

Candy and Similar Products.

§ 66-17. Sale, etc., of candy or other food not complying with health and pure food laws.

It shall be unlawful for any person, firm or corporation, or agent of any person, firm or corporation, to consign, sell, possess or use any candy or other product within this State that does not comply with all federal and State health and pure food laws in force and effect in North Carolina. (1939, c. 323, s. 1.)

Legal Periodicals. — For comment on this Article, see 17 N.C.L. Rev. 384.

§ 66-18. Manufacturer to pay tax upon products consigned to person, etc., other than licensed wholesale or retail merchant.

Any manufacturer of candy or similar products, or the agent of such manufacturer, who consigns any such products to any person, firm or corporation other than a licensed wholesale or retail merchant in the State of North Carolina shall be liable for and pay to the State of North Carolina a tax of three percent (3%) upon the gross retail sales price of merchandise so consigned and/or sold: Provided such manufacturers shall be entitled to a refund or credit for taxes paid on such consigned goods as are returned by the consignee to said manufacturers. (1939, c. 323, s. 2.)

§ 66-19. Regulations as to possession and sale.

It shall be unlawful for any person, firm or corporation other than a licensed wholesale or retail merchant in the State of North Carolina to consign, possess or use any article upon which the tax provided for in G.S. 66-18 preceding is payable, or for any consignee to sell such product, unless the manufacturer thereof is registered with the Secretary of Revenue of the State of North Carolina for payment of said tax. (1939, c. 323, s. 3; 1973, c. 476, s. 193.)

§ 66-20. Secretary of Revenue may require reports.

The Secretary of Revenue shall have authority to require a report, at such times as he may determine, from every person, firm or corporation manufacturing candy or similar products, or from the agent of any such manufacturer, of the names and addresses of all consignees, other than licensed merchants, to whom consignment of such merchandise is made. (1939, c. 323, s. 4; 1973, c. 476, s. 193; c. 1287, s. 1.)

§ 66-21. Violators deprived of legal redress.

The consignor shall not have the right to sue in any court of law in this State for the collection of moneys resulting from the sale of merchandise sold in violation of this Article. (1939, c. 323, s. 5.)

§ 66-22. Violations made misdemeanor.

Any person convicted for the violation of this Article shall be guilty of a misdemeanor and subject to a fine of not exceeding one hundred dollars ($100.00) or imprisonment for not exceeding 30 days or both fine and imprisonment in the discretion of the court. (1939, c. 323, s. 6.)

Article 4.

Electrical Materials, Devices, Appliances and Equipment.

§ 66-23. Sale of electrical goods regulated.

Every person, firm or corporation before selling, offering for sale or exposing for sale, at retail to the general public or disposing of by gift as premiums or in any similar manner any electrical material, devices, appliances or equipment shall first determine if such electrical materials, devices, appliances and equipment comply with the provision of this Article. (1933, c. 555, s. 1.)

§ 66-24. Identification marks required.

All electrical materials, devices, appliances and equipment offered for sale, exposed for sale at retail to the general public, or disposed of by gift as premiums or in any similar manner shall have the maker's name, trademark, or other identification symbol placed thereon, together with such other markings giving voltage, current, wattage, or other appropriate ratings as may be necessary to determine the character of the material, device, appliance or equipment and the use for which it is intended; and it shall be unlawful for any person, firm or corporation to remove, alter, change or deface the maker's name, trademark or other identification symbol. (1933, c. 555, s. 2.)

§ 66-25. Acceptable listings as to safety of goods.

The electrical inspector shall accept, without further examination or test, the listings of Underwriters' Laboratories, Inc., as evidence of safety of such materials, etc., so long as the listing continues in effect to his knowledge and, so long as information and experience have not demonstrated, in his judgment, that any specific listed materials, etc., are not safe.

The electrical inspector may accept as evidence of safety of such materials, etc., not of types for which such Underwriters' Laboratories listings are in effect, such evidence by way of records of tests and examinations by bodies he

deems properly qualified, as he deems necessary to assure him of the safety of such materials, etc. But such acceptance cannot be made to apply to other than the stock of materials, etc., for which such evidence has been specifically secured. One body whose evidence of safety shall be accepted by the electrical inspector for specific stocks is the Insurance Commission of the State of North Carolina, if the stock in question has been submitted to the examinations and tests required by that Commission, and that Commission has certified that in its judgment the stock conforms to the State law, to the requirements of this Article, and to any additional requirements deemed necessary for safety in the judgment of that Commission.

The electrical inspector may decline to accept any evidence of safety other than that provided by Underwriters' Laboratories listings, for specific materials, etc., of types for which such listings are available.

The electrical inspector, in accepting listings of Underwriters' Laboratories, shall keep in file as far as practicable, copies of all Underwriters' Laboratories listings in effect, and copies of the recorded standards, requirements, tests and examinations of Underwriters' Laboratories for such materials, etc., or shall when necessary refer to the files of such information maintained by the Insurance Commission of North Carolina. The words "electrical inspector" when used in this Article shall be construed to refer to any duly licensed and employed electrical inspector of the State or any governmental agency thereof. (1933, c. 555, s. 3.)

§ 66-26. Legal responsibility of proper installations unaffected.

This Article shall not be construed to relieve from or to lessen the responsibility or liability of any party owning, operating, controlling or installing any electrical materials, devices, appliances or equipment for damages to persons or property caused by any defect therein, nor shall the electrical inspector be held as assuming any such liability by reason of the approval of any material, device, appliance or equipment authorized herein. (1933, c. 555, s. 4.)

§ 66-27. Violation made misdemeanor.

Any person, firm or corporation who shall violate any of the provisions of this Article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days. (1933, c. 555, s. 5.)

Article 4A.

Safety Features of Hot Water Heaters.

§ 66-27.1. Certain automatic hot water tanks or heaters to have approved relief valves; installation or sale of unapproved relief valves forbidden.

(a) No individual, firm, corporation or business shall install, sell or offer for sale any automatic hot water tank or heater of 120-gallon capacity or less which does not have installed thereon by the manufacturer of such tank or heater an American Society of Mechanical Engineers and National Board of Boiler and Pressure Vessel Inspectors approved type pressure-temperature relief valve set at or below the safe working pressure of the tank as indicated,

and so labeled by the manufacturer's identification stamped or cast upon the tank or heater or upon a plate secured to it.

(b) No individual, firm, corporation or business shall install, sell, or offer for sale any relief valve, whether it be pressure type, temperature type or pressure-temperature type, which does not carry the stamp of approval of the American Society of Mechanical Engineers and the National Board of Boiler and Pressure Vessel Inspectors. (1965, c. 860, s. 1; 1967, c. 453.)

§ 66-27.2. Certain hot water supply storage tank or heater baffles, heat traps, etc., to be tested before installation or sale.

(a) No individual, firm, corporation or business shall install, sell or offer for sale any hot water supply storage tanks or heaters of 120-gallon capacity or less which utilize dip tubes, supply and hot water nipples, supply water baffles or heat traps that have not been tested to withstand a temperature of 400 degrees Fahrenheit without deteriorating in any manner, and such tank or heater so labeled by the manufacturer.

(b) No individual, firm, corporation or business shall install, sell, or offer for sale any water baffles or heat traps, which are not constructed and tested to withstand a temperature of 400 degrees Fahrenheit without deterioration in any manner and such baffles or heat traps to be so labeled by the manufacturer. (1965, c. 860, s. 2.)

§ 66-27.3. Violation of Article made misdemeanor.

Violation of any provision of this Article is hereby made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1965, c. 860, s. 3.)

§ 66-27.4. Local regulation of hot water heater safety features.

Nothing in this Article shall be interpreted as relieving any individual, firm, corporation or business from complying with additional protective regulations relating to the safety features of hot water heaters as may be prescribed by local law, county or municipal charter or ordinance; provided, however, that no local law, county or municipal charter or ordinance shall fix or govern the temperature or pressure settings of a pressure-temperature relief valve on an automatic hot water tank or heater covered by this Article if there is installed on such tank or heater a pressure-temperature relief valve having settings in compliance with the North Carolina Building Code. (1965, c. 860, s. 4.)

ARTICLE 4B.

Safety Features of Trailers.

§ 66-27.5. House trailers to have two doors.

(a) In order to provide greater protection from the dangers of fire, every new house trailer having a body length exceeding 32 feet and manufactured or assembled after January 1, 1970, and sold in this State shall, if such house trailer is to be used as a residence or dwelling within this State, be equipped with at least two doors. These doors shall be located in the vicinity of the front

and rear rooms of the house trailer. Provided, however, this section shall not apply: to any (i) travel trailer which is factory equipped for the road and designed to be used as a dwelling for travel, recreational or vacation use, if such travel trailer does not exceed 32 feet in length; (ii) to any house trailer of any length sold in North Carolina for use in a state other than North Carolina.

(b) It shall be unlawful for any dealer to sell in this State any house trailer manufactured or assembled after January 1, 1970, having a body length exceeding 32 feet which does not conform to the specifications set forth in subsection (a). Any dealer who violates this section shall be guilty of a misdemeanor and upon conviction fined not exceeding five hundred dollars ($500.00) or imprisoned not exceeding 30 days. (1969, c. 463.)

Article 5.

Sale of Phonograph Records or Electrical Transcriptions.

§ 66-28. Prohibition of rights to further restrict or to collect royalties on commercial use.

When any phonograph record or electrical transcription, upon which musical performances are embodied, is sold in commerce for use within this State, all asserted common-law rights to further restrict or to collect royalties on the commercial use made of such recorded performances by any person is hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted intangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.

Nothing in this section shall be deemed to deny the rights granted any person by the United States copyright laws. The sole intendment of this enactment is to abolish any common-law rights attaching to phonograph records and electrical transcriptions, whose sole value is in their use, and to forbid further restrictions of the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof. (1939, c. 113.)

CASE NOTES

The effect of this section was to eliminate any common-law right to restrict the use of a recording sold for use in this State. Liberty/UA, Inc. v. Eastern Tape Corp., 11 N.C. App. 20, 180 S.E.2d 414, cert. denied, 278 N.C. 702, 181 S.E.2d 600 (1971).

"Use," as employed in this section, means the use for which a recording is intended; i.e., the playing of the recording. Thus, under this section, any record sold in commerce for use in this State may be played privately, publicly, and commercially without restriction. It does not follow that the performance contained on the record can be rerecorded onto another record and the rerecording sold in competition with the original producer. Liberty/UA, Inc. v. Eastern Tape Corp., 11 N.C. App. 20, 180 S.E.2d 414, cert. denied, 278 N.C. 702, 181 S.E.2d 600 (1971).

Copying Sound Recordings. — In North Carolina the conduct and techniques employed to copy and appropriate sound recordings are not justified either under this section or by the fact that such recordings are in the public domain. United Artists Records, Inc. v. Eastern Tape Corp., 19 N.C. App. 207, 198 S.E.2d 452 (1973).

Article 6.

Sale of Nursery Stock.

§ 66-29: Repealed by Session Laws 1973, c. 918.

Article 7.

Tagging Secondhand Watches.

§ 66-30. Definitions.

The following terms as used in this Article are hereby defined as follows:

(1) "Consumer" means an individual, firm, partnership, association or corporation, who buys for their own use or for the use of another, but not for resale.

(2) "Person" means a person, firm, partnership or corporation, but shall not include a receiver, trustee in bankruptcy, trustee under a mortgage, deed of trust or contract securing any indebtedness, and executor or administrator while acting as such, or any person acting under an order of court or as a licensed pawnbroker.

(3) "Secondhand watch" means a watch as a whole, or any part thereof, which has previously been sold to a consumer, or a watch whose case or movement, serial numbers or other distinguishing numbers or identification marks have been erased, defaced, removed, altered or covered, or a watch any part of which has been replaced by parts from another make or model watch. (1941, c. 244, s. 1.)

§ 66-31. Tags required; "sell" defined.

Any person, or agent or employee thereof, who sells a secondhand watch, as herein defined, shall affix and keep affixed to the same a tag with the words "secondhand" legibly written or printed thereon in the English language. For the purpose of this section, "sell" includes an offer to sell or exchange, expose for sale or exchange, possess with intent to sell or exchange and to sell or exchange. (1941, c. 244, s. 2.)

§ 66-32. Invoices delivered to purchasers; duplicate invoices open to inspection.

Any person, or agent or employee thereof who sells a secondhand watch, shall deliver to the purchaser a written invoice or bill of sale, setting forth the name and address of the seller, the name and address of the purchaser, the date of the sale, and a full description of the secondhand watch so sold, with the serial numbers, if any, or other distinguishing numbers or identification marks on its case and movements. A duplicate of such invoice or bill of sale shall be kept on file by the vendor for at least one year from the date of such sale, and such duplicate shall be open to inspection during all business hours by any peace officer or by any person authorized by any such peace officer to make an investigation regarding same. (1941, c. 244, s. 3.)

§ 66-33. Advertisement.

Any person advertising in any manner secondhand watches for sale shall state in such advertising that the watches so advertised are secondhand watches. (1941, c. 244, s. 4.)

§ 66-34. Violation of Article made misdemeanor.

Any person violating any of the provisions of this Article shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars ($50.00), or by imprisonment for not more than 30 days, or both. (1941, c. 244, s. 5.)

ARTICLE 8.

Public Warehouses.

§ 66-35. Who may become public warehousemen.

Any person or any corporation organized under the laws of this State whose charter authorizes it to engage in the business of a warehouseman may become a public warehouseman and authorized to keep and maintain public warehouses for the storage of cotton, goods, wares, and other merchandise as hereinafter prescribed upon giving the bond hereinafter required. (1901, c. 678; Rev., s. 3029; 1919, c. 212; C. S., s. 5118.)

CASE NOTES

Cited in Champion Shoe Mach. Co. v. Sellers, 197 N.C. 30, 147 S.E. 674 (1929).

§ 66-36. Bond required.

Every person or every corporation organized under G.S. 66-35, to become a public warehouseman, except such as shall have a capital stock of not less than five thousand dollars ($5,000), shall give bond in a reliable bonding or surety company, or an individual bond with sufficient sureties, payable to the State of North Carolina, in an amount not less than ten thousand dollars ($10,000), to be approved, filed with and recorded by the clerk of the superior court of the county in which the warehouse is located, for the faithful performance of the duties of a public warehouseman; but if such person or corporation has a capital stock of not less than five thousand dollars ($5,000), then it shall not be required to give the bond mentioned in this section. (1901, c. 678, s. 2; 1905, c. 540; Rev., s. 3030; 1908, c. 56; 1919, c. 212; C. S., s. 5119.)

§ 66-37. Person injured may sue on bond.

Whenever such warehouseman fails to perform any duty or violates any of the provisions of this Article, any person injured by such failure or violation may bring an action in his name and to his own use in any court of competent jurisdiction on the bond of said warehouseman. (1901, c. 678, s. 3; Rev., s. 3031; C. S., s. 5120.)

CASE NOTES

Warehousemen are liable under the general law for their negligence causing damage to articles stored with them. A.H. Motley & Co. v. Southern Finishing & Whse. Co., 122 N.C. 347, 30 S.E. 3 (1898); A.H. Motley Co. v. Southern Finishing & Whse. Co., 124 N.C. 232, 32 S.E. 555 (1899).

Care Required of Bailee. — Where it was known to bailor at time of storage that the bailee knew nothing about tobacco, and had no experience in handling it, the bailee will not be held liable for injury resulting from want of skill and experience; but will be bound to use such ordinary care as a prudent man would exercise to guard against moisture in the structure of the warehouse and the location of the tobacco. Motley v. Southern Finishing & Whse. Co., 126 N.C. 339, 35 S.E. 601 (1900).

Provision against Liability. — A provision in a charter of a warehouse corporation to the effect that such corporation shall not be liable for loss or damages not provided for in its warehouse receipt or contract attempts to confer exclusive privileges and is therefore unconstitutional and void. A.H. Motley & Co. v. Southern Finishing & Whse. Co., 122 N.C. 347, 30 S.E. 3 (1898).

The measure of damages for property damaged while in the care of a storage or warehouse company is the difference between the market value of the property in its damaged condition and what it would have sold for, if undamaged, on the day of its return to the owner. A.H. Motley & Co. v. Southern Finishing & Whse. Co., 122 N.C. 347, 30 S.E. 3 (1898).

Carrier's Liability as Warehouseman. — See Poythress v. Durham & S. Ry., 148 N.C. 391, 62 S.E. 515 (1908); Citizens & Marine Bank v. Southern Ry., 153 N.C. 346, 69 S.E. 261 (1910).

§ 66-38. When insurance required; storage receipts.

Every such warehouseman shall, when requested thereto in writing by a party placing property with it on storage, cause such property to be insured; every such warehouseman shall give to each person depositing property with it for storage a receipt therefor. (1901, c. 678, s. 4; 1905, c. 540, s. 2; Rev., s. 3032; C. S., s. 5121.)

Cross References. — As to warehouse receipts, see Chapter 27.

§ 66-39. Books of account kept; open to inspection.

Every such warehouseman shall keep a book in which shall be entered an account of all its transactions relating to warehousing, storing, and insuring cotton, goods, wares and merchandise, and to the issuing of receipts therefor, which books shall be open to the inspection of any person actually interested in the property to which such entry relates. (1901, c. 678, s. 7; Rev., s. 3035; C. S., s. 5122.)

§ 66-40. Unlawful dispostion of property stored.

If any person unlawfully sells, pledges, lends, or in any other way disposes of or permits or is a party to the unlawful selling, pledging, lending, or other disposition of any goods, wares, merchandise, or anything deposited in a public warehouse, without the authority of the party who deposited the same, he shall be punished by a fine not to exceed two thousand dollars ($2,000) and by imprisonment in the State's prison for not more than three years; but no officer, manager, or agent of such public warehouse shall be liable to the penalties provided in this section unless, with the intent to injure or defraud any person, he so sells, pledges, lends, or in any other way disposes of the same, or is a party to the selling, pledging, lending, or other disposition of any goods, wares, merchandise, article, or thing so deposited. (1901, c. 678, s. 11; Rev., s. 3831; C. S., s. 5123.)

Cross References. — As to warehouse receipts, see Chapter 27.

Article 9.

Collection of Accounts.

§§ 66-41 to 66-49: Recodified as §§ 66-49.24 to 66-49.50.

Editor's Note. — This Article was rewritten by Session Laws 1979, c. 835, and has been recodified as Article 9C, §§ 66-49.24 to 66-49.50.

Article 9A.

Private Detectives.

§§ 66-49.1 to 66-49.8: Repealed by Session Laws 1977, c. 712, s. 2, effective July 1, 1979.

Editor's Note. — This Article is repealed, effective July 1, 1979, by the "Sunset Law," Session Laws 1977, c. 712, s. 2, codified as § 143-34.11. Session Laws 1977, c. 712, s. 5, codified as § 143-34.14, provides: "Upon termination, each program or function shall continue in operational existence until July 1 of the next succeeding year as a winding-up period. During the winding-up period, termination shall not reduce or otherwise limit the powers or authority of the responsible agencies. Upon the expiration of the one-year period after termination, each such program or function shall cease operation entirely."

Article 9B.

Motor Clubs and Associations.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 66-49.9. Definitions.

As used in this Article, unless the context otherwise requires, the term:

(1) "Motor club" means any person, firm, association or corporation, whether or not residing, domiciled or chartered in this State, which, in consideration of dues, assessments, or periodic payments of money, promises its members or subscribers to assist them in matters relating to the ownership, operation, use or maintenance of a motor vehicle by rendering three or more of such services as towing service, emergency road service, legal service, bail or cash appearance bond service, map

service, touring service, personal travel and accident insurance service, or automobile theft reward service.

(2) "Commissioner" means the Commissioner of Insurance of North Carolina; and "Department" means the Department of Insurance of North Carolina.

(3) "Licensee" means a motor club to whom a license has been issued under this Article.

(4) "Towing service" shall mean furnishing means to move a motor vehicle from one place to another under power other than its own.

(5) "Emergency road service" shall mean roadside adjustment of a motor vehicle so that such vehicle may be operated under its own power, provided the cost of rendering such service does not exceed twenty-five dollars ($25.00).

(6) "Legal service" shall mean providing for reimbursement of members or subscribers for attorneys' fees not to exceed three hundred dollars ($300.00) in the event criminal proceedings are instituted against such members or subscribers as a result of the operation of a motor vehicle.

(7) "Bail or cash appearance bond service" shall mean the furnishing of cash or surety bond for its members or subscribers accused of a violation of the motor vehicle law, or of any law of this State by reason of an automobile accident to secure their release and subsequent appearance in court.

(8) "Map service" shall mean the furnishing of road maps to its members or subscribers without cost.

(9) "Touring service" shall mean the furnishing of touring information to its members or subscribers without cost.

(10) "Personal travel and accident insurance service" means making available to its members or subscribers a personal travel and accident insurance policy issued by a duly licensed insurance company in this State.

(11) "Automobile theft reward service" means a reward payable to any person, law-enforcement agency or officer for information leading to the recovery of a member's or subscriber's stolen vehicle and to the apprehension and conviction of the person or persons unlawfully taking such vehicle. (1963, c. 698.)

§ 66-49.10. License required.

No motor club, district or branch office of a motor club, or franchise motor club shall engage in business in this State unless it holds a valid license issued to it by the Commissioner as hereinafter provided. (1963, c. 698.)

§ 66-49.11. Applications for licenses; fees; bonds or deposits.

Licenses hereunder shall be obtained by filing written application therefor with the Commissioner in such form and manner as the Commissioner shall require. As a prerequisite to issuance of a license:

(1) The applicant shall furnish to the Commissioner such data and information as the Commissioner may deem reasonably necessary to enable him to determine, in accordance with the provisions of G.S. 66-49.12, whether or not a license should be issued to the applicant.

(2) If the applicant is a motor club it shall be required to pay to the Commissioner an annual license fee of one hundred dollars ($100.00) and to deposit or file with the Commissioner a bond, in favor of the

State of North Carolina and executed by a surety company duly authorized to transact business in this State, in the amount of fifty thousand dollars ($50,000), or securities of the type hereinafter specified in the amount of fifty thousand dollars ($50,000), pledged to or made payable to the State of North Carolina and conditioned upon the full compliance by the applicant with the provisions of this Article and the regulations and orders issued by the Commissioner pursuant thereto, and upon the good faith performance by the applicant of its contracts for motor club services.

(3) If the applicant is a branch or district office of a motor club licensed under this Article it shall pay to the Commissioner a license fee of ten dollars ($10.00).

(4) If the applicant is a franchise motor club it shall pay to the Commissioner an annual license fee of twenty-five dollars ($25.00) and shall deposit or file with the Commissioner a bond, in favor of the State of North Carolina and executed by a surety company duly authorized to transact business in this State, in the amount of fifty thousand dollars ($50,000), or securities of the type hereinafter specified in the amount of fifty thousand dollars ($50,000), pledged to or made payable to the State of North Carolina and conditioned upon the full compliance by the applicant with the provisions of this Article and the regulations and orders issued by the Commissioner pursuant thereto and upon the good faith performance by the applicant of its contracts for motor club services.

(5) Any applicant depositing securities under this section shall do so in the form and manner as prescribed in Article 20, Chapter 58 of the General Statutes of North Carolina, and the provisions of Article 20, Chapter 58 of the General Statutes of North Carolina, shall be applicable to securities pledged under this Article. (1963, c. 698.)

§ 66-49.12. Issuance or refusal of license; notice of hearing on refusal; renewal.

Within 60 days after an application for license is filed, the Commissioner shall issue a license to the applicant unless he shall find:

(1) That the applicant has not met all of the requirements of this Article, or

(2) That the applicant does not have sufficient financial responsibility to engage in business as a motor club in this State, or

(3) That the applicant has failed to make a reasonable showing that its managers, officers, directors and agents are persons of reliability and integrity. If any such finding is made, the Commissioner shall notify the applicant as soon as practicable of the reason for his refusal to issue the license, and inform the applicant of its right to a hearing on the matters as provided in G.S. 66-49.14. All licenses issued hereunder, and all renewals thereof, shall expire on June 30 following such issuance or renewal. Renewal of all licenses not previously revoked or suspended shall be automatic upon timely payment by the licensee of the annual fee. (1963, c. 698.)

§ 66-49.13. Powers of Commissioner.

The Commissioner shall have the same powers and authority for the purpose of conducting investigations and hearings under this Article as that vested in him by G.S. 58-9.2 and 58-44.6.

(1) To investigate possible violation of this Article and to report evidence thereof to the Attorney General who may recommend prosecution to the appropriate solicitor;

(2) To suspend or revoke any license issued under this Article upon a finding, after notice and opportunity for hearing, that the holder of said license has violated any of the provisions of this Article, or has failed to maintain the standards requisite to original licensing as indicated in G.S. 66-49.12 hereof;

(3) To require any licensee to cease doing business through any particular agent or representative upon a finding after notice and opportunity for hearing, that such agent or representative has intentionally made false or misleading statements concerning the motor club services offered by the motor club represented by him;

(4) To approve or disapprove the name, trademarks, emblems, and all forms which an applicant for license or licensee employs or proposes to employ in connection with its business. If such name, trademarks or emblems is distinctive and not likely to confuse or mislead the public as to the nature or identity of the motor club using or proposing to use it, then it shall be approved, otherwise, the Commissioner may disapprove its use and effectuate such disapproval by the issuance of an appropriate order; and

(5) To make any rules or regulations necessary to enforce the provisions of this Article. (1963, c. 698.)

§ 66-49.14. Hearing on denial of license; judicial review of determination by Commissioner.

Any applicant for a license or renewal of a license hereunder shall be entitled to a hearing before the Commissioner in the event such application is denied or not acted upon within a reasonable time. Any applicant or licensee adversely affected by a determination of the Commissioner shall have a right to seek judicial review of such determination under the provisions and limitations of G.S. 58-9.3. (1963, c. 698.)

§ 66-49.15. Agent for service of process.

Every motor club licensed hereunder shall appoint and maintain at all times an agent for service of process who shall be a resident of North Carolina. (1963, c. 698.)

§ 66-49.16. Violations; penalty.

Any person, firm, association or corporation who shall violate any of the provisions of this Article shall be guilty of a misdemeanor, and upon conviction shall be punished in the discretion of the court. (1963, c. 698.)

§ 66-49.17. Disposition of fees.

In the event an application for license filed hereunder is not approved, the Commissioner shall retain ten dollars ($10.00) of the fee paid to him in connection with said application, and return the balance to the applicant. All fees collected by the Commissioner hereunder shall be available to the Department of Insurance for paying the expense incurred in connection with the administration of this Article. (1963, c. 698.)

§ 66-49.18. Insurance licensing provisions not affected.

Nothing in this Article shall be construed as amending, repealing, or in any way affecting any laws now in force relating to the licensing of insurance agents or insurance companies, or to the regulation thereof, as provided in Chapter 58 of the General Statutes. (1963, c. 698.)

§§ 66-49.19 to 66-49.23: Reserved for future codification purposes.

ARTICLE 9C.

Collection Agencies.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

Part 1. Permit Procedures.

§ 66-49.24. Permit from Commissioner of Insurance; misdemeanor to do business without permit; penalty for violation; exception.

No person, firm, corporation, or association shall conduct or operate a collection agency or do a collection agency business, as the same is hereinafter defined in this Article, until he or it shall have secured a permit therefor as provided in this Article. Any person, firm, corporation or association conducting or operating a collection agency or doing a collection agency business without the permit shall be guilty of a misdemeanor. Any officer or agent of any person, firm, corporation or association, who shall personally and knowingly participate in any violation of this Part shall likewise be guilty of a misdemeanor. Provided, however, that nothing in this section shall be construed to require a regular employee of a duly licensed collection agency in this State to procure a collection agency permit. (1931, c. 217, s. 1; 1943, c. 170; 1959, c. 1194, s. 1; 1969, c. 906, s. 1; 1979, c. 835.)

Editor's Note. — This Article is Article 9, §§ 66-41 to 66-44 of this Chapter as rewritten by Session Laws 1979, c. 835, and recodified. Where appropriate, the historical citations to the former Article have been added to corresponding sections in the Article as rewritten.

CASE NOTES

Contract in Violation of Article Not Enforceable. — A contract entered into and signed in this State between plaintiff, a nonresident collection agency, and defendant, a State resident, calling for the collection of the accounts of the defendant in this State, was not enforceable in this State. Divine v. Wautauga Hosp., 137 F. Supp. 628 (M.D.N.C. 1956), decided under former Article 9 before its revision and recodification.

§ 66-49.25. Application to Commissioner for permit.

Any person, firm, corporation or association desiring to secure a permit as provided by G.S. 66-49.24, shall make application to the Commissioner of Insurance for each location at which such person, firm, corporation or association desires to carry on the collection agency business as hereinafter defined. Such applicant shall be entitled to a permit upon submission to the Commissioner of Insurance of the following:

(a) The name, trade name if any, street address, and telephone number of the applicant, including any home office address and telephone number, if different;

(b) If the applicant is a corporation,

(1) A certified copy of the board of director's resolution authorizing the submission of the application;

(2) An authenticated copy of the Articles of Incorporation and all amendments thereto;

(3) An authenticated copy of the bylaws or other governing instruments;

(4) If the applicant is a foreign corporation, a copy of the certificate of authority to transact business in this State issued by the North Carolina Secretary of State;

(c) If the applicant is a partnership, an authenticated copy of the then current partnership agreement;

(d) If the trade name is used, certificates showing that the trade name has been filed as required by G.S. 66-68;

(e) A surety bond as required by G.S. 66-49.28;

(f) A completed statement by each stockholder owning ten percent (10%) or more of the applicant's outstanding voting stock and each partner, director, officer, office manager, sales representative or other collector actively engaged in the collection agency business, containing the name of the collection agency, the name and address of the individual completing the form, the positions held by such individual, the name and address of three people not related to the individual who can attest to the individual's reputation for honesty and fair dealings;

(g) A statement sworn to by an appropriate corporate officer, partner, or individual proprietor giving a description of the collection method to be employed in North Carolina;

(h) A statement certifying that there are no unsatisfied judgments against the applicant;

(i) A list of all telephone numbers assigned to, or to be used by the applicant in the operation of the collection agency;

(j) The appropriate permit fee as required by G.S. 66-49.31;

(k) A balance sheet as of the last day of the month prior to the date of submission of the application, certified true and correct by a corporate officer, partner, or proprietor, setting forth the current assets, fixed assets, current liabilities and positive net worth of the applicant;

(l) The address of the location at which the applicant will make those records of its collection agency business described in G.S. 66-49.29 available for inspection by the Commissioner of Insurance. (1931, c. 217, s. 2; 1943, c. 170; 1959, c. 1194, s. 2; 1969, c. 906, s. 2; 1979, c. 835.)

§ 66-49.26. Application to Commissioner for permit renewal.

Any person, firm, corporation or association desiring to renew a permit issued pursuant to G.S. 66-49.25 shall make application to the Commissioner of Insurance not less than 30 days prior to the expiration date of the then

current permit. Such renewal applicant shall be entitled to a renewal permit upon submission to the Commissioner of Insurance of all the information as required by G.S. 66-49.25; provided, however, it shall be sufficient, wherever applicable, to reference the prior year's application if there has been no change as to any of the required information and it shall not be necessary to submit with a renewal application a new director's resolution. In addition, the applicant shall submit to the Commissioner a copy of a "continuation certificate" or paid receipt for renewal premiums for the collection agency bond for the year for which the renewal permit is applied. The application shall include a calculation in accordance with G.S. 66-49.28, and if the bond is increased, an endorsement by the surety. With a renewal application, the applicant shall submit a balance sheet for the last fiscal year ending prior to the application, certified true and correct by a corporate officer, partner, or proprietor, setting forth the current assets, fixed assets, current liabilities and positive net worth of the applicant. (1979, c. 835.)

§ 66-49.27. Definition of collection agency and collection agency business.

"Collection agency" means and includes all persons, firms, corporations, and associations directly or indirectly engaged in soliciting, from more than one person, firm, corporation or association, delinquent claims of any kind owed or due or asserted to be owed or due the solicited person, firm, corporation or association, and all persons, firms, corporations and associations directly or indirectly engaged in the asserting, enforcing or prosecuting of those claims.

"Collection agency" shall include:

(1) Any person, firm, corporation or association who shall procure a listing of delinquent debtors from any creditor and who shall sell such listing or otherwise receive any fee or benefit from collections made on such listing; and

(2) Any person, firm, corporation or association which attempts to or does transfer or sell to any person, firm, corporation or association not holding the permit prescribed by this Article any system or series of letters or forms for use in the collection of delinquent accounts or claims which by direct assertion or by implication indicate that the claim or account is being asserted or collected by any person, firm, corporation, or association other than the creditor or owner of the claim or demand; provided that no bond shall be required of any such collection agency if it does not collect any money from the debtor nor hold itself out as being authorized to receive payment of all or any part of such debt.

"Collection agency" does not mean or include:

(1) Regular employees of a single creditor;

(2) Banks, trust companies, or bank-owned, controlled or related firms, corporations or associations engaged in accounting, bookkeeping or data processing services where a primary component of such services is the rendering of statements of accounts and bookkeeping services for creditors;

(3) Mortgage banking companies;

(4) Savings and loan associations;

(5) Building and loan associations;

(6) Duly licensed real estate brokers and agents when the claims or accounts being handled by the broker or agent are related to or are in connection with the broker's or agent's regular real estate business;

(7) Express, telephone and telegraph companies subject to public regulation and supervision;

(8) Attorney[s]-at-law handling claims and collections in their own name and not operating a collection agency under the management of a layman;

(9) Any person, firm, corporation or association handling claims, accounts or collections under an order or orders of any court; or

(10) A person, firm, corporation or association which, for valuable consideration purchases accounts, claims, or demands of another, which such accounts, claims, or demands of another are not delinquent at the time of such purchase, and then, in its own name, proceeds to assert or collect the accounts, claims or demands;

(11) "Collection agency" shall not include any person, firm, corporation or association attempting to collect or collecting claims of a business or businesses owned wholly or substantially by the same person or persons operating such collection agency. (1969, c. 906, s. 3; 1973, c. 785; 1979, c. 835.)

§ 66-49.28. Bond requirement.

As a condition precedent to the issuance of any permit under G.S. 66-49.24, any applicant for such permit shall file with the Commissioner of Insurance and shall thereafter maintain in force while licensed a bond in favor of the State of North Carolina and executed by a surety company duly authorized to transact business in this State. The bond shall be continuous in form and shall remain in full force and effect until all moneys collected have been accounted for, and it shall be expressly stated in the bond that it is for the benefit of any person, firm or corporation for whom such collection agency engages in the collection of accounts. Such bond shall be in the amount of five thousand dollars ($5,000) for the initial permit. The amount of such bond for any renewal permit shall be no less than five thousand dollars ($5,000) nor more than fifty thousand dollars ($50,000), and shall be computed as follows: The total collections paid directly to the collection agency less commissions earned by the collection agency on those collections for the calendar year ending immediately prior to the date of application, multiplied by one-sixth. (1943, c. 170; 1959, c. 1194, s. 3; 1979, c. 835.)

§ 66-49.29. Record of business in State.

(a) Each person, firm, or corporation licensed as a collection agency in North Carolina shall keep within this State a full and correct record of all business done in this State as set forth below. All such records pertaining to collection activity, concerning debtor records and client accounting records, but not general operating records, shall be open to inspection by the Commissioner of Insurance or his duly authorized deputy upon demand. Each licensed collection agency engaged in the collection of debts shall maintain an office in this State.

(b) Every permit holder shall maintain adequate records which shall contain the items listed below. These records must be kept separate from records of any other business and must be maintained for not less than three years after the final entry has been made:

(1) A daily collection record or cash receipt journal in which all collections are recorded and allocated as to total collections, setting forth:
   a. The amount credited to principal and to interest, if any;
   b. The amount due creditors or forwarders.

(2) The amount retained as commission or commission paid to forwardees.

(3) Payments made directly to creditors as reported to the collection agency by those creditors and commissions due the collection agency on those payments.

(4) A record of each debtor's account shall be maintained consisting of the following:
   a. The name and address of the debtor;
   b. The name of the creditor or forwarder or forwardee if the account has been forwarded;
   c. The principal amount owing and, if available, the date of the last credit or debit;
   d. The amount and date of each payment made by the debtor; and
   e. The date and time of each telephone or personal contact with the debtor.

(5) A master alphabetical record by name and address of every creditor or forwarder with whom the permit holder engages in the business of collecting accounts.

(6) A check register or carbon copies of each check issued or numerically numbered check stubs corresponding with all checks issued on the trust account for funds collected on behalf of creditors. Cancelled checks, together with voided or unused checks (adequately explained) drawn on the trust account shall be maintained in numerical order with the monthly bank statements.

(7) A record by client or client number showing the number of accounts received from the client, the date received and the principal amount of the accounts.

(8) A duplicate copy of each remittance statement furnished a creditor or forwarder, or other listing of the information contained on the statement. (1959, c. 1194, s. 3; 1979, c. 835.)

§ 66-49.30. Hearing granted applicant if application denied; appeal.

If, upon application, the Commissioner shall find that a permit should not be issued to the applicant, he shall decline the same, giving notice of his action to the applicant. Following notice the applicant shall have 10 days within which to submit additional information in support of his application and if, upon further hearing upon the application and additional information the Commissioner shall again decline to issue the permit, the applicant shall have the right to appeal to the superior court and his appeal shall stand for hearing in the Superior Court of the County of Wake, and the evidence, data and information submitted to the Commissioner shall constitute the record in the superior court to determine whether or not the Commissioner had evidence sufficient to justify his action. If the Commissioner shall decline an application for renewal, the applicant may continue to do business pending any appeal taken pursuant hereto. (1931, c. 217, s. 3; 1979, c. 835.)

§ 66-49.31. Application fee; issuance of permit; contents and duration.

Upon the filing of the application and information hereinbefore required, the Commissioner may require the applicant to pay a fee of two hundred fifty dollars ($250.00), and no permit may be issued until this fee is paid. If the application is denied, the Commissioner shall retain fifty dollars ($50.00) of the application fee and return the remainder to the applicant. The fifty dollars ($50.00) so retained upon applications not granted, and the full fee of two hundred fifty dollars ($250.00) upon the applications granted, shall be used in paying the expenses incurred in connection with the consideration of such applications and the issuance of such permits.

Each permit shall state the name of the applicant, his place of business, and the nature and kind of business in which he is engaged. The Commissioner shall assign to the permit a serial number for each year, and each permit shall be for a period of one year, beginning with July 1 and ending with June 30 of the following year. (1931, c. 217, s. 4; 1979, c. 835.)

§ 66-49.32. Revocation of permit.

If the Commissioner shall have issued any permit to any person, firm or corporation as herein provided, and shall have information that the holder of the permit is conducting business in violation of Part 1, 2, or 3 of this Article, or has obtained said permit through materially false and misleading statements in its application, he shall notify the holder of the permit of a date for a hearing, which notice shall name a time and place for the hearing, and at which hearing any and all evidence as to the conduct of the business may be heard by the Commissioner. If, upon the hearing of the evidence, the Commissioner shall be of the opinion that the applicant is conducting business in violation of Part 1, 2, or 3 of this Article, the Commissioner shall then require the holder to show cause why said permit should not be cancelled. Upon a determination that the permit should be cancelled, the Commissioner shall cancel said permit; provided, however, pending any appeal permitted hereby, the permit holder may continue to do business. If the permit be cancelled upon hearing, either the holder of the permit or the complaining party shall have the right to appeal as hereinbefore provided in the case where an application is denied, and the record of the hearing before the Commissioner shall be the record in the superior court upon which the judge shall determine whether or not the Commissioner had sufficient evidence upon which to base his action. (1931, c. 217, s. 5; 1979, c. 835.)

§ 66-49.33. Disposition of permit fees.

All permit fees collected hereunder shall be credited to the account of the Commissioner for the specific purpose of providing the personnel, equipment and supplies necessary to enforce this Article, but the State Budget Officer shall have the right to budget the revenues received in accordance with the requirements of the Commissioner for the purposes herein required, and at the end of the fiscal year, if any sum whatever shall remain to the credit of the Commissioner, derived from the sources herein referred to, the same shall revert to the general treasury of the State to be appropriated as other funds. (1931, c. 217, s. 8; 1943, c. 170; 1979, c. 835.)

§ 66-49.34. All collection agencies to identify themselves in correspondence.

All collection agencies licensed under this Part to do the business of a collection agency in this State, shall in all correspondence with debtors use stationery or forms which contain the permit number and the true name and address of such collection agency.

The permit to engage in the business of a collection agency shall at all times be prominently displayed in each office of the person, firm, corporation or association to whom or to which the permit is issued. (1931, c. 217, s. 9; 1969, c. 906, s. 5; 1979, c. 835.)

Part 2. Operating Procedures.

§ 66-49.35. Office hours.

If an office of a duly licensed collection agency does not maintain normally accepted business hours, the hours the office is open shall be posted so as to be prominently displayed to the public at all times. If at any time it is anticipated that the permit holder's office will be closed to the public for a period exceeding seven days, the Department of Insurance shall be notified thereof in writing. (1979, c. 835.)

§ 66-49.36. Statements to be furnished each collection creditor.

(a) Acknowledgment of Accounts. — When any account is received for collection, the permit holder shall upon request furnish the collection creditor or forwarder with a written listing or acknowledgment of the accounts received.

(b) Remittance Statements. — Each permit holder shall remit all moneys due to any collection creditor or forwarder within 30 days after the end of the collection month during which the collection was effected. The remittance shall be accompanied by a statement setting forth:

(1) The date of remittance;

(2) The debtor's name;

(3) The date or month of collection and amount collected from each debtor; and

(4) A breakdown showing money collected from each debtor and the amount due the creditor or forwarder. (1979, c. 835.)

§ 66-49.37. Remittance trust account.

Each permit holder shall deposit, no later than two banking days from receipt, in a separate trust fund account in a local or approved bank sufficient funds to pay all moneys due or owing all collection creditors or forwarders. Said funds shall not be commingled with any other operating funds. The trust account shall be used only for the purpose of remitting to collection creditors or forwarders the proceeds to which they are entitled and remitting to the collection agency the commission that is due the collection agency. (1979, c. 835.)

§ 66-49.38. Receipt requirement.

Whenever a payment is received in cash from a debtor, forwardee, or other person, an original receipt or an exact copy thereof shall be furnished the individual from whom payment is received. Evidence of all receipts issued shall be kept in the permit holder's office for three years. All receipts issued must:

(1) Be prenumbered by the printer and used and filed in consecutive numerical order;

(2) Show the name, street address and permit number of the permit holder;

(3) Show the name of the creditor or creditors for whom collected;

(4) Show the amount and date paid; and

(5) Show the last name of the person accepting payment. (1979, c. 835.)

§ 66-49.39. Creditor may request return of accounts.

The written request of a creditor or forwarder for the return of any account which is not in the actual process of collection shall be complied with by the permit holder in writing within a reasonable length of time, but in any event not to exceed 60 days. All valuable papers furnished by the creditor or forwarder in connection with the account shall be returned. (1979, c. 835.)

§ 66-49.40. Return of accounts and all valuable papers upon termination of permit.

Whenever the permit of a collection agency is revoked, cancelled, or terminated for any reason, all accounts and valuable papers placed with the agency for collection shall be returned to the person placing the account for collection within five days of the termination of said permit unless, upon written application, an extension of time is granted by the Department of Insurance. All agreements between the collection agency and creditor or forwarder are automatically cancelled as of the date on which said permit is revoked, cancelled or terminated. If any of the accounts placed for collection are in the hands of others at the time of the permit termination, they shall immediately be notified by the collection agency to thereafter correspond, remit and be solely responsible to the creditor placing the accounts with the agency for collection unless the creditor has authorized a successor or other permit holder to continue to collect the accounts. In the case of dissolution of the collection agency, all accounts shall be returned within a reasonable period of time, but in any event not to exceed 60 days. Valuable papers shall include, but not be limited to, notes payable, creditor account cards and any other items placed within the collection agency by the creditor. (1979, c. 835.)

§ 66-49.41. Application of funds where there is a debtor-creditor relationship.

If a creditor has listed accounts with a permit holder for collection and also has had accounts on which he is debtor listed with the permit holder by any other creditors, collections effected in his behalf as a creditor may not be applied on accounts that he owes unless the permit holder has a written authorization on file as to how the moneys collected are to be applied. (1979, c. 835.)

Part 3. Prohibited Practices by Collection Agencies Engaged in the Collection of Debts from Consumers.

§ 66-49.42. Definitions.

As used in this Part, the following terms have the meanings specified:

(1) "Collection agency" means a collection agency as defined in G.S. 66-49.27 which engages, directly or indirectly, in debt collection from a consumer.

(2) "Consumer" means an individual, aggregation of individuals, corporation, company, association, or partnership that has incurred a debt or alleged debt.

(3) "Debt" means any obligation owed or due or alleged to be owed or due from a consumer. (1961, c. 782; 1971, c. 814, ss. 1-3; 1979, c. 835.)

§ 66-49.43. Threats and coercion.

No collection agency shall collect or attempt to collect any debt alleged to be due and owing from a consumer by means of any unfair threat, coercion, or attempt to coerce. Such unfair acts include, but are not limited to, the following:

(1) Using or threatening to use violence or any illegal means to cause harm to the person, reputation or property of any person;
(2) Falsely accusing or threatening to accuse any person of fraud or any crime, or of any conduct that would tend to cause disgrace, contempt or ridicule;
(3) Making or threatening to make false accusations to another person, including any credit reporting agency, that a consumer has not paid, or has willfully refused to pay a just debt;
(4) Threatening to sell or assign, or to refer to another for collection, the debt of the consumer with an attending representation that the result of such sale, assignment or reference would be that the consumer would lose any defense to the debt or would be subject to harsh, vindictive, or abusive collection attempts;
(5) Representing that nonpayment of an alleged debt may result in the arrest of any person;
(6) Representing that nonpayment of an alleged debt may result in the seizure, garnishment, attachment, or sale of any property or wages unless such action is in fact contemplated by the debt collector and permitted by law;
(7) Threatening to take any action not in fact taken in the usual course of business, unless it can be shown that such threatened action was actually intended to be taken in the particular case in which the threat was made;
(8) Threatening to take any action not permitted by law. (1979, c. 835.)

§ 66-49.44. Harassment.

No collection agency shall use any conduct, the natural consequence of which is to oppress, harass, or abuse any person in connection with the attempt to collect any debt. Such conduct includes, but is not limited to, the following:

(1) Using profane or obscene language, or language that would ordinarily abuse the typical hearer or reader;
(2) Placing collect telephone calls or sending collect telegrams unless the caller fully identifies himself and the company he represents;
(3) Causing a telephone to ring or engaging any person in telephone conversation with such frequency as to be unreasonable or to constitute a harassment to the person under the circumstances or at times known to be times other than normal waking hours of the person;
(4) Placing telephone calls or attempting to communicate with any person, contrary to his instructions, at his place of employment, unless the collection agency does not have a telephone number where the consumer can be reached during the consumer's nonworking hours. (1979, c. 835.)

§ 66-49.45. Unreasonable publication.

No collection agency shall unreasonably publicize information regarding a consumer's debt. Such unreasonable publication includes, but is not limited to, the following:

(1) Any communication with any person other than the debtor or his attorney, except:

a. With the permission of the debtor or his attorney;
b. To persons employed by the collection agency, to a credit reporting agency, to a person or business employed to collect the debt on behalf of the creditor, or to a person who makes a legitimate request for the information;
c. To the spouse (or one who stands in place of the spouse) of the debtor, or to the parent or guardian of the debtor if the debtor is a minor;
d. For the sole purpose of locating the debtor, if no indication of indebtedness is made;
e. Through legal process.

(2) Using any form of communication which ordinarily would be seen or heard by any person other than the consumer that displays or conveys any information about the alleged debt other than the name, address and phone number of the collection agency except as otherwise provided in this Part.
(3) Disclosing any information relating to a consumer's debt by publishing or posting any list of consumers, except for credit reporting purposes. (1979, c. 835.)

§ 66-49.46. Deceptive representation.

No collection agency shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following:

(1) Communicating with the consumer other than in the name of the person making the communication, the collection agency and the person or business on whose behalf the collection agency is acting or to whom the debt is owed;
(2) Failing to disclose in all communications attempting to collect a debt that the purpose of such communication is to collect a debt;
(3) Falsely representing that the collection agency has in its possession information or something of value for the consumer;
(4) Falsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding; falsely representing that the collection agency is in any way connected with any agency of the federal, State or local government; or falsely representing the creditor's rights or intentions;
(5) Using or distributing or selling any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source;
(6) Falsely representing that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges;
(7) Falsely representing the status or true nature of the services rendered by the collection agency or its business. (1979, c. 835.)

§ 66-49.47. Unconscionable means.

No collection agency shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:

(1) Seeking or obtaining any written statement or acknowledgment in any form containing an affirmation of any debt by a consumer who has

been declared bankrupt, an acknowledgment of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver;

(2) Collecting or attempting to collect from the consumer all or any part of the collection agency's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge;

(3) Communicating with a consumer whenever the collection agency has been notified by the consumer's attorney that he represents said consumer. (1979, c. 835.)

§ 66-49.48. Unauthorized practice of law.

A permit holder as defined in G.S. 66-49.27 shall not engage in the practice of law. (1979, c. 835.)

§ 66-49.49. Shared office space.

The office of a collection agency shall not be shared or have a common waiting room with a practicing attorney or any type of lending institution. The office may be located in a private residence only if it is solely for business purposes, has an outside entrance and can be isolated from the remainder of the residence. (1979, c. 835.)

Part 4. Enforcement.

§ 66-49.50. Civil liability.

(a) Any collection agency which violates Part 3 of this Article with respect to any debtor shall be liable to that debtor in an amount equal to the sum of any actual damages sustained by the debtor as a result of the violation.

(b) Any collection agency which violates Part 3 of this Article with respect to any debtor shall, in addition to actual damages sustained by the debtor as a result of the violation, also be liable to the debtor only in an individual action, and its additional liability therein to that debtor shall be for a penalty in such amount as the court may allow, which shall not be less than one hundred dollars ($100.00) nor greater than one thousand dollars ($1,000).

(c) The specific and general provisions of Part 3 shall constitute unfair or deceptive acts or practices proscribed herein or by G.S. 75-1.1 in the area of commerce regulated thereby. Notwithstanding the provisions of G.S. 75-15.2 and 75-16, civil penalties in excess of one thousand dollars ($1,000) shall not be imposed, nor shall damages be trebled for any violation under Part 3.

(d) The remedies provided by this section shall be cumulative, and in addition to remedies otherwise available. Provided, that any punitive damages assessed against a collection agency shall be reduced by the amount of the civil penalty assessed against such agency pursuant to subsection (b). (1979, c. 835.)

Article 10.

Fair Trade.

§§ 66-50 to 66-57: Repealed by Session Laws 1975, c. 172.

Article 11.

Government in Business.

§ 66-58. Sale of merchandise by governmental units.

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of any such unit, department or agency, or any individual employee or employees of any such unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to contract with any person, firm or corporation for the operation or rendering of any such businesses or services on behalf of any such unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Counties and municipalities.

(2) The Department of Human Resources or the Department of Agriculture for the sale of serums, vaccines, and other like products.

(3) The Department of Administration, except that said agency shall not exceed the authority granted in the act creating the agency.

(4) The State hospitals for the insane.

(5) The Department of Human Resources.

(6) The North Carolina School for the Blind at Raleigh.

(7) The North Carolina School for the Deaf at Morganton.

(8) The Greater University of North Carolina with regard to its utilities and other services now operated by it nor to the sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise not exceeding twenty-five cents (25¢) in value when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students nor to the sale of meals or merchandise to persons attending meetings or conventions as invited guests nor to the operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn, nor to the hospital and Medical School of the University of North Carolina, nor to the Coliseum of North Carolina State College, and the other schools and colleges for higher

education maintained or supported by the State, nor to the comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.

(9) The Department of Natural Resources and Community Development, except that said Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.

(10) Child-caring institutions or orphanages receiving State aid.

(11) Highlands School in Macon County.

(12) The North Carolina State Fair.

(13) Rural electric memberships corporations.

(13a) State Farm Operations Commission.

(13b) The Department of Agriculture with regard to its lessees at farmers' markets operated by the Department.

(14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North Carolina or any of its departments or agencies; provided such leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.

(15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for such tags shall be fixed and agreed upon by the Governor, the State Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase such supplies.

(16) Laundry services performed by the Department of Corrections may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Corrections, or for which services have been contracted or applied for in writing, as of May 22, 1973.

Such services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by such institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by such institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Corrections, be processed by a dry-cleaning method.

(c) The provisions of subsection (a) shall not prohibit:

(1) The sale of products of experiment stations or test farms.

(2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.

(3) The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by public postsecondary educational institutions of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of such stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students and their immediate families, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.

(4) The operation of lunch counters by the Department of Human Resources as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.

(5) The operation of concession stands in the State Capitol during the sessions of the legislature.

(6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.

(7) The operation by penal, correctional or institutions for the care of the blind, or mentally or physically defective, or by the State Department of Agriculture, of dining rooms for the inmates or patients or members of the staff while on duty and for the accommodation of persons visiting such inmates or patients, and other bona fide visitors.

(8) The sale by the Department of Agriculture of livestock, poultry and publications in keeping with its present livestock and farm program.

(9) The operation by the public schools of school cafeterias.

(10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.

(11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.

(12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.

(13) The operation by the Department of Correction of forestry management programs on state-owned lands, including the sale on the open market of timber cut as a part of such management program.

(14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.

(15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.

(d) A department, agency or educational unit named in subsection (b) shall not perform any of the prohibited acts for or on behalf of any other department, agency or educational unit.

(e) Any person, whether employee of the State of North Carolina or not, who shall violate, or participate in the violation of this section, shall be guilty of a misdemeanor.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Correction of facilities for the manufacture of any product or the providing of any service pursuant to G.S. 148-70 not regulated by the provisions of subsection (c) hereof, shall be subject to the prior approval of the Advisory Budget Commission, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Advisory Budget Commission. (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s. 1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4.)

Local Modification. — Columbus: 1977, c. 850.

Effect of Amendments. — The 1979 amendment, effective July 1, 1980, added the second sentence of subdivision (b)(9).

ARTICLE 12.

Coupons for Products of Photography.

§ 66-59. Title of Article.

The title of this Article shall be "An Act to Prevent the Perpetration of Certain Fraudulent Practices by Photographers within the State of North Carolina." (1943, c. 25, s. 1.)

CASE NOTES

Article Invalid as Applied to Interstate Commerce. — This Article is repugnant to the Commerce Clause — Article I, Section 8, Clause 3, of the Constitution of the United States. Therefore, the statute is declared invalid and inoperative as applied to persons engaged in interstate commerce. State v. Mobley, 234 N.C. 55, 66 S.E.2d 12 (1951).

Quoted in State v. Mobley, 234 N.C. 55, 66 S.E.2d 12 (1951).

§ 66-60. Definitions.

(a) Coupon. — The term "coupon" as used herein shall mean any coupon, certificate, receipt or similar device, by whatever name called.

(b) Photographer. — The term "photographer" as used herein shall mean any individual, firm, partnership, association, corporation, or other group or combination acting as a unit.

(c) Solicitor. — The term "solicitor" as used herein shall mean any agent, salesman, employee, solicitor, canvasser, or any other person acting for or on behalf of a photographer. (1943, c. 25, s. 2.)

§ 66-61. Coupons redeemable in products of photography prohibited unless bond given.

No photographer or solicitor shall sell or issue any coupon, whether for a consideration or otherwise, purporting to be exchangeable, redeemable, or payable, in whole or in part, for any products of photography, including photographs, coloring, tinting, frames, mounts, folders, copying or the reproduction of photographs, and all other products of photography, unless the principal for which said business is conducted shall first file with the clerk of the superior court in each and every county in which said business is to be conducted a good and sufficient bond in the principal sum of two thousand dollars ($2,000), the condition of such bond being that the principal shall well and truly discharge all contracts, representations and other obligations made by said principal and all contracts, representations and other obligations made by any solicitor of such principal. (1943, c. 25, s. 3.)

CASE NOTES

The bonding requirement of this section reaches beyond the justifiable purpose of the Article, and engrafts upon the bond unlimited liability for any and all representations and obligations of any solicitor, without regard for the presence or absence of elements of fraud. Also, in burdening the bond with unlimited liability for any "representation, or other obligation" of any solicitor, the statute in effect suspends settled rules of law governing the relation of principal and agent, under which ordinarily the principal may not be held liable for acts and conduct of the agent beyond the scope of the agent's authority, actual or apparent. These conditions, when interpreted in the light of common knowledge, would seem so to fetter the bond with contingent liabilities as to make compliance onerously difficult, if not prohibitory. Here the section moves close to, if not beyond, the permissive bonds of the due process and equal protection clauses of the constitutions. State v. Mobley, 234 N.C. 55, 66 S.E.2d 12 (1951).

Section Is Discriminatory and Unduly Burdensome on Interstate Commerce. — The fixed-sum bonding requirement in this section, in failing to provide flexibility in reasonable relation to the volume of sales, is inherently discriminatory and unduly burdensome on interstate commerce. State v. Mobley, 234 N.C. 55, 66 S.E.2d 12 (1951).

§ 66-62. Method of withdrawing bond.

The coupons, as above defined, issued in any county shall be serially numbered, and before any bond, herein required to be filed, can be withdrawn, the principal on said bond shall file a sworn statement with the clerk of the superior court, in a form approved by said clerk, showing the lowest and highest serial number of the coupon, the total number issued, and the total number that has been redeemed. On the unredeemed coupons, the said principal shall show the name and address of the person to whom the said coupon was issued; that each of said persons have been notified, in writing, at the address shown, at least 30 days prior thereto, to redeem said coupons, or otherwise that said coupon would become void on a day certain stated in said notice. (1943, c. 25, s. 4.)

CASE NOTES

Quoted in State v. Mobley, 234 N.C. 55, 66 S.E.2d 12 (1951).

§ 66-63. Remedies for loss sustained through nonperformance of obligation in connection with sale of coupons.

Any person sustaining any loss or damage by reason of any photographer or solicitor failing to fully perform and discharge any contract, representation or other obligation in connection with the sale of any coupon purporting to be exchangeable, redeemable or payable, in whole or in part, for any product of photography, whether such contract, promise or representation be made by the photographer or solicitor, may recover in any court of competent jurisdiction against the principal and his, her or its surety, the sum of twenty-five dollars ($25.00), in addition to any actual loss or damage sustained, and any amount so recovered shall be a specific lien on the bond filed as herein required. (1943, c. 25, s. 5.)

CASE NOTES

Quoted in State v. Mobley, 234 N.C. 55, 66 S.E.2d 12 (1951).

§ 66-64. Violation a misdemeanor.

Any person violating the provisions of this Article, including the make [making] of any false statement in the affidavit required under G.S. 66-62, shall be guilty of a misdemeanor and, upon conviction, be fined or imprisoned, or both, in the discretion of the court. (1943, c. 25, s. 6.)

CASE NOTES

Quoted in State v. Mobley, 234 N.C. 55, 66 S.E.2d 12 (1951).

ARTICLE 13.

Miscellaneous Provisions.

§ 66-65. Indemnity bonds required of agents, etc., to state maximum liability and period of liability.

Wherever any person, firm, or corporation, engaged in the business of merchandising any articles whatsoever, shall require of its agents, solicitors, salesmen, representatives, consignees, or peddlers, or other persons selling or handling its merchandise, as a condition precedent to selling or handling any of the merchandise of said person, firm, or corporation, that such agents, solicitors, salesmen, representatives, consignees, or peddlers should furnish and provide a bond or guaranty or indemnity contract guaranteeing the full and faithful accounting of moneys collected from such merchandise, such bond or indemnity contract shall state specifically therein the maximum amount of money or other liability which the principal and the sureties or guarantors thereof undertake thereby to pay in event of default of said bond or indemnity or guaranty contract; and said bond or indemnity or guaranty contract shall also state specifically the period of time during which liability may be incurred on account of any default in said bond or indemnity or guaranty contract.

Any bond or indemnity or guaranty contract which does not comply with the provisions of this section shall be null and void and no action may be maintained against the surety or guarantor to recover any sum due thereon in any court of this State. (1943, c. 604, ss. 1, 2.)

Legal Periodicals. — For comment on this section, see 21 N.C.L. Rev. 362.

§ 66-66. Manufacture or sale of antifreeze solutions compounded with inorganic salts or petroleum distillates prohibited.

The manufacture or sale of antifreeze solutions which are designated, intended, advertised, or recommended by the manufacturer or seller for use in the cooling systems of motor vehicles or gasoline combustion engines, and which are compounded with calcium chloride, magnesium chloride, sodium chloride, or other inorganic salts or with petroleum distillates is hereby prohibited.

Any person, firm, or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished in the discretion of the court. (1943, c. 625, ss. 1, 2.)

§ 66-67. Disposition by laundries and dry cleaning establishments of certain unclaimed clothing.

If any person shall fail to claim any garment, clothing, household article or other article delivered for laundering, cleaning or pressing to any laundry or dry cleaning establishment as defined in G.S. 105-85, or any dry cleaning establishment as defined in G.S. 105-74, for a period of 60 days after the surrender of such articles for processing, the laundry or dry cleaning establishment shall have the right to dispose of such garments, clothing, household articles or other articles by whatever means it may choose, without liability or responsibility to the owner. Provided, however, that before such laundry or dry cleaning establishment may claim the benefit of this section it shall at the time of receiving such garments, clothing, household articles or other articles, have a notice of dimensions of not less than eight and one-half by 11 inches, prominently displayed in a conspicuous place in the office, branch office or retail outlet where said clothes, garments or articles are received, if the same be received at an office, on which notice shall appear the words "NOT RESPONSIBLE FOR GOODS LEFT ON HAND FOR MORE THAN 60 DAYS": Provided further, that any garment or clothing or other article of a value of more than one hundred and fifty dollars ($150.00) may not be disposed of for a period of two years after the surrender of such articles for processing, in which case such garments, clothing or other articles may be disposed of 30 days after a notice thereof has been sent by registered or certified mail, with return receipt requested, to the last known address of the owner of such garment, clothing or other article; provided further, that the provisions of this section shall also be applicable with respect to the storage of garments, furs, rugs, clothing or other articles after the completion of the period for which storage was agreed to be provided. (1947, c. 975; 1953, c. 1054; 1967, c. 931.)

ARTICLE 14.

Business under Assumed Name Regulated.

§ 66-68. Certificate to be filed; contents; exemption of certain certified public accountants.

(a) Unless exempt under subsection (e) hereof, before any person or partnership other than a limited partnership engages in business in any county in this State under an assumed name or under any designation, name or style other than the real name of the owner or owners thereof, or before a corporation engages in business in any county other than under its corporate name, such person, partnership, or corporation must file in the office of the register of deeds of such county a certificate giving the following information:

(1) The name under which the business is to be conducted;

(2) The name and address of the owner, or if there is more than one owner, the name and address of each.

(b) If the owner is an individual or a partnership, the certificate must be signed and duly acknowledged by the individual owner, or by each partner. If the owner is a corporation, it must be signed in the name of the corporation and duly acknowledged as provided by G.S. 47-41.

(c) Whenever a partner withdraws from or a new partner joins a partnership, a new certificate shall be filed.

(d) It is not necessary that any person, partnership, or corporation file such certificate in any county where no place of business is maintained and where the only business done in such county is the sale of goods by sample or by traveling agents or by mail.

(e) Any partnership engaged in the practice of certified public accountancy in this State shall be exempt from the requirements of this section if it shall file annually with the North Carolina State Board of Certified Public Accountant Examiners, or at such intervals as shall be designated from time to time by such Board, a listing of the names and addresses of its partners (including both residents and nonresidents of this State); and such listing shall be open to public inspection during normal working hours. (1913, c. 77, s. 1; C. S., s. 3288; 1951, c. 381, ss. 3, 7; 1967, c. 823, s. 28; 1977, c. 384.)

Cross References. — As to prohibition of use of title "certified public accountant" by partnership or association unless all members qualified, see § 93-4. See Editor's note to § 53-5.

Legal Periodicals. — For comment on the 1951 amendments to this Article, see 29 N.C.L. Rev. 377, 409.

CASE NOTES

Statute Is Highly Penal. — Chapter 77, Laws of 1913, codified as §§ 66-68 through 66-71, is of a highly penal character, and its meaning will not be extended by interpretation to include cases that do not come clearly within its provision. Jennette v. Coppersmith, 176 N.C. 82, 97 S.E. 54 (1918); Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925).

And the courts will not lend their aid to extend a highly penal statute, although it is within the police power, unless the case comes within the letter of the law, and also within its meaning and palpable design. It is just as clearly the policy of the law that it will not lend its aid in enforcing a claim founded on its own violation. Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925).

The intent of the statute is to prevent fraud or imposition upon those dealing with a business conducted under an assumed name, and to afford them means for knowing the status and responsibility of the concern with which they deal. Price v. Edwards, 178 N.C. 493, 101 S.E. 33 (1919).

The statute was enacted as a police regulation to protect the general public from fraud and imposition. Courtney v. Parker, 173 N.C. 479, 92 S.E. 324 (1917); Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925).

The statute manifestly is for the protection of

creditors of persons who fail to comply with its provisions, or of others who do business with them. The consequences of a violation are prescribed by § 66-71. They seem to be limited to punishment as a misdemeanor, for it is expressly provided that failure to comply with this section, shall not prevent a recovery in a civil action by the person who shall violate the statute. Farmers' Bank & Trust Co. v. Murphy, 189 N.C. 479, 127 S.E. 527 (1925).

The statute does not apply between partners who are presumed to know the status and responsibility of the partnership; and a surviving partner may maintain his action against the heirs of the dead one to recover his share in the assets of a partnership in a legitimate business, notwithstanding the business had been conducted in the name solely of the dead partner, and the requirements of the statute had not been complied with. Price v. Edwards, 178 N.C. 493, 101 S.E. 33 (1919).

Where a partnership in a legitimate business has been conducted in the name of one of the partners alone, as between themselves the statute does not apply; and an action of the silent partner to recover his share of the assets from the other is not founded upon any wrong avoiding his recovery. Price v. Edwards, 178 N.C. 493, 101 S.E. 33 (1919).

Where a partnership is being conducted under the surname of the proprietors in such manner as to afford a reasonable and sufficient guide to a correct knowledge of the individuals composing the firm, the statute does not apply. Befarah v. Spell, 176 N.C. 193, 96 S.E. 949 (1918).

In Jennette v. Coppersmith, 176 N.C. 82, 97 S.E. 54 (1918), it was held that the title of the plaintiffs' firm, Jennette Bros., afforded a reasonable and sufficient guide to correct knowledge of the individuals composing the firm, and therefore did not come clearly within the doctrine of "assumed" names within the meaning of this statute.

Cited in Patterson v. Southern Ry., 214 N.C. 38, 198 S.E. 364 (1938); In re Nissen's Estate, 345 F.2d 230 (4th Cir. 1965).

§ 66-69. Index of certificates kept by register of deeds.

Each register of deeds of this State shall keep an index which will show alphabetically every assumed name with respect to which a certificate is hereafter so filed in his county. (1913, c. 77, s. 2; C. S., s. 3299; 1951, c. 381, ss. 4, 7; 1967, c. 823, s. 29.)

Cross References. — See Editor's note to § 53-5.

§ 66-69.1. Copy of certificate prima facie evidence.

A copy of such certificate duly certified by the register of deeds in whose office it has been filed shall be prima facie evidence of the facts required to be stated herein. (1913, c. 77, s. 2; C. S., s. 3299; 1951, c. 381, ss. 5, 7; 1967, c. 823, s. 30.)

Cross References. — See Editor's note to § 53-5.

§ 66-70: Repealed by Session Laws 1969, c. 751, § 45.

§ 66-71. Violation of Article a misdemeanor; civil penalty.

(a) Any person, partner or corporation failing to file the certificate as required by this Article —

(1) Shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days, and

(2) Shall be liable in the amount of fifty dollars ($50.00) to any person demanding that such certificate be filed if he fails to file the certificate within seven days after such demand. Such penalty may be collected in a civil action therefor.

(b) The failure of any person to comply with the provisions of this Article does not prevent a recovery by such person in any civil action brought in any of the courts of this State. (1913, c. 77, s. 4; 1919, c. 2; C. S., s. 3291; 1951, c. 381, ss. 6, 7.)

CASE NOTES

Nature and Purpose of Section. — See note to § 66-68.

Contracts in Violation of Statute Not Void. — It is clear that the legislature intended, by adding what is now subsection (b) of this section, that the punishment should be confined to the fine or imprisonment set out, but that contracts made by persons carrying on or conducting or transacting business in violation of § 66-68 should not be void. Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925). See Williamson Real Estate Co. v. Sasser, 179 N.C. 497, 103 S.E. 73 (1920); Farmers' Bank & Trust Co. v. Murphy, 189 N.C. 479, 127 S.E. 527 (1925).

Subsection (b) had the effect of changing the decision in Courtney v. Parker, 173 N.C. 479, 92 S.E. 324 (1917). See Security Fin. Co. v. Hendry, 189 N.C. 549, 127 S.E. 629 (1925).

ARTICLE 15.

Person Trading as "Company" or "Agent."

§ 66-72. Person trading as "company" or "agent" to disclose real parties.

If any person shall transact business as trader or merchant, with the addition of the words "factor," "agent," "& Company" or "& Co.," or shall conduct such business under any name or style other than his own, except in case of a corporation, and fail to disclose the name of his principal or partner by a sign placed conspicuously at the place wherein such business is conducted, then all the property, stock of goods and merchandise, and choses in action purchased, used and contracted in the course of such business shall, as to creditors, be liable for the debts contracted in the course of such business by the person in charge of same. Provided, this section shall not apply to any person transacting business under license as an auctioneer, broker, or commission merchant; in all actions under this section it is incumbent on such trader or merchant to prove compliance with the same. (1905, c. 443; Rev., s. 2118; C. S., s. 3292; 1951, c. 381, s. 8.)

Cross References. — As to running of statute of limitations against undisclosed partner, see § 1-28.

Legal Periodicals. — For a note on consignments and the consignor's duty to satisfy public notice requirements, see 13 Wake Forest L. Rev. 507 (1977).

CASE NOTES

Quoted in In re Griffin, 225 F. Supp. 482 (W.D.N.C. 1963).

ARTICLE 16.

Unfair Trade Practices in Diamond Industry.

§ 66-73. Definitions.

For the purpose of this Article:

(1) A "diamond" is a natural mineral consisting essentially of pure carbon crystallized in the isometric system and is found in many colors. Its hardness is 10; its specific gravity approximately 3.52; and it has a refractive index 2.42.

(2) "A member of the diamond industry" shall be construed to mean any person, firm, corporation or organization engaged in the business of selling, offering for sale, or distributing in commerce, diamonds (other than industrial diamonds), whether cut, polished, or in the rough, synthetic diamonds and imitation diamonds, and of any jewelry items or other products containing diamonds, synthetic diamonds, or imitation diamonds.

(3) "The diamond industry" or "the industry" as used in this Article is a trade, industry or business which shall be construed to embrace all persons, firms, corporations and organizations engaged in selling, offering for sale, or the distribution in commerce of diamonds (other than industrial diamonds), whether cut, polished or in the rough, synthetic diamonds and imitation diamonds, and of any jewelry item or other products containing diamonds, synthetic diamonds or imitation diamonds.

(4) "Unfair trade practices" as referred to herein are unfair methods of competition, unfair or deceptive acts or practices and other illegal practices which are prohibited by law. (1957, c. 585, s. 1.)

§ 66-74. What constitutes unfair trade practice.

It is an unfair trade practice for any member of the diamond industry:

(1) To use, or cause or promote the use of, any trade promotional literature, advertising matter, guarantee, warranty, mark, brand, label, trade name, picture, design or device, designation, or other type of oral or written representation, however disseminated or published, which has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers with respect to the type, kind, grade, quality, color, cut, quantity, size, weight, nature, substance, durability, serviceability, origin, preparation, production, manufacture, distribution, or customary or regular price, of any diamond or other product of the industry, or which has the capacity and tendency or effect of misleading or deceiving the purchasing or consuming public in any other material respect.

(2) In the sale, offering for sale, or distribution of products of the industry to use the unqualified word "diamond" as descriptive of or as an identification for any object or product not meeting the requirement specified in the definition of diamond hereinabove set forth, or which, through meeting such requirements, has not been symmetrically fashioned with at least 17 polished facets.

The foregoing provisions of subdivision (2) have application to the unqualified use of the word "diamond." They are not to be construed as inhibiting:

a. The use of the words "rough diamond" as descriptive of or as a designation for, uncut or unfaceted objects or products meeting

the requirements specified in the mentioned definition of diamond; or

b. The use of the word "diamond" as descriptive of or as a designation for objects or products meeting the requirements of said definition of diamond, but which have not been symmetrically fashioned with at least 17 polished facets when in immediate conjunction with the word "diamond," there is either a disclosure of the number of facets and shape of the diamond or the name of a type of diamond which denotes shape and which usually has less than 17 facets (e.g., "rose diamond"); or

c. The use of the words "imitation diamond" as descriptive of or as a designation for objects or products which do not meet the requirements of said definition of diamond but have an appearance similar to that of a cut and polished diamond.

When the word "diamond" is so used, the qualifying word or words shall be of at least equal conspicuousness as the word "diamond."

(3) To use the words "reproduction," "replica," "diamond-like," or similar terms as descriptive of imitation diamonds.

(4) To use the term "synthetic diamond" as descriptive of any object or product unless such object or product has in fact been artificially created and is of similar appearance and of essentially the same optical and physical properties and chemical structure as a diamond, or to apply the term "diamond" to any man-made objects or products unless it is immediately preceded in each instance with equal conspicuity by the word "synthetic."

(5) To use the word "perfect" or any other word, expression or representation of similar import, as descriptive of any diamond which discloses flaws, cracks, carbon spots, clouds, or other blemishes or imperfection of any sort when examined in normal daylight, or its equivalent, by a trained eye under a 10-power corrected diamond eye loupe or other equal magnifier.

The use with respect to a stone which is not perfect of any phase (such as "commercially perfect") containing the word "perfect" or "perfectly" is regarded as misleading and in violation of this subdivision, and this subdivision shall not be construed as approving of the use of the word "perfect," or any word or representation of like import, as descriptive of any diamond that is of inferior color or make. Nothing is to be construed as inhibiting the use of the word "flawless" as descriptive of a diamond which meets the requirements for "perfect" set forth in this subdivision.

(6) In connection with the offering of any ring or rings or other articles of jewelry having a perfect center stone or stones, and side or supplementary stones which are not of such quality, to use the word "perfect" without clearly disclosing that such description applies only to the center stone or center stones.

(7) To use the term "blue white" or any other term, expression or representation of similar import as descriptive of any diamond which under normal, north daylight or its equivalent, shows any color or any trace of any color, other than blue or bluish.

(8) To advertise, offer for sale, or sell any diamond which has been artificially colored or tinted by coating, irradiating, or heating, or by use of nuclear bombardment, or by any other means, without disclosure of such fact to purchasers or prospective purchasers, or without disclosure that such artificial coloring or tinting is not permanent, if such is the fact.

(9) To use the terms "properly cut," "proper cut," "modern cut," "well made," or expressions of similar import, to describe any diamond that is lopsided or so thick or so thin in depth as materially to detract from the brilliance of the stone.

(10) To use the unqualified expressions "brilliant," or "brilliant cut," or "full cut" to describe, identify or refer to any diamond except a round diamond which has at least 32 facets, plus the table above the girdle and at least 24 facets below.

Such terms should not be applied to single or rose-cut diamonds, either with or without qualification. They may be applied to emerald (rectangular) cut and marquise (pointed oval) cut diamonds meeting the above stated facet requirements when, in immediate conjunction with the term used, disclosure is made of the fact that the diamond is of emerald or marquise form.

(11) To use the terms "clean," "eye clean," "commercially clean," "commercially white," or any other terms, expressions, or representations of similar import in advertising, labeling, representing, or describing any diamond when such terms are used for the purpose, or with the capacity and tendency or effect, of misleading or deceiving purchasers, prospective purchasers, or the consuming public.

(12) To misrepresent the weight of any diamond or to deceive purchasers or prospective purchasers as to the weight of any diamond.

The standard unit for designation of the weight of a diamond is the carat, which is equivalent to 200 milligrams (one-fifth gram). While advertisements may state the approximate weight or range of weights of a group of products, all weight representations regarding individual products shall state the exact weight of the stone or stones and be accurate to within 1/200th of a carat (one-half "point").

(13) To state or otherwise represent the weight of all diamonds contained in a ring or other article of jewelry unless such weight figure is accompanied with equal conspicuity by the words "total weight" or words of similar import, so as to indicate clearly that the weight shown is that of all stones in the article and not that of the center or largest stone.

(14) To use the word "gem" to describe, identify or refer to any diamond which does not possess the requisite beauty, brilliance, value and other qualities necessary for classification as a gem.

Not all diamonds are gems. For example: Small pieces of diamond rough or melee weighing only one or two points are not to be described as "gems." Neither should stones which are grossly imperfect or of decidedly poor color be so classified unless they are of such a size as to be rare and desirable and valuable for that reason.

No imitation diamond can be described as a gem under any circumstances.

(15) In connection with the offering for sale, sale, or distribution of diamonds or articles set with diamonds, to use as part of any advertisement, label, packaging material, or other sales promotion literature, any illustration, picture, diagram or other depiction which either alone or in conjunction with accompanying words or phrases has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers concerning the type, kind, grade, color, cut, quality, size, weight, or character of any diamond, or which has the capacity and tendency or effect of misleading the purchasing or consuming public in any other material respect.

(16) To use as part of any advertisement, label, packaging material, or other sales promotion literature, any illustration which exaggerates the size of a diamond inset or enlarges it out of proper proportion to

the mounting, without clearly and conspicuously stating either the amount that the diamond has been enlarged in the illustration, or that the diamond in the illustration has been "enlarged to show detail."

(17) To represent, directly or indirectly, through the use of any statement or representation in advertising or through the use of any word or term in a corporate or trade name, or otherwise, that said member is a producer, cutter, or importer of diamonds, or owns or controls a cutting plant, or has connections abroad, through which importations of rough or cut stones are secured, or maintains offices abroad, when such is not the fact, or in any other manner to misrepresent the character, extent, volume, or type of business being conducted.

(18) To publish or circulate false or misleading price quotations, price lists, terms or conditions of sale or reports as to production or sales which have the capacity and tendency or effect of misleading purchasers, prospective purchasers, or the consuming public, or to advertise, sell or offer to sell diamonds or articles set with diamonds at prices purporting to be reduced from what are, in fact, fictitious or exaggerated manufacturer's or distributor's suggested retail selling price, or that contains what purport to be bona fide price quotations which are in fact higher than the prices at which such products are regularly and customarily sold in bona fide retail transactions. It is likewise an unfair trade practice to distribute, sell or offer for sale to the consuming public in such manner diamonds or articles set with diamonds bearing such false, fictitious, or exaggerated price tags or labels.

(19) To offer for sale, sell, advertise, describe, or otherwise represent diamonds or diamond-set merchandise as "close-outs," "discontinued lines," or "special bargains," by use of such terms or by words or representations of similar import, when such is not true in fact; or to offer for sale, sell, advertise, describe or otherwise represent such articles where the capacity and tendency or effect thereof is to lead the purchasing or consuming public to believe the same are being offered for sale or sold at greatly reduced prices, or at so-called "bargain" prices when such is not the fact.

(20) To advertise a particular style or type of product for sale when purchasers or prospective purchasers responding to such advertisement cannot readily purchase the advertised style or type of product from the industry member and the purpose of the advertisement is to obtain prospects for the sale of a different style or type of product than that advertised.

(21) To use sale practices or methods which:

a. Deprive prospective customers of a fair opportunity to purchase any advertised style or type of product; or

b. To falsely disparage any advertised style or type of product or, without the knowledge of the customer, to substitute other styles or types of products which the advertiser intends to sell instead of the advertised style or type of product.

(22) To advertise or offer for sale a grossly inadequate supply of products at reduced or bargain prices without disclosure of the inadequacy of the supply available at such prices when such advertisement or offer has the capacity and tendency or effect of misleading or deceiving purchasers or prospective purchasers.

(23) To describe, identify or refer to a diamond as "certified," or to use respecting it any other word or words of similar meaning or import unless:

a. The identity of the certifier and the specific matters or qualities certified are clearly disclosed in conjunction therewith; and

b. The certifier has examined such diamond, has made such certification and is qualified to certify as to such matters and qualities; and

c. There is furnished the purchaser a certificate setting forth clearly and nondeceptively the name of the certifier and the matters and qualities certified.

(24) To aid, abet, coerce or induce another, directly or indirectly, to use or promote the use of any unfair trade practice specified in this Article. (1957, c. 585, s. 2.)

§ 66-75. Penalty for violation; each practice a separate offense.

Any person, firm, corporation or organization engaging in any unfair trade practice, as defined in this Article, shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) or imprisoned; or both fined and imprisoned in the discretion of the court; and each and every unfair trade practice engaged in shall be deemed a separate offense. (1957, c. 585, s. 3.)

Article 17.

Closing-Out Sales.

§ 66-76. Definitions.

For the purposes of this Article, "closing-out sale" shall mean and include all sales advertised, represented or held forth under the designation of "going out of business," "discontinuance of business," "selling out," "liquidation," "lost our lease," "must vacate," "forced out," "removal," or any other designation of like meaning; and "person" shall mean and include individuals, partnerships, voluntary associations and corporations. (1957, c. 1058, s. 1.)

§ 66-77. License required; contents of applications; inventory required; fees; bond; extension of licenses; records; false statements.

(a) No person shall advertise or offer for sale a stock of goods, wares or merchandise under the description of closing-out sale, or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, unless he shall have obtained a license to conduct such sale from the clerk of the city or town in which he proposes to conduct such a sale. The applicant for such a license shall make to such clerk an application therefor, in writing and under oath at least seven days prior to the opening date of sale, showing all the facts relating to the reasons and character of such sale, including the opening and terminating dates of the proposed sale, a complete inventory of the goods, wares or merchandise actually on hand in the place whereat such sale is to be conducted, and all details necessary to locate exactly and identify fully the goods, wares or merchandise to be sold.

(b) If such clerk shall be satisfied from said application that the proposed sale is of the character which the applicant desires to advertise and conduct, the clerk shall issue a license, upon the payment of a fee of twenty-five dollars ($25.00) therefor, together with a bond, payable to the city or town in the penal sum of five hundred dollars ($500.00), conditioned upon compliance with this

Article, to the applicant authorizing him to advertise and conduct a sale of the particular kind mentioned in the application; provided, however, that the license fee provided for herein shall be good for a period of 30 days from its date, and if the applicant shall not complete said sale within said 30-day period then the applicant shall make application to such clerk for a license for a new permit, which shall be good for an additional period of 30 days, and shall pay therefor the sum of fifty dollars ($50.00); and provided further a second extension period of 30 days may be similarly applied for and granted by the clerk upon payment of an additional fee of fifty dollars ($50.00) and upon the clerk being satisfied that the applicant is holding a bona fide sale of the kind contemplated by this Article and is acting in a bona fide manner. No additional bond shall be required in the event of one or more extensions as herein provided for. Any merchant who shall have been conducting a business in the same location where the sale is to be held for a period of not less than one year, prior to the date of holding such sale, or any merchant who shall have been conducting a business in one location for such period but who shall, by reason of the building being untenantable or by reason of the fact that said merchant shall have no existing lease or ownership of the building and shall be forced to hold such sale at another location, shall be exempted from the payment of the fees and the filing of the bond herein provided for.

(c) Every city or town to whom application is made shall endorse upon such application the date of its filing, and shall preserve the same as a record of his office, and shall make an abstract of the facts set forth in such application, and shall indicate whether the license was granted or refused.

(d) Any person making a false statement in the application provided for in this section shall, upon conviction, be deemed guilty of perjury. (1957, c. 1058, s. 2.)

§ 66-78. Additions to stock in contemplation of sale prohibited.

No person in contemplation of a closing-out sale under a license as provided for in G.S. 66-77 shall order any goods, wares or merchandise for the purpose of selling and disposing of the same at such sale, and any unusual purchase and additions to the stock of such goods, wares or merchandise within 60 days prior to the filing of application for a license to conduct such sale shall be presumptive evidence that such purchases and additions to stock were made in contemplation of such sale. (1957, c. 1058, s. 3.)

§ 66-79. Replenishment of stock prohibited.

No person carrying on or conducting a closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, under a license as provided in G.S. 66-77 shall, during the continuance of such sale, add any goods, wares or merchandise to the damaged stock inventoried in his original application for such license, and no goods, wares or merchandise shall be sold as damaged merchandise at or during such sale, excepting the goods, wares or merchandise described and inventoried in such original application. (1957, c. 1058, s. 4.)

§ 66-80. Continuation of sale or business beyond termination date.

No person shall conduct a closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise beyond the termination date specified for such sale, except as otherwise provided for in subsection (b)

of G.S. 66-77; nor shall any person, upon conclusion of such sale, continue that business which had been represented as closing out or going out of business under the same name, or under a different name, at the same location, or elsewhere in the same city or town where the inventory for such sale was filed; nor shall any person, upon conclusion of such sale, continue business contrary to the designation of such sale. (1957, c. 1058, s. 5.)

§ 66-81. Advertising or conducting sale contrary to Article; penalty.

Any person who shall advertise, hold, conduct or carry on any sale of goods, wares or merchandise under the description of closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, contrary to the provisions of this Article, or who shall violate any of the provisions of this Article shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be fined or imprisoned, or both, in the discretion of the court. (1957, c. 1058, s. 6.)

§ 66-82. Sales excepted; liability for dissemination of false advertisement.

The provisions of this Article shall not apply to sheriff's, constables or other public or court officers, or to any other person or persons acting under the license, direction or authority of any court, State or federal, selling goods, wares or merchandise in the course of their official duties; provided, however, that no newspaper publisher, radio-broadcast licensee, television-broadcast licensee, or other agency or medium for the dissemination of advertising shall be liable under this Article by reason of the dissemination of any false advertisement prohibited by this Article, unless he has refused, on the written request of any law-enforcement officer or agency of this State, to furnish to such officer or agency the name and address of the person who caused the dissemination of such advertisement. (1957, c. 1058, s. 7.)

§ 66-83. Restraining or enjoining illegal act.

Upon complaint of any person the superior court shall have jurisdiction to restrain and enjoin any act forbidden or declared illegal by any provisions of this Article. (1957, c. 1058, s. 8.)

§ 66-84. Counties within Article.

This Article shall apply only to the following counties: Ashe, Bertie, Buncombe, Burke, Cabarrus, Catawba, Cleveland, Columbus, Craven, Cumberland, Davidson, Durham, Edgecombe, Forsyth, Gaston, Graham, Guilford, Halifax, Haywood, Henderson, Hoke, Iredell, Jackson, Johnston, Lee, McDowell, Moore, Nash, New Hanover, Northampton, Onslow, Orange, Person, Pitt, Randolph, Richmond, Robeson, Rockingham, Rowan, Sampson, Stanly, Surry, Swain, Transylvania, Union, Wake and Wayne. (1957, c. 1058, ss. 10½, 10¾; 1959, cc. 928, 1089; c. 1251, s. 1; c. 1287; 1963, cc. 205, 738; 1965, cc. 96, 306, 374; 1967, cc. 347, 476, 514; 1969, c. 502; 1973, c. 1072; 1975, cc. 60, 440.)

Article 18.

Labeling of Household Cleaners.

§ 66-85. Labeling cleaners containing volatile substances capable of producing toxic effects; definition.

It shall be unlawful for any person, firm, or corporation manufacturing household cleaners which contain volatile substances capable of producing toxic effects in or on their users when used for their intended domestic purposes to sell or offer for sale any such cleaner unless such cleaner shall be labeled with the word "caution" or other word of similar import and unless directions shall plainly appear thereon as to the safe and proper use of the contents. Such label shall identify the particular substance contained therein. The phrase "volatile substances capable of producing toxic effect" as used herein shall include, but shall not be limited to, the following: benzene (benzol), toluene (toluol), coal tar naphtha, carbon tetrachloride, trichlorethylene, tetrachlorethylene (perchlorethylene), tetrachlorethane, methyl alcohol, and aromatic and chlorinated hydrocarbons of comparable volatility and toxicity. (1957, c. 1241, s. 1.)

§ 66-86. Penalty for selling product in violation of Article.

Any person, firm or corporation selling or offering to sell any product in violation of the terms of this Article shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1957, c. 1241, s. 2.)

§ 66-87. Injunctions.

Upon complaint by the Department of Human Resources, the superior court shall have jurisdiction to enjoin any sale or offer of sale which is in violation of the provisions of this Article. (1957, c. 1241, s. 3; 1973, c. 476, s. 128.)

§ 66-88. Application of Article after enactment of federal legislation.

If the Congress of the United States shall, at any time hereafter, enact in any form legislation designed to regulate the interstate distribution, labeling and sale of hazardous articles in packages suitable for or intended for household use, the Department of Human Resources shall, upon so determining, issue a proclamation to such effect and, from and after the date of such proclamation, this Article shall be applicable only with respect to intrastate manufacture, distribution, sale and labeling by persons, firms or corporations who do not comply with the federal legislation as to interstate distribution, labeling and sale of the materials or articles described in G.S. 66-85. (1957, c. 1241, s. 3½; 1973, c. 476, s. 128.)

§§ 66-89 to 66-93: Reserved for future codification purposes.

ARTICLE 19.

Business Opportunity Sales.

§ 66-94. Definition.

For purposes of this Article, "business opportunity" means the sale or lease of any products, equipment, supplies or services which are sold to the purchaser for the purpose of enabling the purchaser to start a business, and in which the seller represents:

(1) That the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, or currency-operated amusement machines or devices, on premises [neither] owned nor leased by the purchaser or seller; or

(2) That it will purchase any or all products made, produced, fabricated, grown, bred or modified by the purchaser using in whole or in part, the supplies, services or chattels sold to the purchaser; or

(3) The seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid for the business opportunity; or that the seller will refund all or part of the price paid for the business opportunity, or repurchase any of the products, equipment, supplies or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity; or

(4) That upon payment by the purchaser of a fee or sum of money which exceeds fifty dollars ($50.00) to the seller, the seller will provide a sales program or marketing program which will enable the purchaser to derive income from the business opportunity which exceeds the price paid for the business opportunity, provided that this subsection shall not apply to the sale of a marketing program made in conjunction with the licensing of a registered trademark or service mark.

Provided, that "business opportunity" does not include the sale of an on-going business when the owner of that business sells and intends to sell only that one business opportunity; nor does it include the not-for-profit sale of sales demonstration equipment, materials, or samples, for a total price of one hundred dollars ($100.00) or less. (1977, c. 884, s. 1.)

Editor's Note. — The word "neither," in brackets, has been inserted by the Editors near the end of subdivision (1).

Legal Periodicals. — For a survey of 1977 law on trade regulation, see 56 N.C.L. Rev. 934 (1978).

§ 66-95. Required disclosure statement.

At least 48 hours prior to the time the purchaser signs a business opportunity contract, or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document, the cover sheet of which is entitled in at least 10-point bold face capital letters "DISCLOSURES REQUIRED BY NORTH CAROLINA LAW." Under this title shall appear the statement in at least 10-point type that

"The State of North Carolina has not reviewed and does not approve, recommend, endorse or sponsor any business opportunity. The information contained in this disclosure has not been verified by the State. If you have any questions about this investment, see an attorney before you sign a contract or agreement." Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

(1) The name of the seller, whether the seller is doing business as an individual, partnership, or corporation, the names under which the seller has done, is doing or intends to do business, and the name of any parent or affiliated company that will engage in business transactions with purchasers or who takes responsibility for statements made by the seller.

(2) The names, addresses and titles of the seller's officers, directors, trustees, general partners, general managers, principal executives, and any other persons charged with responsibility for the seller's business activities relating to the sale of business opportunities.

(3) The length of time the seller has:
   (a) Sold business opportunities;
   (b) Sold business opportunities involving the product(s), equipment, supplies or services currently being offered to the purchaser.

(4) A full and detailed description of the actual services that the business opportunity seller undertakes to perform for the purchaser.

(5) A copy of a current (not older than 13 months) financial statement of the seller, updated to reflect any material changes in the seller's financial condition.

(6) If training of any type is promised by the seller, the disclosure statement must set forth a complete description of the training and the length of the training.

(7) If the seller promises services to be performed in connection with the placement of the equipment, product(s) or supplies at various location(s), the disclosure statement must set forth the full nature of those services as well as the nature of the agreements to be made with the owners or managers of these location(s) where the purchaser's equipment, product(s) or supplies will be placed.

(8) If the business opportunity seller is required to secure a bond or establish a trust deposit pursuant to G.S. 66-96, the document shall state either:
   a. "As required by North Carolina law, the seller has secured a bond issued by . . . . . a surety
   (name and address of surety company)
   company authorized to do business in this State. Before signing a contract to purchase this business opportunity, you should check with the surety company to determine the bond's current status," or
   b. "As required by North Carolina law, the seller has established a trust account . . . . . (number of account)
   with . . . . . (name and address of bank or savings institution)
   Before signing a contract to purchase this business opportunity, you should check with the bank or savings institution to determine the current status of the trust account."

(9) The following statement:
   "If the seller fails to deliver the product(s), equipment or supplies necessary to begin substantial operation of the business within 45 days of the delivery date stated in your contract, you

may notify the seller in writing and demand that the contract be cancelled."

(10) If the seller makes any statement concerning sales or earnings, or range of sales or earnings that may be made through this business opportunity, the document must disclose:

a. The total number of purchasers of business opportunities involving the product(s), equipment, supplies or services being offered who to the seller's knowledge have actually received earnings in the amount or range specified, within three years prior to the date of the disclosure statement.

b. The total number of purchasers of business opportunities involving the product(s), equipment, supplies or services being offered within three years prior to the date of the disclosure statement. (1977, c. 884, s. 1.)

§ 66-96. Bond or trust account required.

If the business opportunity seller makes any of the representations set forth in G.S. 66-94(3), the seller must either have obtained a surety bond issued by a surety company authorized to do business in this State or have established a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. The amount of the bond or trust account shall be an amount not less than fifty thousand dollars ($50,000). The bond or trust account shall be in favor of the State of North Carolina. Any person who is damaged by any violation of this Article, or by the seller's breach of the contract for the business opportunity sale or of any obligation arising therefrom may bring an action against the bond or trust account to recover damages suffered; provided, however, that the aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account. (1977, c. 884, s. 1.)

§ 66-97. Filing with Secretary of State.

(a) The seller of every business opportunity shall file with the Secretary of State a copy of the disclosure statement required by G.S. 66-95 prior to placing any advertisement or making any other representations to prospective purchasers in this State, and shall update this filing as any material change in the required information occurs, but no less than annually. If the seller is required by G.S. 66-96 to provide a bond or establish a trust account, he shall contemporaneously file with the Secretary of State a copy of the bond or a copy of the formal notification by the depository that the trust account is established.

(b) Failure to so file shall be a misdemeanor. (1977, c. 884, s. 1.)

§ 66-98. Prohibited acts.

Business opportunity sellers shall not:

(1) Represent that the business opportunity provides income or earning potential of any kind unless the seller has documented data to substantiate the claims of income or earning potential and discloses this data to the prospective purchaser at the time such representations are made;

(2) Use the trademark, service mark, trade names, logotype, advertising or other commercial symbol of any business which does not either control the ownership interest in the seller or accept responsibility for all representations made by the seller in regard to the business opportunity, unless it is clear from the circumstances that the owner of the

commercial symbol is not involved in the sale of the business opportunity;

(3) Make or authorize the making of any reference to its compliance with this Article in any advertisement or other contact with prospective purchasers. (1977, c. 884, s. 1.)

§ 66-99. Contracts to be in writing; form; provisions.

(a) Every business opportunity contract shall be in writing and a copy shall be given to the purchaser at the time he signs the contract.

(b) Every contract for a business opportunity shall include the following:

(1) The terms and conditions of payment;

(2) A full and detailed description of the acts or services that the business opportunity seller undertakes to perform for the purchaser;

(3) The seller's principal business address and the name and address of its agent in the State of North Carolina authorized to receive service of process;

(4) The approximate delivery date of any product(s), equipment or supplies the business opportunity seller is to deliver to the purchaser. (1977, c. 884, s. 1.)

§ 66-100. Remedies.

(a) If a business opportunity seller uses any untrue or misleading statements in the sale of a business opportunity, or fails to give the proper disclosures in the manner required by G.S. 66-95, or fails to deliver the equipment, supplies or product(s) necessary to begin substantial operation of the business within 45 days of the delivery date stated in the business opportunity contract, or if the contract does not comply with the requirements of G.S. 66-99, then, within one year of the date of the contract, upon written notice to seller, the purchaser may void the contract and shall be entitled to receive from the business opportunity seller all sums paid to the business opportunity seller. Upon receipt of such sums, the purchaser shall make available to the seller at purchaser's address or at the places at which they are located at the time notice is given, all product(s), equipment or supplies received by the purchaser. Provided, that purchaser shall not be entitled to unjust enrichment by exercising the remedies provided in this subsection.

(b) Any purchaser injured by a violation of this Article or by the business opportunity seller's breach of a contract subject to this Article or any obligation arising therefrom may bring an action for recovery of damages, including reasonable attorneys' fees.

(c) Upon complaint of any person that a business opportunity seller has violated the provisions of this Article, the superior court shall have jurisdiction to enjoin the defendant from further such violations.

(d) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(e) The violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1. (1977, c. 884, s. 1.)

§§ 66-101 to 66-105: Reserved for future codification purposes.

ARTICLE 20.

Loan Brokers.

§ 66-106. Definitions.

For purposes of this Article the following definitions apply:

(1) A "loan broker" is any person, firm, or corporation who, in return for any consideration from any person, promises to (1) procure for such person, or assist such person in procuring a loan from any third party; or (2) consider whether or not it will make a loan to such person.

(2) A "loan" is an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, a lease, or otherwise. Provided, that this Article shall not apply to any party approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a national mortgage association or any federal agency; nor to any party currently designated and compensated by a North Carolina licensed insurance company as its agent to service loans it makes in this State. (1979, c. 705, s. 1.)

Editor's Note. — Session Laws 1979, c. 705, s. 2, makes this Article effective July 1, 1979.

§ 66-107. Required disclosure statement.

At least seven days prior to the time any person signs a contract for the services of a loan broker, or the time of the receipt of any consideration by the loan broker, whichever occurs first, the broker must provide to the party with whom he contracts a written document, the cover sheet of which is entitled in at least 10-point bold face capital letters "DISCLOSURES REQUIRED BY NORTH CAROLINA LAW." Under this title shall appear the statement in at least 10-point type that "The State of North Carolina has not reviewed and does not approve, recommend, endorse or sponsor any loan brokerage contract. The information contained in this disclosure has not been verified by the State. If you have any questions see an attorney before you sign a contract or agreement." Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

(1) The name of the broker; whether the broker is doing business as an individual, partnership, or corporation; the names under which the broker has done, is doing or intends to do business; and the name of any parent or affiliated companies;

(2) The names, addresses and titles of the broker's officers, directors, trustees, general partners, general managers, principal executives, and any other persons charged with responsibility for the broker's business activities; and all the broker's employees located in North Carolina;

(3) The length of time the broker has conducted business as a loan broker;

(4) The total number of loan brokerage contracts the broker has entered within the past 12 months;

(5) The number of loan brokerage contracts in which the broker has successfully obtained a loan for the prospective borrower within the past 12 months;

(6) A copy of a current (not older than 13 months) financial statement of the broker, updated to reflect any material changes in the broker's financial condition;

(7) A full and detailed description of the actual services that the broker undertakes to perform for the prospective borrower;

(8) A specific statement of the circumstances in which the broker will be entitled to obtain or retain consideration from the party with whom he contracts;

(9) One of the following statements, whichever is appropriate:

a. "As required by North Carolina law, this loan broker has secured a bond by . . . . . a surety

(name and address of surety company)

authorized to do business in this State. Before signing a contract with this loan broker, you should check with the surety company to determine the bond's current status," or

b. "As required by North Carolina law, this loan broker has established a trust account . . . . . .

(number of account)

with . . . . . .

(name/address of bank or savings institution).

Before signing a contract with this loan broker you should check with the bank or savings institution to determine the current status of the trust account." (1979, c. 705, s. 1.)

§ 66-108. Bond or trust account required.

(a) Every loan broker must obtain a surety bond issued by a surety company authorized to do business in this State, or establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. The amount of the bond or trust account shall be ten thousand dollars ($10,000). The bond or trust account shall be in favor of the State of North Carolina. Any person damaged by the loan broker's breach of contract or of any obligation arising therefrom, or by any violation of this Article, may bring an action against the bond or trust account to recover damages suffered. The aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account.

(b) Failure to comply with subsection (a) shall be a misdemeanor. (1979, c. 705, s. 1.)

§ 66-109. Filing with Secretary of State.

(a) Prior to placing any advertisement or making any other representations to prospective borrowers in this State, every loan broker shall file with the Secretary of State a copy of the disclosure statement required by G.S. 66-107, and either a copy of the bond required by G.S. 66-108, or a copy of the formal notification by the depository that the trust account required by G.S. 66-108 is established. These filings shall be updated as any material changes in the required information or the status of the bond or trust account occur, but no less than annually.

(b) Failure to comply with subsection (a) shall be a misdemeanor. (1979, c. 705, s. 1.)

§ 66-110. Contracts to be in writing.

Every loan brokerage contract shall be in writing, and signed by all contracting parties. A copy of the contract shall be given to the prospective borrower at the time he signs the contract. (1979, c. 705, s. 1.)

§ 66-111. Remedies.

(a) If a loan broker uses any untrue or misleading statements in connection with a loan brokerage contract, fails to fully comply with the requirements of this Article, fails to comply with the terms of the contract or any obligation arising therefrom, or fails to make diligent effort to grant a loan to or procure a loan on behalf of the prospective borrower, then, upon written notice to the broker, the prospective borrower may void the contract, and shall be entitled to receive from the broker all sums paid to the broker, and recover any additional damages including attorney's fees.

(b) Upon complaint of any person that a loan broker has violated the provisions of this Article, the superior court shall have jurisdiction to enjoin that defendant from further such violations.

(c) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(d) The violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1. (1979, c. 705, s. 1.)

§ 66-112. Scope.

The provisions of this Article shall apply in all circumstances in which any party to the contract conducted any contractual activity (including but not limited to solicitation, discussion, negotiation, offer, acceptance, signing, or performance) in this State. (1979, c. 705, s. 1.)

§§ 66-113 to 66-117: Reserved for future codification purposes.

Article 21.

Prepaid Entertainment Contracts.

§ 66-118. Definition.

For purposes of this Article, a "prepaid entertainment contract" is any contract in which:

(1) The buyer of a service pays for or is obligated to pay for service prior to the buyer's receipt of or enjoyment of any or all of the service; and

(2) The seller is other than a licensed nonprofit school, college, or university; the State or any subdivision thereof; or a nonprofit religious, ethnic, or community organization; and

(3) The services to be performed are related to any one of the following:
   a. Dance lessons or facilities, or any related services or events;
   b. Matching, dating, or social club services or facilities, including any service represented as providing names of, introductions to, or opportunity to meet members of the opposite sex;
   c. Martial arts training;
   d. Health or athletic club services or facilities. (1979, c. 833, s. 1.)

Editor's Note. — Session Laws 1979, c. 833, s. 2, makes this Article effective Sept. 1, 1979.

§ 66-119. Contract requirements.

Every prepaid entertainment contract shall:

(1) Be in writing, fully completed, dated and signed by all contracting parties. A copy of the contract shall be given to the buyer at the time he signs the contract;

(2) Have a duration of service that is a precisely measured period of years or any definite part of a year;

(3) Contain a full statement of the buyer's rights under G.S. 66-120;

(4) Contain, in immediate proximity to the space reserved for the signature of the buyer, in bold face type of a minimum size of 10 points, a statement of the buyer's rights under G.S. 66-121, in substantially the following form:

"You the buyer, may cancel this contract at any time prior to midnight of the third business day after the date of this contract. To cancel, you must notify the seller in writing not later than midnight of . . . . . .

. . . . . .

(Date)."

(1979, c. 833, s. 1.)

§ 66-120. Buyer's rights.

Every seller of a prepaid entertainment contract must:

(1) Deliver to the buyer all information of a personal or private nature, including but not limited to answers to tests or questionnaires, photographs, evaluations, and background information, within 30 days after request therefor;

(2) Refund to the buyer at least ninety percent (90%) of the pro rata cost of any unused services, within 30 days after request therefor, if:

a. The buyer is unable to receive benefits from the seller's services by reason of death or disability; or

b. The buyer relocates more than eight miles from his present location, and more than 30 miles from the seller's facility and any substantially similar facility that will accept the seller's obligation under the contract and this Article; or

c. The seller relocates his facility more than eight miles from its present location, or the services provided by the seller are materially impaired.

(3) Refund to the buyer the pro rata cost of any unused services under all contracts between the parties, within 30 days after request therefor, if the aggregate price of all contracts in force between the parties exceeds one thousand five hundred dollars ($1,500). Provided, if the contract so provides, the seller may retain a cancellation fee of not more than 25 percent (25%) of the pro rata cost of unused services on all contracts, not to exceed five hundred dollars ($500.00). (1979, c. 833, s. 1.)

§ 66-121. Buyer's right to cancel.

(a) In addition to any right otherwise to revoke an offer or cancel a sale or contract, the buyer has the right to cancel a prepaid entertainment contract sale until midnight of the third business day after the buyer signs a contract which complies with G.S. 66-119(4).

(b) Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the contract.

(c) Notice of cancellation, if given by mail, is given when it is deposited in the United States mail properly addressed and postage prepaid.

(d) Notice of cancellation need not take a particular form and is sufficient if it indicates by any form of written expression the intention of the buyer not to be bound by the contract.

(e) For purposes of this Article, business days are all days other than Saturdays, Sundays, holidays, and days on which the seller's facility is not open to the buyer. (1979, c. 833, s. 1.)

§ 66-122. Rights and responsibilities after cancellation.

Within 30 days after a prepaid entertainment contract has been cancelled in accordance with G.S. 66-121, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness. (1979, c. 833, s. 1.)

§ 66-123. Prohibited practices.

(a) No person shall sell any prepaid entertainment contract or contracts which, when taken together with all other contracts in force between the parties have an aggregate duration of service in excess of three years.

(b) No person shall sell any prepaid entertainment contract unless performance of that contract is to begin within 180 days. (1979, c. 833, s. 1.)

§ 66-124. Services not available until future date.

If, for any reason, services under a prepaid entertainment contract are not available to the buyer on the date of sale, then:

(1) The seller must establish a surety bond issued by a surety company authorized to do business in this State, or establish a trust account with a licensed and insured bank or savings institution located in this State. The amount of the bond or trust account shall equal all consideration received from the buyer. The bond or trust account must remain in force until 60 days after all services of the seller are available to the buyer. The bond or trust account shall be in favor of the State of North Carolina. Any person who is damaged by any violation of this Article, or by the seller's breach of the contract for sale or any obligation arising therefrom may bring an action against the bond or trust account to recover damages suffered; provided, however, that the aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account.

(2) The buyer's right to cancel the contract pursuant to G.S. 66-121 shall be extended until midnight of the third business day after the date upon which the services become available and the buyer is so notified. However, the buyer may waive the extension of his right to cancel by initialing a written contract provision to that effect, if in consideration for such waiver he has been allowed to buy the seller's services at a price at least twenty-five percent (25%) below the lowest price the seller will charge for similar services when the facility is available. (1979, c. 833, s. 1.)

§ 66-125. Remedies.

(a) Any buyer injured by any violation of this Article may bring an action for recovery of damages, including reasonable attorney's fees.

(b) The remedies herein shall be in addition to any other remedies provided for by law or in equity, but the damages assessed shall not exceed the largest amount of damages available by any single remedy.

(c) The violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1. (1979, c. 833, s. 1.)

Chapter 67.

Dogs.

Article 1.

Owner's Liability.

Sec.
67-1. Liability for injury to livestock or fowls.
67-2. Permitting bitch at large.
67-3. Sheep-killing dogs to be killed.
67-4. Failing to kill mad dog.

Article 2.

License Taxes on Dogs.

67-5 to 67-11. [Repealed.]
67-12. Permitting dogs to run at large at night; penalty; liability for damage.
67-13. [Repealed.]
67-14. Mad dogs, dogs killing sheep, etc., may be killed.
67-14.1. Dogs injuring deer or bear on wildlife management area may be killed; impounding unmuzzled dogs running at large.
67-15. Dogs, when listed, personal property; larceny of dog a misdemeanor.
67-16. Failure to discharge duties imposed under this Article.
Sec.
67-17. [Deleted.]
67-18. Application of Article.

Article 3.

Special License Tax on Dogs.

67-19 to 67-28. [Repealed.]

Article 4.

Guide Dogs.

67-29. [Repealed.]

Article 5.

Protection of Livestock and Poultry from Ranging Dogs.

67-30. Appointment of animal control officers authorized; salary, etc.
67-31. Powers and duties of dog warden.
67-32. Pound; disposition of impounded dogs.
67-33 to 67-35. [Repealed.]
67-36. Article supplements existing laws.

Article 1.

Owner's Liability.

§ 67-1. Liability for injury to livestock or fowls.

If any dog, not being at the time on the premises of the owner or person having charge thereof, shall kill or injure any livestock or fowls, the owner or person having such dog in charge shall be liable for damages sustained by the injury, killing, or maiming of any livestock, and costs of suit. (1911, c. 3, s. 1; C. S., s. 1669.)

Cross References. — As to dogfighting, see § 14-362. As to admittance of dogs to bedrooms by innkeeper or guest, see § 72-7; but see also §§ 168-4 and 168-7, relating to guide dogs.

CASE NOTES

Generally. — As to owner's liability for personal injury by dog, see Perry v. Phipps, 32 N.C. 259 (1849); Harris v. Fisher, 115 N.C. 318, 20 S.E. 461 (1894). As to property in dogs and liability for wrongfully killing or injuring them, see Dodson v. Mock, 20 N.C. 146 (1838); Mowery v. Town of Salisbury, 82 N.C. 175 (1880); State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911); Beasley v. Byrum, 163 N.C. 3, 79 S.E. 270 (1913). As to right to kill dog attempting to destroy animals used for food, see Parrott v. Hartsfield, 20 N.C. 110 (1838); State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911).

Legal Periodicals. — For note on liability of owner for trespass of dogs while hunting, see 33 N.C.L. Rev. 134 (1954).

§ 67-2. Permitting bitch at large.

If any person owning or having any bitch shall knowingly permit her to run at large during the erotic stage of copulation he shall be guilty of a misdemeanor and fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. (1862-3, c. 41, s. 2; Code, s. 2501; Rev., s. 3303; C. S., s. 1670.)

CASE NOTES

Cited in Pegg v. Gray, 240 N.C. 548, 82 S.E.2d 757 (1954).

§ 67-3. Sheep-killing dogs to be killed.

If any person owning or having any dog that kills sheep or other domestic animals, or that kills a human being, upon satisfactory evidence of the same being made before any judge of the district court in the county, and the owner duly notified thereof, shall refuse to kill it, and shall permit such dog to go at liberty, he shall be guilty of a misdemeanor, and fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days, and the dog may be killed by anyone if found going at large. (1862-3, c. 41, s. 1; 1874-5, c. 108, s. 2; Code, s. 2500; Rev., s. 3304; C. S., s. 1671; 1973, c. 108, s. 24; 1977, c. 597.)

Cross References. — As to what dogs may be killed, see § 67-14, and see note to § 67-1.

CASE NOTES

Applied in Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

Cited in Parrott v. Hartsfield, 20 N.C. 110 (1838); Daniels v. Homer, 139 N.C. 219, 51 S.E. 922 (1905).

§ 67-4. Failing to kill mad dog.

If the owner of any dog shall know, or have good reason to believe, that his dog, or any dog belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately to kill the same, he shall forfeit and pay the sum of fifty dollars ($50.00) to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by anyone, in his property or person, by the bite of any such dog, and shall be guilty of a misdemeanor, and fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. (R. C., c. 67; Code, s. 2499; Rev., s. 3305; C. S., s. 1672.)

Cross References. — As to killing mad dogs, see § 67-14. As to rabies, vaccination, etc., generally, see § 106-364 et seq.

CASE NOTES

Actual Knowledge Unnecessary. — In an action under this section it is not necessary to prove that the biting dog was in fact mad. The words "good reason to believe" apply both to the condition of the biting dog and to the fact that the dog was bitten by a mad dog. Wallace v. Douglas, 32 N.C. 79 (1849).

Dog Can Be Destroyed. — If owner refuses to destroy a dog, which is mad or is bitten by a mad dog, he subjects himself to the possibility of a fine and imprisonment and the dog can be destroyed by order of the justice issuing the warrant under this section. Beasley v. Byrum, 163 N.C. 3, 79 S.E. 270 (1913).

As to contributory negligence of person bitten by a mad dog, see Holton v. Moore, 165 N.C. 549, 81 S.E. 779 (1914).

ARTICLE 2.

License Taxes on Dogs.

§§ 67-5 to 67-11: Repealed by Session Laws 1973, c. 822, s. 6.

Cross References. — As to the effect of the repeal, see the Editor's note following the analysis to Chapter 153A.

Editor's Note. — Session Laws 1973, c. 822, s. 6(c), provides: "All local acts and clauses of local acts modifying any section of the General Statutes repealed by this section or otherwise relating to the use of the proceeds of the dog tax heretofore levied pursuant to G.S. 67-5 (herein repealed) are repealed."

§ 67-12. Permitting dogs to run at large at night; penalty; liability for damage.

No person shall allow his dog over six months old to run at large in the nighttime unaccompanied by the owner or by some member of the owner's family, or some other person by the owner's permission. Any person intentionally, knowingly, and willfully violating this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days, and shall also be liable in damages to any person injured or suffering loss to his property or chattels. (1919, c. 116, s. 5; C. S., s. 1680.)

Local Modification. — Buncombe: 1925, c. 314; Forsyth: 1967, c. 918; Gaston: 1973, c. 1327; Halifax, New Hanover, Wake: 1925, c. 314; Watauga: Pub. Loc. 1927, c. 503. (See § 67-18.)

Cross References. — As to permitting dogs to run at large on Capitol Square, see § 14-396.

CASE NOTES

Valid Exercise of Police Power. — A city ordinance which prohibits the owner from allowing dogs to run at large without muzzles is a valid exercise of the police power. State v. Clifton, 152 N.C. 800, 67 S.E. 751 (1910).

§ 67-13: Repealed by Session Laws 1973, c. 822, s. 6.

§ 67-14. Mad dogs, dogs killing sheep, etc., may be killed.

Any person may kill any mad dog, and also any dog if he is killing sheep, cattle, hogs, goats, or poultry. (1919, c. 116, s. 8; C. S., s. 1682.)

Cross References. — As to liability of owner who fails to kill sheep-killing dog, see § 67-3. As to liability of owner who fails to kill mad dog, see § 67-4.

CASE NOTES

Applied in Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

§ 67-14.1. Dogs injuring deer or bear on wildlife management area may be killed; impounding unmuzzled dogs running at large.

(a) Any dog which trails, runs, injures or kills any deer or bear on any wildlife refuge, sanctuary or management area, now or hereafter so designated and managed by the Wildlife Resources Commission, during the closed season for hunting with dogs on such refuge or management area, is hereby declared to be a public nuisance, and any wildlife protector or other duly authorized agent or employee of the Wildlife Resources Commission may destroy, by humane method, any dog discovered trailing, running, injuring or killing any deer or bear in any such area during the closed season therein for hunting such game with dogs, without incurring liability by reason of his act in conformity with this section.

(b) Any unmuzzled dog running at large upon any wildlife refuge, sanctuary, or management area, when unaccompanied by any person having such dog in charge, shall be seized and impounded by any wildlife protector, or other duly authorized agent or employee of the Wildlife Resources Commission.

(c) The person impounding such dog shall cause a notice to be published at least once a week for two successive weeks in some newspaper published in the county wherein the dog was taken, or if none is published therein, in some newspaper having general circulation in the county. Such notice shall set forth a description of the dog, the place where it is impounded, and that the dog will be destroyed if not claimed and payment made for the advertisement, a catch fee of one dollar ($1.00) and the boarding, computed at the rate of fifty cents (50¢) per day, while impounded, by a certain date which date shall be not less than 15 days after the publication of the first notice. A similar notice shall be posted at the courthouse door.

(d) The owner of the dog, or his agent, may recover such dog upon payment of the cost of the publication of the notices hereinbefore described together with a catch fee of one dollar ($1.00) and the expense, computed at the rate of fifty cents (50¢) per day, incurred while impounding and boarding the dog.

(e) If any impounded dog is not recovered by the owner within 15 days after the publication of the first notice of the impounding, the dog may be destroyed in a humane manner by any wildlife protector or other duly authorized agent or employee of the North Carolina Wildlife Resources Commission, and no liability shall attach to any person acting in accordance with this section. (1951, c. 1021, s. 1.)

§ 67-15. Dogs, when listed, personal property; larceny of dog a misdemeanor.

All dogs, when listed for taxes, become personal property and shall be governed by the laws governing other personal property: Provided, the larceny of any dog upon which aforesaid tax has been paid shall be a misdemeanor. (1919, c. 116, s. 9; C. S., s. 1683.)

Cross References. — As to larceny of listed dog, see § 14-84.

CASE NOTES

Not Larceny in Absence of Statute. — In the absence of a statute, stealing a dog is not larceny in this State. State v. Holder, 81 N.C. 527 (1879).

§ 67-16. Failure to discharge duties imposed under this Article.

Any person failing to discharge any duty imposed upon him under this Article shall be guilty of a misdemeanor, and upon conviction shall pay a fine not exceeding fifty dollars ($50.00) or be imprisoned not more than 30 days. (1919, c. 116, s. 10; C. S., s. 1684.)

§ 67-17: Deleted.

Editor's Note. — This section has been deleted as it appeared to be local legislation of the type contemplated by § 67-18 and repealed by that section. It was held to have been so repealed in McAlister v. Yancey County, 212 N.C. 208, 193 S.E. 141 (1937).

§ 67-18. Application of Article.

This Article, G.S. 67-5 to 67-18, inclusive, is hereby made applicable to every county in the State of North Carolina, notwithstanding any provisions in local, special or private acts exempting any county or any township or municipality from the provisions of the same enacted at any General Assembly commencing at the General Assembly of 1919 and going through the General Assembly of 1929. (1929, c. 318.)

CASE NOTES

Applied in McAlister v. Yancey County, 212 N.C. 208, 193 S.E. 141 (1937).

Article 3.

Special License Tax on Dogs.

§§ 67-19 to 67-28: Repealed by Session Laws 1973, c. 822, s. 6.

Cross References. — As to the effect of the repeal, see the Editor's note following the analysis to Chapter 153A.

Editor's Note. — Session Laws 1973, c. 822, s. 6(c), provides: "All local acts and clauses of local acts modifying any section of the General Statutes repealed by this section or otherwise relating to the use of the proceeds of the dog tax heretofore levied pursuant to G.S. 67-5 (herein repealed) are repealed."

Article 4.

Guide Dogs.

§ 67-29: Repealed by Session Laws 1973, c. 493, s. 2.

Cross References. — For present provisions as to guide dogs, see §§ 168-4, 168-7.

Article 5.

Protection of Livestock and Poultry from Ranging Dogs.

§ 67-30. Appointment of animal control officers authorized; salary, etc.

A county may appoint one or more animal control officers and may fix their salaries, allowances, and expenses. (1951, c. 931, s. 1; 1955, c. 1333, s. 1; 1957, cc. 81, 840; 1973, c. 822, s. 6.)

Local Modification. — Cabarrus: 1979, c. 119; Forsyth: 1967, c. 587, s. 2; Franklin: 1953, c. 1005; Granville: 1965, c. 464, s. 2; Harnett: 1963, c. 664.

§ 67-31. Powers and duties of dog warden.

The powers and duties of the county dog warden shall be as follows:

(1) He shall have the power of arrest and be responsible for the enforcement within his county of all public and public-local laws pertaining to the ownership and control of dogs, and shall cooperate with all other law-enforcement officers operating within the county in fulfilling this responsibility.

(2) In those counties having a rabies control officer, the county dog warden shall act as assistant to the rabies control officer, working under the supervision of the county health department, to collect the dog tax. In those counties having no rabies control officer, the county dog warden shall serve as rabies control officer. (1951, c. 931, s. 2.)

Local Modification. — Cumberland: 1967, c. 814; Orange: 1953, c. 367, ss. 1-5, 8.

§ 67-32. Pound; disposition of impounded dogs.

The board of county commissioners in each county in which a county dog warden is appointed under this Article shall establish and maintain a dog pound in each county, the same to be under the supervision of the county dog warden, for the purpose of impounding lost and stray dogs for a period to be determined by the board of county commissioners during which time the county dog warden shall make every reasonable effort to locate and give notice to the owners of such dogs, or if such owners cannot be located, to find new owners for such dogs. The dog warden shall keep a permanent bound record of the date on which each dog is impounded, and if at the end of the holding period to be determined by the board of commissioners such dogs remain unclaimed by their owners or by prospective owners, such dogs are to be destroyed in a humane manner, under the direct supervision of the county dog warden. Anyone claiming or redeeming a dog at the pound will be required to pay the actual cost of keeping the dog in the pound, as well as any tax due, before any such dog may be released. (1951, c. 931, s. 3; 1955, c. 1333, s. 2.)

Local Modification. — Orange: 1953, c. 367, ss. 1-5, 8.

§§ 67-33 to 67-35: Repealed by Session Laws 1973, c. 822, s. 6.

Cross References. — As to the effect of the repeal, see the Editor's note following the analysis to Chapter 153A.

Editor's Note. — Session Laws 1973, c. 822, s. 6(c), provides:

"All local acts and clauses of local acts modifying any section of the General Statutes repealed by this section or otherwise relating to the use of the proceeds of the dog tax heretofore levied pursuant to G.S. 67-5 (herein repealed) are repealed."

§ 67-36. Article supplements existing laws.

The provisions of this Article are to be construed as supplementing and not repealing existing State laws pertaining to the ownership, taxation, and control of dogs. (1951, c. 931, s. 7.)

Chapter 68.

Fences and Stock Law.

Article 1.

Lawful Fences.

Sec.

68-1 to 68-5. [Repealed.]

Article 2.

Division Fences.

68-6 to 68-14. [Repealed.]

Article 3.

Livestock Law.

68-15. Term "livestock" defined.
68-16. Allowing livestock to run at large forbidden.
68-17. Impounding livestock at large; right to recover costs and damages.
68-18. Notice and demand when owner known.
68-19. Determination of damages by selected landowners or by referee.
68-20. Notice of sale and sale where owner fails to redeem or is unknown; application of proceeds.
68-21. Illegally releasing or receiving impounded livestock misdemeanor.
68-22. Impounded livestock to be fed and watered.
68-23. Right to feed impounded livestock; owner liable.
68-24. Penalties for violation of this Article.
68-25. Domestic fowls running at large after notice.
68-26 to 68-41. [Repealed.]

Article 4.

Stock along the Outer Banks.

68-42. Stock running at large prohibited; certain ponies excepted.
68-43. Authority of Secretary of Natural Resources and Community Development to remove or confine ponies on Ocracoke Island and Shackelford Banks.
68-44. Penalty for violation of § 68-42.
68-45. Impounding stock.
68-46. "Outer banks of this State" defined.

Article 1.

Lawful Fences.

§§ 68-1, 68-2: Repealed by Session Laws 1969, c. 691.

§§ 68-3, 68-4: Repealed by Session Laws 1971, c. 741, s. 2.

§ 68-5: Repealed by Session Laws 1969, c. 619.

Article 2.

Division Fences.

§§ 68-6 to 68-14: Repealed by Session Laws 1971, c. 741, s. 2.

Article 3.

Livestock Law.

§ 68-15. Term "livestock" defined.

The word "livestock" in this Chapter shall include, but shall not be limited

to, equine animals, bovine animals, sheep, goats and swine. (Code, s. 2822; Rev., s. 1681; C. S., s. 1841; 1971, c. 741, s. 1.)

Editor's Note. — The case cited below was decided prior to the revision of this Article by Session Laws 1971, c. 741.

CASE NOTES

A dog is not "stock" within the meaning of the section, but nevertheless subject to larceny. Meekins v. Simpson, 176 N.C. 130, 96 S.E. 894 (1918).

§ 68-16. Allowing livestock to run at large forbidden.

If any person shall allow his livestock to run at large, he shall be guilty of a misdemeanor. (Code, s. 2811; 1889, c. 504; Rev., s. 3319; C. S., s. 1849; 1971, c. 741, s. 1.)

CASE NOTES

Duty to Restrain Stock. — This section imposes upon all persons the statutory duty of restraining their stock from running at large. McCoy v. Tillman, 224 N.C. 201, 29 S.E.2d 683 (1944).

The person having charge of an animal is under the legal duty to exercise the ordinary care and foresight of a reasonably prudent person in keeping the animal in restraint. Sutton v. Duke, 7 N.C. App. 100, 171 S.E.2d 343 (1969), aff'd, 277 N.C. 94, 176 S.E.2d 161 (1970).

Implicit Civil Responsibility as Tort-Feasor if Section Violated. — See Kelly v. Willis, 238 N.C. 637, 78 S.E.2d 711 (1953).

This section implies knowledge, consent or willingness on the part of the owner that the animals be at large, or negligence equivalent thereto, and the mere fact that animals are at large does not raise the presumption that the owner permits them to run at large, nor does the doctrine of res ipsa loquitur apply upon the establishment of the facts that animals are found at large. Gardner v. Black, 217 N.C. 573, 9 S.E.2d 10 (1940).

Liability of Animal's Keeper Rests on Question of Negligence. — The keeper of a pony, mule or other animal is liable under this section for negligently permitting such animal to escape and go upon public highways in the event it does damage to travelers or others lawfully thereon. The liability of the keeper rests upon the question of whether the keeper is guilty of negligence in permitting such animal to escape. The same rules as to what is or is not negligence in ordinary situations apply. Sutton v. Duke, 7 N.C. App. 100, 171 S.E.2d 343 (1969), aff'd, 277 N.C. 94, 176 S.E.2d 161 (1970).

Evidence. — That an owner knowingly or negligently allowed his mule to run at large on the highway may be inferred from the fact that the mule repeatedly ran loose thereon. Kelly v. Willis, 238 N.C. 637, 78 S.E.2d 711 (1953).

§ 68-17. Impounding livestock at large; right to recover costs and damages.

Any person may take up any livestock running at large and impound the same; and such impounder may recover from the owner the reasonable costs of impounding and maintaining the livestock as well as damages to the impounder caused by such livestock, and may retain the livestock, with the right to use with proper care until such recovery is had. (Code, s. 2186; Rev., s. 1679; C. S., s. 1850; 1951, c. 569; 1971, c. 741, s. 1.)

Cross References. — As to larceny of stock and malicious injury thereto, see § 14-85.

CASE NOTES

Not Applicable to Stock under Control. — This section does not authorize the taking up and impounding of livestock unless running at large, and does not apply to cows securely tied to trees under the immediate control of the owner with the permission of the lessee of the land, and it is forcible trespass to take them away over the protest of the owner, to prevent which the owner may use all necessary force, unless the taking is by appropriate legal proceedings. Kirkpatrick v. Crutchfield, 178 N.C. 348, 100 S.E.2d 602 (1919). See State v. Hunter, 118 N.C. 1196, 24 S.E. 708 (1896).

When and by Whom Stock May Be Impounded. — All persons are under the statutory duty of restraining their livestock from running at large, and when out of the pasture such stock are at large and subject to be taken up and impounded by any person, even though they are at large as a result of the negligence of the person who so impounds them, where the owner has knowledge of their being at large and neglects to restrain them. McCoy v. Tillman, 224 N.C. 201, 29 S.E.2d 683 (1944).

Liability for Killing Strays. — Under this section one has the power to take up a stray, and the law requires that he do so in preference to killing or injuring it. If he wantonly kills such a stray, he is guilty of a misdemeanor. State v. Brigman, 94 N.C. 888 (1886). See § 14-366.

§ 68-18. Notice and demand when owner known.

If the owner of impounded livestock is or becomes known to the impounder, actual notice of the whereabouts of the impounded livestock must be immediately given to the owner and the impounder must then make demand upon the owner of the livestock for the costs of impoundment and the damages to the impounder, if any, caused by such livestock. (Code, s. 2817; Rev., s. 1680; C. S., s. 1851; 1971, c. 741, s. 1.)

§ 68-19. Determination of damages by selected landowners or by referee.

If the owner and impounder cannot agree as to the cost of impounding and maintaining such livestock, as well as damages to the impounder caused by such livestock running at large, then such costs and damages shall be determined by three disinterested landowners, one to be selected by the owner of the livestock, one to be selected by the impounder and a third to be selected by the first two. If within 10 days a majority of the landowners so selected cannot agree, or if the owner of the livestock or the impounder fails to make his selection, or if the two selected fail to select a third, then the clerk of superior court of the county where the livestock is impounded shall select a referee. The determination of such costs and damages by the landowners or by the referee shall be final. (Code, s. 2186; Rev., s. 1679; C. S., s. 1850; 1951, c. 569; 1971, c. 741, s. 1.)

§ 68-20. Notice of sale and sale where owner fails to redeem or is unknown; application of proceeds.

If the owner fails to redeem his livestock within three days after the notice and demand as provided in G.S. 68-18 is received or within three days after the determination of the costs and damages as provided in G.S. 68-19, then, upon written notice fully describing the livestock, stating the place, date, and hour of sale posted at the courthouse door and three or more public places in the township where the owner resides, and after 10 days from such posting, the impounder shall sell the livestock at public auction. If the owner of the

livestock is not known to the impounder, then, upon written notice fully describing the livestock, stating the place, date, and hour of sale posted at the courthouse door and three public places in the township where the livestock is impounded, and after 20 days from such posting, the impounder shall sell the livestock at public auction. The proceeds of any such public sale shall be applied to pay the reasonable costs of impounding and maintaining the livestock and the damages to the impounder caused by the livestock and the balance, if any, shall be paid to the owner of the livestock, if known, or, if the owner is not known, then to the school fund of the county where the livestock was impounded. (Code, s. 2817; Rev., s. 1680; C. S., s. 1851; 1971, c. 741, s. 1.)

CASE NOTES

When Owner May Not Complain. — Where a party lawfully impounds a sow, sells same under provisions of a recorder's judgment, and pays himself his lawful fees for impounding the sow and his damages caused by the sow, and pays to the owner the amount due him out of the purchase price, the owner may not complain. Beasley v. Edwards, 211 N.C. 393, 190 S.E. 221 (1937).

§ 68-21. Illegally releasing or receiving impounded livestock misdemeanor.

If any person willfully releases any lawfully impounded livestock without the permission of the impounder or receives such livestock knowing that it was unlawfully released, he shall be guilty of a misdemeanor. (Code, s. 2819; 1889, c. 504; Rev., s. 3310; C. S., s. 1853; 1971, c. 741, s. 1.)

§ 68-22. Impounded livestock to be fed and watered.

If any person shall impound or cause to be impounded any livestock and shall fail to supply to the livestock during the confinement a reasonably adequate quantity of good and wholesome feed and water, he shall be guilty of a misdemeanor. (1881, c. 368, s. 3; Code, s. 2484; 1891, c. 65; Rev., s. 3311; C. S., s. 1854; 1971, c. 741, s. 1.)

§ 68-23. Right to feed impounded livestock; owner liable.

When any livestock is impounded under the provisions of this Chapter and remains without reasonably adequate feed and water for more than 24 hours, any person may lawfully enter the area of impoundment to supply the livestock with feed and water. Such person shall not be liable in trespass for such entry and may recover of the owner or, if the owner is unknown, of the impounder of the livestock, the reasonable costs of the feed and water. (1881, c. 368, s. 4; Code, s. 2485; Rev., s. 1682; C. S., s. 1855; 1971, c. 741, s. 1.)

CASE NOTES

The difference between an impounding fee and a charge for food is recognized by the law. Former § 68-24 (see now §§ 68-17 and 68-19) prescribed the impounding fees for taking up stock running at large, and this section prescribes for payment for feeding such stock when taken up. The former fees go to the officer or the town or county, and the latter is a humane provision without which the stock might suffer for want of food and water. Owen v. Williamston, 171 N.C. 57, 87 S.E. 959 (1916).

§ 68-24. Penalties for violation of this Article.

Any person found guilty of violating any of the provisions of G.S. 68-16, 68-21 or 68-22 shall be punished by a fine not exceeding two hundred dollars ($200.00) or imprisonment not exceeding 30 days or both. (1971, c. 741, s. 1.)

§ 68-25. Domestic fowls running at large after notice.

If any person shall permit any turkeys, geese, chickens, ducks or other domestic fowls to run at large on the lands of any other person while such lands are under cultivation in any kind of grain or feedstuff or while being used for gardens or ornamental purposes, after having received actual or constructive notice of such running at large, he shall be guilty of a misdemeanor.

If it shall appear to any magistrate that after three days' notice any person persists in allowing his fowls to run at large in violation of this section and fails or refuses to keep them upon his own premises, then the said magistrate may, in his discretion, order any sheriff or other officer to kill the fowls when they are running at large as herein provided. (C. S., s. 1864; 1971, c. 741, s. 1.)

§§ 68-26 to 68-41: Repealed by Session Laws 1971, c. 741, s. 2.

Article 4.

Stock along the Outer Banks.

§ 68-42. Stock running at large prohibited; certain ponies excepted.

From and after July 1, 1958, it shall be unlawful for any person, firm or corporation to allow his or its horses, cattle, goats, sheep, or hogs to run free or at large along the outer banks of this State. This Article shall not apply to horses known as marsh ponies or banks ponies on Ocracoke Island, Hyde County. This Article shall not apply to horses known as marsh ponies or banks ponies on Shackelford Banks between Beaufort Inlet and Barden's Inlet in Carteret County. Saving and excepting those animals known as "banker ponies" on the island of Ocracoke owned by the Boy Scouts and not exceeding 35 in number. (1957, c. 1057, s. 1.)

Legal Periodicals. — For an article on local legislation in the General Assembly, discussing the Chadwick decision, see 45 N.C.L. Rev. 340 (1967).

CASE NOTES

Constitutionality. — In an action instituted to enjoin a sheriff from removing plaintiffs' cattle from Shackelford Banks, it was held that plaintiffs were not entitled to challenge the constitutionality of this Article, since it does not purport to authorize the destruction or removal of cattle from any portion of the outer banks, but provides for enforcement of its provisions solely by criminal prosecution, and plaintiffs would be entitled to attack the constitutionality of that statute only as a defense to a criminal prosecution thereunder. Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961).

§ 68-43. Authority of Secretary of Natural Resources and Community Development to remove or confine ponies on Ocracoke Island and Shackelford Banks.

Notwithstanding any other provisions of this Article, the Secretary of Natural Resources and Community Development shall have authority to remove or cause to be removed from Ocracoke Island and Shackelford Banks all ponies known as banks ponies or marsh ponies if and when he determines that such action is essential to prevent damage to the island. In the event such a determination is made, the Secretary, in lieu of removing all ponies, may require that they be restricted to a certain area or corralled so as to prevent damage to the island. In the event such action is taken, the Secretary is authorized to take such steps and act through his duly designated employees or such other persons as, in his opinion, he deems necessary and he may accept any assistance provided by or through the National Park Service. (1957, c. 1057, s. 1½; 1973, c. 1262, s. 86; 1977, c. 771, s. 4.)

§ 68-44. Penalty for violation of § 68-42.

Any person, firm or corporation violating the provisions of G.S. 68-42 shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than one hundred dollars ($100.00) or imprisoned not more than 30 days. (1957, c. 1057, s. 2.)

§ 68-45. Impounding stock.

The provisions of G.S. 68-24 to 68-30, relative to the impounding of stock running at large shall apply with equal force and effect along the outer banks of this State. (1957, c. 1057, s. 3.)

Editor's Note. — The reference to §§ 68-24 to 68-30 above is to sections existing prior to the revision of Article 3 by Session Laws 1971, c. 741. For present provisions as to the impounding of stock running at large, see §§ 68-17 to 68-23.

§ 68-46. "Outer banks of this State" defined.

For the purposes of this Article, the terms "outer banks of this State" shall be construed to mean all of that part of North Carolina which is separated from the mainland by a body of water, such as an inlet or sound, and which is in part bounded by the Atlantic Ocean. (1957, c. 1057, s. 4.)

Chapter 69.

Fire Protection.

Article 1.

Investigation of Fires and Inspection of Premises.

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69-1. Fires investigated; reports; records.
69-2. Attorney General to make examination; arrests and prosecution.
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Article 3.

State Volunteer Fire Department.

69-14. Purpose of Article.
69-15. Personnel.
69-16. Organization.
69-17. Acceptance by municipalities.
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69-19. Dispatching firemen and apparatus from municipalities.
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69-23. Rights and privileges of firemen; liability of municipality.
69-24. Relief in case of injury or death.
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Article 3A.

Rural Fire Protection Districts.

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69-25.1. Election to be held upon petition of voters.
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69-25.9. Procedure when area lies in more than one county.
69-25.10. Means of abolishing tax district.
69-25.11. Changes in area of district.
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Article 1.

Investigation of Fires and Inspection of Premises.

§ 69-1. Fires investigated; reports; records.

The Attorney General, through the State Bureau of Investigation, and the chief of the fire department, or chief of police where there is no chief of the fire department, in municipalities and towns, and the county fire marshal and the sheriff of the county and the chief of the rural fire department where such fire occurs outside of a municipality, are hereby authorized to investigate the cause, origin, and circumstances of every fire occurring in such municipalities or counties in which property has been destroyed or damaged, and shall specially make investigation whether the fire was the result of carelessness or design. A preliminary investigation shall be made by the chief of fire department or chief of police, where there is no chief of fire department in municipalities, and by the county fire marshal and the sheriff of the county or the chief of the rural fire department where such fire occurs outside of a municipality, and must be begun within three days, exclusive of Sunday, of the occurrence of the fire, and the Attorney General, through the State Bureau of Investigation, shall have the right to supervise and direct the investigation when he deems it expedient or necessary.

The officer making the investigation of fires shall forthwith notify the Attorney General, and must within one week of the occurrence of the fire furnish to the Attorney General a written statement of all facts relating to the cause and origin of the fire, the kind, value and ownership of the property destroyed, and such other information as is called for by the forms provided by the Attorney General. Departments capable of submitting the required information by the utilization of computers and related equipment, by means of an approved format of standard punch cards, magnetic tapes or an approved telecommunications system, may do so in lieu of the submission of the written statement as provided for in this section. The Attorney General shall keep in his office a record of all reports submitted pursuant to this section. These reports shall at all times be open to public inspection. (1899, c. 58; 1901, c. 387; 1903, c. 719; Rev., s. 4818; C. S., s. 6074; 1943, c. 170; 1969, c. 894; 1977, c. 596, s. 1.)

Local Modification. — Guilford: 1965, c. 102.

§ 69-2. Attorney General to make examination; arrests and prosecution.

It is the duty of the Attorney General to examine, or cause examination to be made, into the cause, circumstances, and origin of all fires occurring within the State to which his attention has been called in accordance with the provisions of G.S. 69-1, or by interested parties, by which property is accidentally or unlawfully burned, destroyed, or damaged, whenever in his judgment the

evidence is sufficient, and to specially examine and decide whether the fire was the result of carelessness or the act of an incendiary. The Attorney General shall, in person, by deputy or otherwise, fully investigate all circumstances surrounding such fire, and, when in his opinion such proceedings are necessary, take or cause to be taken the testimony on oath of all persons supposed to be cognizant of any facts or to have means of knowledge in relation to the matters as to which an examination is herein required to be made, and shall cause the same to be reduced in writing. If the Attorney General or any deputy appointed to conduct such investigations, is of the opinion that there is evidence to charge any person or persons with the crime of arson, or other willful burning, or fraud in connection with the crime of arson or other willful burning, he may arrest with warrant or cause such person or persons to be arrested, charged with such offense, and prosecuted, and shall furnish to the district attorney of the district all such evidence, together with the names of witnesses and all other information obtained by him, including a copy of all pertinent and material testimony taken in the case. (1899, c. 58, s. 2; 1901, c. 387, s. 2; 1903, c. 719; Rev., s. 4819; C. S., s. 6075; 1943, c. 170; 1955, c. 642, s. 1; 1959, c. 1183; 1973, c. 47, s. 2; 1977, c. 596, s. 2.)

§ 69-3. Powers of Attorney General in investigations.

The Attorney General, or his deputy appointed to conduct such examination, has the powers of a trial justice for the purpose of summoning and compelling the attendance of witnesses to testify in relation to any matter which is by provisions of this Article a subject of inquiry and investigation, and may administer oaths and affirmations to persons appearing as witnesses before them. False swearing in any such matter or proceeding is perjury and shall be punished as such. The Attorney General or his deputy has authority at all times of the day or night, in performance of the duties imposed by the provisions of this Article, to enter upon and examine any building or premises where any fire has occurred, and other buildings and premises adjoining or near the same. All investigations held by or under the direction of the Attorney General or his deputy may, in their discretion, be private, and persons other than those required to be present by the provisions of this Article may be excluded from the place where the investigation is held, and witnesses may be kept apart from each other and not allowed to communicate with each other until they have been examined. (1899, c. 58, s. 3; 1901, c. 387, s. 3; Rev., s. 4820; C. S., s. 6076; 1943, c. 170; 1977, c. 596, s. 2.)

§ 69-3.1. Failure to comply with summons or subpoena.

The failure of a person to comply with a summons or subpoena of the Attorney General or his deputy under G.S. 69-3 shall be brought before a court of record and punished as for contempt in the same manner as if he had failed to appear and testify before said court of record. (1955, c. 642, s. 2; 1977, c. 596, s. 2.)

§ 69-4. Inspection of premises; dangerous material removed.

The Commissioner of Insurance, or the chief of fire department or chief of police where there is no chief of fire department, or the city or county building inspector, electrical inspector, heating inspector, or fire prevention inspector has the right at all reasonable hours, for the purpose of examination, to enter into and upon all buildings and premises in their jurisdiction. When any of such officers find in any building or upon any premises combustible material or inflammable conditions dangerous to the safety of such building or premises

they shall order the same to be removed or remedied, and this order shall be forthwith complied with by the owner or occupant of such buildings or premises. The owner or occupant may, within twenty-four hours, appeal to the Commissioner of Insurance from the order, and the cause of the complaint shall be at once investigated by his direction, and unless by his authority the order of the officer above named is revoked it remains in force and must be forthwith complied with by the owner or occupant. The Commissioner of Insurance, fire chief, or building inspector, electrical inspector, heating inspector, or fire prevention inspector shall make an immediate investigation as to the presence of combustible material or the existence of inflammable conditions in any building or upon any premises under their jurisdiction upon complaint of any person having an interest in such building or premises or property adjacent thereto. The Commissioner may, in person or by deputy, visit any municipality or county and make such inspections alone or in company with the local officer. The Commissioner shall submit annually, as early as consistent with full and accurate preparation, and not later than the first day of June, a detailed report of his official action under this Article, and it shall be embodied in his report to the General Assembly. (1899, c. 58, s. 4; 1901, c. 387, s. 4; 1903, c. 719; Rev., s. 4821; C. S., s. 6077; 1943, c. 170; 1969, c. 1063, s. 3; 1977, c. 596, s. 4.)

§ 69-5. Deputy investigators.

It shall be the duty of the Attorney General to appoint two or more persons as deputies, whose particular duty it shall be to investigate forest fires and endeavor to ascertain the persons guilty of setting such fires and cause prosecution to be instituted against those who, as a result of such investigation, are deemed guilty. (1899, c. 58, s. 6; 1901, c. 387, s. 6; 1903, c. 719, s. 2; Rev., s. 4823; 1915, c. 109, s. 2; 1919, c. 186, s. 7; C. S., s. 6078; Ex. Sess. 1924, c. 119; 1943, c. 170; 1977, c. 596, s. 2.)

CASE NOTES

Cited in O'Neal v. Wake County, 196 N.C. 184, 145 S.E. 28 (1928).

§ 69-6. Reports of Attorney General.

The Attorney General shall submit annually, as early as consistent with full and accurate preparation, and not later than the first day of June, a detailed report of his official action under this Article, and it shall be embodied in his report to the General Assembly. He shall, in his annual report, make a statement of the fires investigated, the value of property destroyed, the amount of insurance, if any, the origin of the fire, when ascertained, and the location of the property damaged or destroyed, whether in town, city, or country. (1899, c. 58, s. 7; 1901, c. 387, s. 7; Rev., s. 4824; 1915, c. 109, s. 1; C. S., s. 6079; 1943, c. 170; 1977, c. 596, s. 2.)

§ 69-7. Fire prevention and Fire Prevention Day.

It is the duty of the Commissioner of Insurance, the Superintendent of Public Instruction and the State Board of Education to provide a pamphlet containing printed instructions for properly conducting fire drills in all schools and auxiliary school buildings and the principal of every public and private school shall conduct at least one fire drill every month during the regular school session in each building in his charge where children are assembled. The fire drills shall

include all children and teachers and the use of various ways of egress to assimilate evacuation of said buildings under various conditions, and such other regulations as prescribed by the Commissioner of Insurance, Superintendent of Public Instruction and State Board of Education.

The Commissioner of Insurance and Superintendent of Public Instruction shall further provide for the teaching of "Fire Prevention" in the colleges and schools of the State, and to arrange for a textbook adapted to such use. The ninth day of October of every year shall be set aside and designated as "Fire Prevention Day," and the Governor shall issue a proclamation urging the people to a proper observance of the day, and the Commissioner of Insurance shall bring the day and its observance to the attention of the officials of all organized fire departments of the State, whose duty it shall be to disseminate the materials and to arrange suitable programs to be followed in its observance. (1915, c. 166, s. 5; C. S., s. 6080; 1925, c. 130; 1943, c. 170; 1947, c. 781; 1957, c. 845.)

Cross References. — As to requirement that fire prevention be taught in public schools, see § 115-37.

§ 69-7.1. Insurance company to furnish information.

(a) The chief of any municipal fire or police department, county fire marshal or sheriff, or special agent of the State Bureau of Investigation may request any insurance company investigating a fire loss of real or personal property to release any information in its possession relative to that loss. The company shall release the information and cooperate with any official authorized to request such information pursuant to this section. The information shall include, but is not limited to:

(1) Any insurance policy relevant to a fire loss under investigation and any application for such a policy;
(2) Policy premium payment records;
(3) History of previous claims made by the insured for fire loss;
(4) Material relating to the investigation of the loss, including statements of any person, proof of loss, and any other relevant evidence.

(b) If an insurance company (or insurance agency) has reason to suspect that a fire loss to its insured's real or personal property was caused by incendiary means, the company shall furnish the State Bureau of Investigation with all relevant material acquired during its investigation of the fire loss, cooperate with and take such action as may be requested of it by any law-enforcement agency, and permit any person ordered by a court to inspect any of its records pertaining to the policy and the loss.

(c) In the absence of fraud or malice, no insurance company (or insurance agency), or person who furnishes information on its behalf, shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other action that is necessary to supply information required pursuant to this section.

(d) The officials and departmental and agency personnel receiving any information furnished pursuant to this section shall hold the information in confidence until such time as its release is required pursuant to a criminal or civil proceeding.

(e) Any official referred to in subsection (a) of this section may be required to testify as to any information in his possession regarding the fire loss of real or personal property in any civil action in which any person seeks recovery under a policy against an insurance company for the fire loss. (1977, c. 520, s. 1.)

ARTICLE 2.

Fire Escapes.

§ 69-8. Construction of buildings regulated.

All hotels, lodging houses, school dormitories, hospitals, sanitariums, apartment houses, flats, tenement houses and all buildings other than private dwellings not over three stories in height, in which rooms are to be rented or leased or let or offered for rent, let or leased for living or sleeping purposes, hereafter constructed in this State shall be constructed so that the occupants of all rooms above the first floor shall have unobstructed access to two separate and distinct ways of egress extending from the uppermost floor to the ground, such ways of egress to be so arranged in reference to rooms that in case of fire on one stairway the other stairway can be reached by the occupant without his or her having to pass the stairway involved. Entrance to all such ways of egress aforementioned in this section shall be from corridors or hallways of not less than three feet in width, and in no case shall entrance to such ways of egress be through a room or closet, and where such building is in the opinion of the Commissioner of Insurance of sufficient size to require more than two ways of egress the "National Fire Protection Association" standard governing corridors and stair areas shall be adhered to. Every hotel, lodging house, school dormitory, hospital, sanatorium, apartment house, flat, tenement or other building, other than a private dwelling not over three stories in height, in which rooms are rented, leased, let or offered for rent, leased or let, shall forthwith, at the owner's expense, be provided with additional ways of egress as the Commissioner of Insurance shall deem practicable in order that the object of this Article may be accomplished and that existing dangers may not be perpetuated. (1909, c. 637, s. 1; C. S., s. 6081; 1923, c. 149, s. 4; 1943, c. 170.)

CASE NOTES

Nonsuit Held Proper. — These actions to recover for personal injuries and for wrongful death resulting from a fire in defendants' building, the third floor of which was rented for sleeping quarters, were founded on this section, upon allegations that defendants failed to have two exits from the sleeping quarters in case of fire. All the evidence tended to show that the building was constructed prior to 1913, and there was no evidence that the Commissioner of Insurance ever deemed practical that the building should be provided with any additional ways of egress in order that the dangers existing should be terminated. It was held that defendants' motion to nonsuit was properly allowed, since plaintiffs failed to bring themselves within the statute relied upon. Woods v. Hall, 214 N.C. 16, 197 S.E. 557 (1938).

§ 69-9. Places of public amusement, how constructed.

Every theater, opera house, or other like place of public amusement shall have as many doors for egress therefrom as may be necessary and can be made consistently with the proper strength of the building; all such doors shall be hung so as to open outwardly, or both outwardly and inwardly; and the seats therein shall be arranged in rows properly spaced, with aisles of adequate width, so as to afford easy egress therefrom. All scenery shall be made as secure against becoming inflamed as reasonably practical, and also all reasonably practical arrangements shall be made for the constant supply of water and other means for extinguishment of fires, and they shall be kept constantly

effective during the presence of an audience. The Commissioner of Insurance may require all theaters to be equipped with a front curtain of asbestos or other fireproof material, to be furnished by owner of the building, and this curtain shall be raised and lowered not less than twice before each performance, in order to guarantee its being in perfect working order. (1909, c. 637, s. 2; C. S., 6082; 1943, c. 170.)

§ 69-10. Doors in certain buildings to open outwardly.

In all public schoolhouses and other buildings, and also all theaters, assembly rooms, halls, churches, factories with more than 10 employees, and all other buildings or places of public resort where people are accustomed to assemble (excepting schoolhouses and churches of one room on the ground floor) which shall hereafter be erected, together with all those heretofore erected and which are still in use as such buildings or places of resort, the doors for ingress and egress shall be so hung as to open outwardly from the audience rooms, halls, or workshops of such buildings or places, or the doors may be hung on double hinges, so as to open with equal ease outwardly or inwardly. And it is further provided that, in order to safeguard the public from the dangers of fire and contingencies arising and resulting therefrom in places of this kind, and the owner or owners from unnecessary confusion and expense, plans for all such theaters, opera houses, moving picture shows, and other like places of amusement to be hereafter erected shall be submitted to and approved, as to the safety of the building from fire and the occupants in case of fire, by the Commissioner of Insurance, before work is begun on the building. This requirement shall apply also where any building standing or part thereof is to be changed to use as a theater, opera house, moving picture show or other like place of amusement. (1909, c. 637, s. 3; C. S., s. 6083; 1923, c. 149, s. 1; 1943, c. 170.)

§ 69-11. Fire escapes to be provided.

All factories, manufacturing establishments or workshops of three or more stories in height, in which 10 or more people are employed above the first floor thereof, shall be provided with one or (if the proper official shall deem necessary) more outside fire escapes, not less than six feet in length and three feet in width, properly and safely constructed, guarded by iron railings not less than three feet in length and taking in at least one door and one window or two windows at each story and connected with the interior by easily accessible and unobstructed openings; and the fire escapes shall connect by iron stairs not less than 25 inches wide, the steps to be not less than six inches tread, placed at not more than an angle of 45 degrees slant, and protected by a well secured handrail on both sides, with a 12-inch wide drop ladder from the lowest platform reaching to the ground. Each story of all factories, manufacturing establishments or workshops of three or more stories in height shall be amply supplied with means for extinguishing fires. All the main doors, both inside and outside, in factories, except fire doors, shall open outwardly, when the proper official shall so direct, and no outside or inside door of any building wherein operatives are employed shall be locked, bolted, or otherwise fastened during the hours of labor so as to prevent egress. (1909, c. 637, s. 4; C. S., s. 6084; 1923, c. 149, s. 2.)

§ 69-12. Ways of escape provided.

Every building now or hereafter used, in whole or in part, as a public building, public or private institution, schoolhouse, church, theater, public hall, place of assembly or place of public resort, and every building in which 20 or more persons are employed, allowed or accustomed to assemble or accommodated above the second story in a factory, workshop, office building or mercantile or other establishment, when the owner or agent of the owner of the buildings is notified in writing by the Commissioner of Insurance or one of his deputies, shall be provided with proper ways of egress or other means of escape from fire sufficient for the use of all persons accommodated, assembled, employed, lodging or residing in such building or buildings, and such ways of egress and means of escape shall be kept free from obstructions, in good repair, and ready for use. Every room above the second story in any such building in which 20 or more persons are employed shall be provided with more than one way of egress by stairways on the inside or outside of the building. All doors in any building subject to the provisions of this Article shall open outwardly, if the Commissioner of Insurance or one of his deputies shall so direct in writing. (1909, c. 637, s. 5; C. S., s. 6085; 1923, c. 149, s. 3; 1927, c. 55, s. 1; 1943, c. 170.)

§ 69-13. Enforcement by Commissioner of Insurance.

The Commissioner of Insurance is charged with the execution of this Article, and he or the chief of the fire department or the city or county building inspector, electrical inspector, heating inspector, or fire prevention inspector is vested with all privileges, duties, and obligations placed upon them in this Chapter, in regard to the inspection of buildings, for the purpose of enforcing the provisions of this Article in regard to the buildings and requirements herein. Any owner or occupant of premises failing to comply with the provisions of this Article, in accordance with the orders of the authorities above specified, shall be guilty of a misdemeanor and punished by a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each day's neglect. If any owner or lessee of any building referred to in this Article shall deem himself aggrieved by any ruling or order of any chief of fire department or local inspector, he may within 24 hours appeal to the Commissioner of Insurance, and the cause of complaint shall at once be investigated by the direction of the Commissioner, and unless by his authority the order or ruling is revoked it shall remain in full force and effect and be forthwith complied with by the owner or lessee. (1909, c. 637, s. 6; C. S., s. 6086; 1943, c. 170; 1969, c. 1063, s. 4.)

Article 3.

State Volunteer Fire Department.

§ 69-14. Purpose of Article.

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. (1939, c. 364, s. 1.)

§ 69-15. Personnel.

The personnel of the North Carolina State Volunteer Fire Department shall consist of all active members of the organized fire departments, who are members of the North Carolina State Firemen's Association, of municipalities whereof the governing bodies shall subscribe to and endorse this Article. (1939, c. 364, s. 2.)

§ 69-16. Organization.

The North Carolina State Fire Marshal shall be chief of the State Volunteer Fire Department; regular municipal fire chiefs shall be assistant chiefs; assistant chiefs shall be deputy chiefs; battalion chiefs, captains; lieutenants and privates shall hold the same position that they occupy in their municipal companies. When engaged in rendering assistance at the scene of any emergency, the ranking officer of the first department arriving at the scene of the emergency shall have complete charge of all operations until the arrival of a superior officer. All subordinate officers and men shall act under the direction of such ranking officer. Whenever present at the scene of an emergency, the chief shall have full and complete control and authority over operations of all members of the Department. (1939, c. 364, s. 3.)

State Government Reorganization. — The State Volunteer Fire Department was transferred to the Department of Insurance by § 143A-79, enacted by Session Laws 1971, c. 864.

§ 69-17. Acceptance by municipalities.

Any municipality having an organized fire department and desiring to participate in the establishment of the State Volunteer Fire Department, may do so by a resolution of the governing body accepting and endorsing the provisions of this Article: Provided, that acceptance shall not be compulsory. (1939, c. 364, s. 4.)

§ 69-18. Withdrawal.

Any municipality which has accepted the provisions of this Article may withdraw its fire departments from membership in the State Volunteer Fire Department by resolution of the governing body thereof. Notice of such withdrawal shall be given to the State Fire Marshal and withdrawal shall not become effective until 60 days after his receipt thereof. (1939, c. 364, s. 5.)

§ 69-19. Dispatching firemen and apparatus from municipalities.

Municipalities endorsing this Article shall retain full and complete control and authority in sending or permitting firemen and apparatus to go beyond the limits of the municipality. The governing bodies of such municipalities shall designate and authorize a person, and at least two alternates, who shall have authority to grant or deny permission to firemen and apparatus to leave the municipality in all cases where request is made for assistance beyond its corporate limits, and the municipality shall, through the office of its municipal fire chief, furnish to the office of the State Commissioner of Insurance, and to the secretary of the North Carolina State Firemen's Association, a list of the

persons so authorized by the municipality. The secretary of the State Firemen's Association shall furnish to all municipalities and counties accepting this Article a list of all such persons so designated in all municipalities within the State. (1939, c. 364, s. 6; 1943, c. 170.)

§ 69-20. No authority in State Volunteer Fire Department to render assistance to nonaccepting counties.

The State Volunteer Fire Department shall not have authority to render assistance in any emergency occurring within a county which has not accepted the terms and conditions of this Article by resolution of the board of county commissioners: Provided, that nothing in this Article shall be construed to prevent any municipality from voluntarily permitting its fire department to render assistance in any emergency, notwithstanding that it may arise in a county which has failed to accept this Article. (1939, c. 364, s. 7.)

§ 69-21. Acceptance by counties.

Any county desiring to accept the benefits of this Article may do so by resolution of the board of county commissioners. Any such county may thereupon make agreements and enter into contracts with respect to payment for services rendered by the State Volunteer Fire Department within its boundaries in the following manner:

The county may contract with any municipality which has accepted the terms of this Article, whether within or without said county, to pay to such municipality an annual fee as a consideration for the municipality providing equipment and carrying compensation insurance which will enable it to respond to calls from within the county so contracting, and to pay an additional sum per truck for each mile traveled from the station house to the scene of the emergency, and to pay an additional sum per truck per hour or fraction thereof for the use of its water or chemical pumping equipment. Said sums shall be paid to the city within 30 days after such services have been performed: Provided, that nothing in this section shall be construed to prevent the county and municipality from adopting a different schedule of fees in cases where those provided above shall be considered excessive or inadequate: Provided, that if the emergency shall occur within the limits of another city or town, such city or town and not the county wherein it lies shall be responsible for the payments and shall assume all liabilities as provided in this section. (1939, c. 364, s. 8; 1973, c. 803, s. 5.)

§ 69-22. Municipalities not to be left unprotected.

At no time shall the entire personnel or equipment of any municipal fire department be absent from the municipality in response to a call to another municipality, or other place lying at a distance exceeding two miles from the corporate limits, but there shall remain within the municipal limits such personnel and equipment as in the judgment of the local fire chief might provide sufficient protection during the absence of the remainder. (1939, c. 364, s. 9.)

§ 69-23. Rights and privileges of firemen; liability of municipality.

When responding to a call and while working at a fire or other emergency outside the limits of the municipality by which they are regularly employed or in volunteer fire service, all members of the State Volunteer Fire Department

shall have the same authority, rights, privileges and immunities which are afforded them while responding to calls within their home municipality. In permitting its fire department or equipment to attend an emergency or answer a call beyond the municipal limits, whether under the terms of this Article or otherwise, a municipality shall be deemed in exercise of a governmental function, and shall hold the privileges and immunities attendant upon the exercise of such functions within its corporate limits. (1939, c. 364, s. 10.)

Cross References. — As to uniformed firemen enforcing motor vehicle laws and ordinances at fires, see § 20-114.1.

CASE NOTES

Cited in Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

§ 69-24. Relief in case of injury or death.

In case of injury or death of any member of the State Volunteer Fire Department arising out of and in the course of the performance of his duties, while such member is assisting at any emergency arising beyond the limits of the municipality with which he is connected, or while going to or returning from the scene of such emergency, such fireman shall be entitled to compensation under the terms of the North Carolina Workmen's Compensation Act, and the municipality with which he is connected shall be liable for the compensation provided under that Act. (1939, c. 364, s. 11.)

Editor's Note. — The former Workmen's Compensation Act is now the Workers' Compensation Act. See §§ 97-1, 97-1.1.

§ 69-24.1. Local appropriations.

Each county and municipality is authorized to make appropriations for the purposes of this Article and to fund them by levy of property taxes pursuant to G.S. 153A-149 and 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law. Sanitary districts are authorized to make appropriations for the purposes of this Article and to fund them by annual levy of a tax on property having a situs in the district under the rules and according to the procedures prescribed in the Machinery Act (Chapter 105, Subchapter II) and by the allocation of other revenues whose use is not otherwise restricted by law. (1973, c. 803, s. 4.)

§ 69-25. Sums from contingent fund of State made available for administration of Article.

In order to assist in carrying out the purposes of the Article the Governor may, from time to time, make provisions for assistance to the North Carolina State Firemen's Association in a sum not to exceed two thousand five hundred dollars ($2,500), in any one year, out of the contingent fund appropriated in the General Appropriation Act. One half of the amount so provided shall, in each instance, go to the State Firemen's Relief Fund, and one half to the expenses of the said Association incurred in carrying out the provisions of this Article. (1939, c. 364, s. 12.)

ARTICLE 3A.

Rural Fire Protection Districts.

§ 69-25.1. Election to be held upon petition of voters.

Upon the petition of fifteen percent (15%) of the resident freeholders living in an area lying outside the corporate limits of any city or town, which area is described in the petition and designated as " .....
(Here insert name)
Fire District," the board of county commissioners of the county shall call an election in said district for the purpose of submitting to the qualified voters therein the question of levying and collecting a special tax on all taxable property in said district, of not exceeding fifteen cents (15¢) of the one hundred dollars ($100.00) valuation of property, for the purpose of providing fire protection in said district.

Upon the petition of fifteen percent (15%) of the resident freeholders living in an area which has previously been established as a fire protection district and in which there has been authorized by a vote of the people a special tax not exceeding ten cents (10¢) on the one hundred dollars ($100.00) valuation of property within the area, the board of county commissioners shall call an election in said area for the purpose of submitting to the qualified voters therein the question of increasing the allowable special tax for fire protection within said district from ten cents (10¢) on the one hundred dollars ($100.00) valuation to fifteen cents (15¢) on the one hundred dollars ($100.00) valuation on all taxable property within such district. Elections on the question of increasing the allowable tax rate for fire protection shall not be held within the same district at intervals less than two years. (1951, c. 820, s. 1; 1953, c. 453, s. 1; 1959, c. 805, ss. 1, 2.)

Local Modification. — Granville: 1957, c. 790, s. 1; Guilford: 1973, c. 263; Scotland: 1969, c. 855 (garnishment and attachment and lien for collection of delinquent fire protection service charges); Wake: 1955, c. 169, ss. 1-3.

Editor's Note. — Section 9 of the act inserting this Article repealed all laws and clauses of laws, except public-local and private laws, in conflict with its provisions.

CASE NOTES

Cited in Tilghman v. West of New Bern Volunteer Fire Dep't, 32 N.C. App. 767, 233 S.E.2d 598 (1977).

OPINIONS OF ATTORNEY GENERAL

When Election Required. — Board of county commissioners is not required to call election for levy of fire district tax where amount of tax is less than 15 cents on the one hundred dollars valuation of property. Opinion of Attorney General to Mr. Harley B. Gaston, Jr., Gaston County Attorney, 40 N.C.A.G. 639 (1969).

§ 69-25.2. Duties of county board of commissioners regarding conduct of elections; cost of holding.

The board of county commissioners, after consulting with the county board of elections, shall set a date for the election by resolution adopted. The county board of elections shall hold and conduct the election in the district. The county

board of elections shall advertise and conduct said election, in accordance with the provisions of this Article and with the procedures prescribed in Chapter 163 governing the conduct of special and general elections. No new registration of voters shall be required, but the deadline by which unregistered voters must register shall be contained in the legal advertisement to be published by the county board of elections. The cost of holding the election shall be paid by the county. (1951, c. 820, s. 2; 1975, c. 706.)

§ 69-25.3. Ballots.

At said election those voters who are in favor of levying a tax in said district for fire protection therein shall vote a ballot on which shall be written or printed, "In favor of tax for fire protection in .....
(Here insert name)
Fire Protection District." Those who are against levying said tax shall vote a ballot on which shall be written or printed the words, "Against tax for fire protection in ..... Fire Protection District."
(Here insert name)

Whenever an election is called pursuant to this Article on the question of increasing the tax limit for fire protection in any area, those voters in favor of such increase therein shall vote a ballot on which shall be printed, "In favor of tax increase for fire protection in ..... Fire Protection District." Those who are against increasing the tax limit for fire protection therein shall vote a ballot on which shall be printed, "Against tax increase for fire protection in ..... Fire Protection District." The failure of the election on the question of an increase in the tax for fire protection shall not be deemed to be the abolishment of the special tax for fire protection already in effect in said district. (1951, c. 820, s. 3; 1959, c. 805, s. 3.)

§ 69-25.4. Tax to be levied and used for furnishing fire protection.

If a majority of the qualified voters voting at said election vote in favor of levying and collecting a tax in said district, then the board of county commissioners is authorized and directed to levy and collect a tax in said district in such amount as it may deem necessary, not exceeding ten cents (10¢) on the one hundred dollars ($100.00) valuation of property in said district from year to year, and shall keep the same as a separate and special fund, to be used only for furnishing fire protection within said district, as provided in G.S. 69-25.5.

Provided, that if a majority of the qualified voters voting at such elections vote in favor of levying and collecting a tax in such district, or vote in favor of increasing the tax limit in said district, then the board of county commissioners is authorized and directed to levy and collect a tax in such districts in such amount as it may deem necessary, not exceeding fifteen cents (15¢) on the one hundred dollars ($100.00) valuation of property in said district from year to year. (1951, c. 820, s. 4; 1959, c. 805, s. 4.)

Local Modification. — Granville: 1957, c. 790, s. 2; Wake: 1955, c. 169, ss. 4-5.

§ 69-25.5. Methods of providing fire protection.

Upon the levy of such tax, the board of county commissioners shall, to the extent of the taxes collected hereunder, provide fire protection for the district —

(1) By contracting with any incorporated city or town, with any incorporated nonprofit volunteer or community fire department, or with the Department of Natural Resources and Community Development to furnish fire protection, or
(2) By furnishing fire protection itself if the county maintains an organized fire department, or
(3) By establishing a fire department within the district, or
(4) By utilizing any two or more of the above listed methods of furnishing fire protection. (1951, c. 820, s. 5; 1973, c. 1262, s. 86; 1977, c. 771, s. 4.)

Local Modification. — Bladen: 1977, c. 800.

CASE NOTES

Cited in Tilghman v. West of New Bern Volunteer Fire Dep't, 32 N.C. App. 767, 233 S.E.2d 598 (1977).

OPINIONS OF ATTORNEY GENERAL

Rural Fire District May Contract with Town Fire Department. — Rural fire department outside corporate limits of a town, once a fire district has been created, may contract with town fire department for fire protection. Opinion of Attorney General to Mr. James R. Sugg, Craven County Attorney, 40 N.C.A.G. 639 (1969).

§ 69-25.6. Municipal corporations empowered to make contracts.

Municipal corporations are hereby empowered to make contracts to carry out the purposes of this Article. (1951, c. 820, s. 6.)

§ 69-25.7. Administration of special fund; fire protection district commission.

The special fund provided by the tax herein authorized shall be administered to provide fire protection as provided in G.S. 69-25.5 by the board of county commissioners or the joint boards of county commissioners, if the area lies in more than one county, or by a fire protection district commission of three qualified voters of the area, to be known as .....
(Here insert name)
Fire Protection District Commission, said board to be appointed by the board of county commissioners or the joint boards of county commissioners, if the area lies in more than one county, for a term of two years, said commission to serve at the discretion of and under the supervision of the board of county commissioners or boards of county commissioners if the area lies in more than one county. (1951, c. 820, s. 7; 1953, c. 453, s. 2.)

§ 69-25.8. Authority, rights, privileges and immunities of counties, etc., performing services under Article.

Any county, municipal corporation or fire protection district performing any of the services authorized by this Article shall be subject to the same authority

and immunities as a county would enjoy in the operation of a county fire department within the county, or a municipal corporation would enjoy in the operation of a fire department within its corporate limits.

No liability shall be incurred by any municipal corporation on account of the absence from the city or town of any or all of its fire-fighting equipment or of members of its fire department by reason of performing services authorized by this Article.

Members of any county, municipal or fire protection district fire department shall have all of the immunities, privileges and rights, including coverage by workers' compensation insurance, when performing any of the functions authorized by this Article, as members of a county fire department would have in performing their duties in and for a county, or as members of a municipal fire department would have in performing their duties for and within the corporate limits of the municipal corporation. (1951, c. 820, s. 8; 1979, c. 714, s. 2.)

Cross References. — As to firemen as traffic officers, see § 20-114.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "workers' " for "workmen's" near the middle of the third paragraph.

§ 69-25.9. Procedure when area lies in more than one county.

In the event that an area petitioning for a tax election under this Article lies in more than one county said petition shall be submitted to the board of county commissioners of all the counties in which said area lies and election shall be called which shall be conducted by the joint boards of county commissioners and the cost of same shall be shared equally by all counties.

Upon passage, the tax herein provided shall be levied and collected by each county on all of the taxable property in its portion of the fire protection district; the tax collected shall be paid into a special fund and used for the purpose of providing fire protection for the district. (1953, c. 453, s. 3.)

Local Modification. — Forsyth and Davidson: 1979, c. 290.

§ 69-25.10. Means of abolishing tax district.

Upon a petition of fifteen percent (15%) of the resident freeholders of any special fire protection district or area, at intervals of not less than two years, the board of county commissioners or the joint boards of county commissioners, if the area lies in more than one county, shall call an election to abolish the special tax for fire protection for the area, the election to be called and conducted as provided in G.S. 69-25.2; if a majority of the registered voters vote to abolish said tax, the commissioners shall cease levy and collecting same and any unused funds of the district shall be turned over to and used by the county commissioners of the county collecting same as a part of its general fund, and any property or properties of the district or the proceeds thereof shall be distributed, used or disposed of equitably by the board of county commissioners or the boards of county commissioners. (1953, c. 453, s. 4.)

Local Modification. — Orange County: 1979, 2nd Sess., c. 1167; Wake: 1955, c. 169, s. 6.

§ 69-25.11. Changes in area of district.

After a fire protection district has been established under the provisions of this Article and fire protection commissioners have been appointed, changes in the area may be made as follows:

(1) The area of any fire protection district may be increased by including within the boundaries of the district any adjoining territory upon the application of the owner, or a two-thirds majority of the owners, of the territory to be included, the unanimous recommendation in writing of the fire protection commissioners of said district, the approval of a majority of the members of the board of directors of the corporation furnishing fire protection to the district, and the approval of the board or boards of county commissioners in the county or counties in which said fire protection district is located. However, before said fire protection district change is approved by the county commissioners, notice shall be given once a week for two successive calendar weeks in a newspaper having general circulation in said district, and notice shall be posted at the courthouse door in each county affected, and at three public places in the area to be included, said notices inviting interested citizens to appear at a designated meeting of said county commissioners, said notice to be published the first time and posted not less than fifteen days prior to the date fixed for hearing before the county commissioners.

(2) The area of any fire protection district may be decreased by removing therefrom any territory, upon the application of the owner or owners of the territory to be removed, the unanimous recommendation in writing of the fire protection commissioners of said district, the approval of a majority of the members of the board of directors of the corporation furnishing fire protection to the district, and the approval of the board or boards of county commissioners of the county or counties in which the district is located.

(3) In the case of adjoining fire districts having in effect the same rate of tax for fire protection, the board of county commissioners, upon petition of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected, shall have the authority to relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as to the board may seem proper. Upon receipt of such petition, the board of county commissioners shall set a date and time for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are altered or relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken.

(4) In the case of adjoining fire districts having in effect a different rate of tax for fire protection, the board of county commissioners, upon petition of two thirds of the owners of the territory involved and after receiving a favorable recommendation of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected, may transfer such territory from one district to another and therefore relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as the board may deem proper. Upon receipt of such petition, the board of county commissioners shall set a date and time

for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken. (1955, c. 1270; 1959, c. 805, s. 5; 1965, cc. 625, 1101.)

Local Modification. — Durham, as to subdivision (2): 1967, c. 791; Orange, as to subdivision (1): 1957, c. 302; 1965, c. 447.

§ 69-25.12. Privileges and taxes where territory added to district.

In case any territory is added to any fire protection district, from and after such addition, the taxpayers and other residents of said added territory shall have the same rights and privileges and the taxpayers shall pay taxes at the same rates as if said territory had originally been included in the said fire protection district. (1955, c. 1270.)

§ 69-25.13. Privileges and taxes where territory removed from district.

In case any territory is removed from any fire protection district from and after said removal, the taxpayers and other residents of said removed territory shall cease to be entitled to the rights and privileges vested in them by their inclusion in said fire protection district, and the taxpayers shall no longer be required to pay taxes upon their property within said district. (1955, c. 1270.)

§ 69-25.14. Contract with city or town to which all or part of district annexed concerning property of district and furnishing of fire protection.

Whenever all or any part of the area included within the territorial limits of a fire protection district is annexed to or becomes a part of a city or town, the governing body of such district may contract with the governing body of such city or town to give, grant or convey to such city or town, with or without consideration, in such manner and on such terms and conditions as the governing body of such district shall deem to be in the best interests of the inhabitants of the district, all or any part of its property, including, but without limitation, any fire-fighting equipment or facilities, and may provide in such contract for the furnishing of fire protection by the city or town or by the district. (1957, c. 526.)

§ 69-25.15. When district or portion thereof annexed by municipality furnishing fire protection.

When the whole or any portion of a fire protection district has been annexed by a municipality furnishing fire protection to its citizens, then such fire protection district or the portion thereof so annexed shall immediately thereupon cease to be a fire protection district or a portion of a fire protection district; and

such district or portion thereof so annexed shall no longer be subject to G.S. 69-25.4 authorizing the board of county commissioners to levy and collect a tax in such district for the purpose of furnishing fire protection therein.

Nothing herein shall be deemed to prevent the board of county commissioners from levying and collecting taxes for fire protection in the remaining portion of a fire protection district not annexed by a municipality, as aforesaid. (1957, c. 1219.)

§ 69-25.16. Exclusion from rural fire protection districts.

There shall be excluded from any rural fire protection district, and the provisions of this Article shall not apply to, an electric generating plant, together with associated land and facilities, which provides electricity to the public; provided that this section shall not apply to any rural fire protection district in existence on May 1, 1971. (1971, c. 297.)

§ 69-25.17. Validation of fire protection funds appropriated in providing rescue and ambulance services.

All prior appropriations and expenditures by any county board of commissioners of funds derived from taxes levied in rural fire protection districts, but used to provide rescue and ambulance services within said districts, are hereby approved, confirmed, validated, and declared to be proper, authorized, and legal. (1977, c. 131, s. 1.)

Article 4.

Hotels; Safety Provisions.

§ 69-26. Administration.

For the purpose of administering and enforcing the provisions of this Article, reference is made to Article 9 of Chapter 143 of the General Statutes of North Carolina, known as the Building Code Council and Building Code and all rights, powers, duties and authorities provided in said code shall apply and be in force in the administration and enforcement of this Article except as may be specifically provided hereunder; and such rules, regulations, standards, classifications or restrictions necessary in the administration and enforcement hereof and appeals therefrom and thereupon shall be made in accordance with said Article 9, Chapter 143 of the General Statutes of North Carolina. (1947, c. 1066.)

§ 69-27. Alarms, bells and gongs.

In any hotel or other building of like occupancy, there shall be provided a manually operated fire alarm, bell or gong system, approved by the Commissioner of Insurance, suitable to arouse all occupants of such buildings if necessary in case of fire or other emergency and capable of being operated by one operation at the main desk or at the telephone switchboard. Where practicable, the alarm system shall be connected with the city fire alarm system and shall be subject to periodic inspection as directed by the Commissioner of Insurance. (1947, c. 1066.)

CASE NOTES

Cited in Parker v. Duke Univ., 230 N.C. 656, 55 S.E.2d 189 (1949).

§ 69-28. Watchman service.

Every proprietor or keeper of any hotel or other building of like occupancy, two stories or more in height or designed to provide 20 or more rooms for sleeping accommodations shall provide or cause to be provided watchman service, utilizing a standard watch clock system in such manner so that each and every floor, corridor and accessible space, exclusive of rooms being occupied, shall be inspected at least once each hour between 10:00 P.M. and 6:00 A.M. Within the corporate limits of municipalities, this watchman service shall be satisfactory to the chief of the fire department and/or the Commissioner of Insurance. In every building subject to the provisions of this section, there shall be kept a record showing compliance therewith, and this record shall be subject to inspection by the Commissioner of Insurance or his deputies or the chief of the fire department. Provided that in lieu of a watchman service such hotel or other building of like occupancy may be provided with an automatic fire detection system approved by the Commissioner of Insurance and the North Carolina Building Code Council. (1947, c. 1066.)

§ 69-29. Automatic sprinklers.

(a) In any hotel or other building of like occupancy of Type III, IV, V, or VI construction as defined in the North Carolina Building Code more than three stories in height, there shall be provided in such building an automatic sprinkler system to be of such design, construction and scope as may meet the approval of the North Carolina Building Code Council, provided, however, that if in the opinion of the Commissioner of Insurance any such building three stories or less in height shall not have ample and adequate protected fire escapes or exits, then he may require the responsible party to provide or cause to be provided in such building an approved automatic sprinkler system of such design, construction and scope as may be approved by the North Carolina Building Code Council.

(b) In any hotel or other building of like occupancy of Type I or II construction, as defined in the North Carolina Building Code, more than four stories in height, there shall be provision that such rooms or areas in such building as are occupied or used for such purposes as linen rooms, storage rooms, carpenter shop, upholstery and furniture repair shop, kitchens, laundries, paint shop, mattress renovation shops, basements and other areas of special fire hazard shall be cut off in a manner approved by the Commissioner of Insurance or his deputy or the chief of fire department of the city in which the building is located, and, in the discretion of said Commissioner of Insurance or his deputy, the responsible party may be required to provide in such areas an approved automatic sprinkler system.

(c) In any hotel or other building of like occupancy of any type construction, wherein, under subsections (a) and (b) above, an automatic sprinkler system is required to be installed, if, in the opinion of the Commissioner of Insurance or his deputy, reasonable life safety may be insured, such Commissioner or his deputy may permit the installation of an approved automatic detection system in lieu of an automatic sprinkler system.

(d) A period of three years from the effective date of this Article shall be allowed for compliance with the provisions of this section.

(e) The obligation of this Article with respect to installation of alarms, bells or gongs and of automatic sprinklers or automatic fire detection systems shall rest upon the owner of the building as the lessor, or upon the operator thereof as the lessee, as the case may be, in accordance with the terms and provisions of the lease contract; and in the absence of any determining provision in such lease contract, or in the absence of any written lease, the obligation with respect to such installations shall be determined in accordance with the law of the State. (1947, c. 1066; 1969, c. 1063, s. 5.)

CASE NOTES

Legislative Intent. — There is a legislative intent to provide a complete and integrated regulatory scheme, including regulations as to the installation of sprinkler systems, in all buildings and structures, wherever situate in North Carolina, except as expressly exempted by statute. Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975).

The care with which individual sections of Chapter 69 spell out fire protection requirements for certain existing buildings demonstrates that the legislature intended to retain for itself the authority to mandate the equipment of existing buildings with fire protection devices. The authority which it granted the Building Code Council to establish technical standards for such devices was a much more limited one, calling for technical determinations in the field of the council's expertise rather than in the field of broad legislative policy. Carolinas-Virginias Ass'n of Bldg. Owners & Managers v. Ingram, 39 N.C. App. 688, 251 S.E.2d 910, cert. denied, 297 N.C. 299, 254 S.E.2d 925 (1979).

Regulatory Authority in Building Code Council. — The intent to vest controlling regulatory authority in the Building Code Council appears within the provisions of this section in that the legislature provided that the installation of the sprinkler systems required by statute must ultimately be of such design, condition and scope "as may be approved by the North Carolina Building Code Council." Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975).

Building Council Has Authority Only over Technical Standards for Sprinkler Systems. — By this section the legislature required automatic sprinkler systems to be provided in certain types of buildings; only the design, construction and scope of such systems were made subject to the approval of the building council. Carolinas-Virginias Ass'n of Bldg. Owners & Managers v. Ingram, 39 N.C. App. 688, 251 S.E.2d 910, cert. denied, 297 N.C. 299, 254 S.E.2d 925 (1979).

City Ordinance. — An interpretation of § 160A-174 to allow a city ordinance requiring sprinkler systems, thus empowering a city to ignore explicit statewide legislative enactments, would, in effect, permit a city to amend the North Carolina Building Code by the simple expedient of codifying a contested ordinance as a part of its fire prevention code and thereby to evade the clear requirements of § 143-138(e). Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975).

§ 69-30. Interior stairways and vertical openings.

(a) In new or existing hotel buildings all interior stairways used as exits, except stairways from a lobby to a mezzanine and open stairways permitted under subsection (b) below, shall be so enclosed as to provide a safe path of escape to the outside of the building without danger from fire or smoke, by means of enclosures and self-closing doors having at least one hour fire resistance rating, or otherwise enclosed in a manner approved by the Commissioner of Insurance or his deputy, and any vertical openings other than stairways through which fire and smoke may spread from story to story, shall be enclosed in a manner approved by the Commissioner of Insurance or his deputy.

(b) In existing hotel buildings of less than four stories in height, the enclosure of floor openings as provided in subsection (a) above may be waived by the Commissioner of Insurance or his deputy if life safety is not endangered thereby. (1947, c. 1066.)

§ 69-31. Fire extinguishers.

Every proprietor or keeper of any hotel or other building of like occupancy shall provide and keep in proper operating condition at least two two-and-one-half gallon extinguishers on each floor utilized for sleeping purposes or at least one two-and-one-half gallon fire extinguisher for each 15 rooms utilized for sleeping purposes on each floor, whichever is the greater number. It shall further be the duty of every proprietor or keeper of any hotel or other building of like occupancy to insure that all employees working in said building shall be trained in the use of fire extinguishers and other fire-fighting equipment located or installed in said building. (1947, c. 1066.)

§ 69-32. Alterations and decorations.

In all hotels or other buildings of like occupancy, located in a city which has a fire department, after September 1, 1947, no interior structural alteration, temporary or permanent, shall be made or no decorations or scenery shall be placed in the public spaces thereof without the prior approval and permit of the chief of the fire department of that city. (1947, c. 1066.)

§ 69-33. Careless or negligent setting of fires.

Any person who in any fashion or manner negligently or carelessly sets fire to any bedding, furniture, draperies, house or household furnishings or other equipment or appurtenances in or to any hotel or other building of like occupancy shall be guilty of a misdemeanor and shall be subject to a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or to imprisonment or to both fine and imprisonment in the discretion of the court. (1947, c. 1066.)

§ 69-34. Penalty for noncompliance.

Any owner, owners, proprietor or keeper of any hotel or other building of like occupancy who fails to comply with any of the foregoing provisions of this Article shall be guilty of a misdemeanor and punished by a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00). Each day of noncompliance herewith shall constitute a separate offense. (1947, c. 1066.)

§ 69-35. Unsafe buildings condemned.

The Commissioner of Insurance is empowered to inspect or cause to be inspected any hotel or other building of like occupancy and any such building which shall be found to be especially dangerous to life, because of its liability to fire or in case of fire by reason of bad condition of walls, overloaded floors, defective construction, insufficient means of egress, decay or other causes shall be held to be unsafe and the Commissioner of Insurance shall affix or cause to be affixed a notice of dangerous character of the structure in a conspicuous place on the exterior wall of such building. (1947, c. 1066.)

§ 69-36. Penalty for allowing unsafe building to remain occupied.

If any person shall continue to use or occupy or permit the use or occupancy of any hotel or other building of like occupancy which has been condemned as unsafe and dangerous to life by the Commissioner of Insurance or his authorized deputy, after having been notified in writing of the unsafe and dangerous

character of said building, and if such use and occupancy shall continue for a period as much as 30 days without remedying the conditions complained of to the satisfaction of the Commissioner of Insurance or the chief of the fire department of the city in which the building is located, such person shall be guilty of a misdemeanor and shall pay a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each day of such continued use and occupancy after the expiration of such 30-day period following such notice. Provided that such 30-day period may be enlarged (for good cause shown) by the Commissioner of Insurance or by the chief of the fire department of the city in which the building is located to such time as in his discretion he may find proper. (1947, c. 1066.)

§ 69-37. Penalty for removing notice from condemned building.

If any person, except by authority of the Insurance Commission, shall remove any condemnation notice which has been affixed to any hotel or other building of like occupancy, he shall be guilty of a misdemeanor and shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense. (1947, c. 1066.)

§ 69-38. Construction of Article.

Nothing in this Article shall be construed to limit powers granted to and duties imposed upon the chiefs of fire departments and building inspectors by Article 11, Chapter 160 of the General Statutes of North Carolina, but the powers granted in this Article shall be in addition thereto. (1947, c. 1066.)

Editor's Note. — Article 11, Chapter 160, referred to above, was repealed by Session Laws 1971, c. 698, s. 2. For present provisions as to cities and towns, see Chapter 160A.

Article 5.

Authority of Firemen.

§ 69-39. Authority of firemen; penalty for willful interference with firemen.

Members and employees of county, municipal corporation, fire protection district, sanitary district or privately incorporated fire departments shall have authority to do all acts reasonably necessary to extinguish fires and protect life and property from fire. Any person, including the owner of property which is burning, who shall willfully interfere in any manner with firemen engaged in the performance of their duties shall be guilty of a misdemeanor and punishable in the discretion of the court. (1965, c. 648.)

Article 6.

Mutual Aid between Fire Departments.

§ 69-40. Authority to send firemen and apparatus beyond territorial limits; privileges and immunities.

A county, municipal corporation, fire protection district, sanitary district or incorporated fire department shall have full authority to send, or to decline to

send, firemen and apparatus beyond the territorial limits which it normally serves.

When responding to a call and while working at a fire or other emergency outside the territorial limits which it normally serves, members and employees of county, municipal corporation, fire protection district, sanitary district and incorporated fire departments shall have all authority, rights, privileges and immunities including coverage under the Workmen's Compensation Laws, as they have when responding to a call and while working at a fire or other emergency inside the territorial limits normally served.

A county, municipal corporation, fire protection district, sanitary district, or incorporated fire department, in attending an emergency or answering a call outside the limits of the county, municipal corporation, fire protection district, sanitary district, or other area normally served, shall have all authority, rights, privileges, and immunities that it would have in attending an emergency or answering a call inside the territorial limits normally served. (1965, c. 707.)

Editor's Note. — The former Workmen's Compensation Act is now the Workers' Compensation Act. See §§ 97-1, 97-1.1.

Chapter 70.

Indian Antiquities.

Sec.
70-1. Private landowners urged to refrain from destruction.
70-2. Possessors of relics urged to commit them to custody of State agencies.
70-3. Preservation of relics on public lands.
70-4. Destruction or sale of relic from public lands made misdemeanor.

§ 70-1. Private landowners urged to refrain from destruction.

Private owners of lands containing Indian relics, artifacts, mounds or burial grounds are urged to refrain from the excavation or destruction thereof and to forbid such conduct by others, without the cooperation of the director of the State Museum and the Secretary of the Department of Cultural Resources or without the assistance or supervision of some person designated by either as qualified to make scientific archaeological explorations. (1935, c. 198, s. 1; 1973, c. 476, s. 48.)

§ 70-2. Possessors of relics urged to commit them to custody of State agencies.

All persons having in their possession collections of Indian relics, artifacts, and antiquities which are in danger of being lost, destroyed or scattered are urged to commit them to the custody of the North Carolina State Museum, the Department of Cultural Resources, or some other public agency or institution within the State which is qualified to preserve and exhibit them for their historic, scientific and educational value to the people of the State. (1935, c. 198, s. 2; 1973, c. 476, s. 48.)

§ 70-3. Preservation of relics on public lands.

It shall be the duty of any person in charge of any construction or excavation on any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, to report promptly to and preserve for the director of the State Museum or the Secretary of the Department of Cultural Resources any Indian relic, artifact, mound, or burial ground discovered in the course of such construction or excavation. (1935, c. 198, s. 3; 1973, c. 476, s. 48.)

§ 70-4. Destruction or sale of relic from public lands made misdemeanor.

Any person who shall excavate, disturb, remove, destroy or sell any Indian relic or artifact, or any of the contents of any mound or burial ground, on or from any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, except with the written approval of the director of the State Museum or the Secretary of the Department of Cultural Resources, shall be guilty of a misdemeanor. (1935, c. 198, s. 4; 1973, c. 476, s. 48.)

Chapter 71.

Indians.

§§ 71-1 to 71-20: Repealed by Session Laws 1977, c. 849, s. 1.

Cross References. — For present provisions as to the North Carolina State Commission of Indian Affairs, see §§ 143B-404 to 143B-411. For present statute partially covering the subject matter of repealed §§ 71-1 to 71-12, see §§ 71A-1 to 71A-6.

State Government Reorganization. — The Commission on Indian Affairs was transferred to the Department of Administration by a Type II transfer by Session Laws 1977, c. 849, s. 1, effective July 1, 1977.

Chapter 71A.

Indians.

Sec.
71A-1. Cherokee Indians of Robeson County; rights and privileges.
71A-2. Chapter not applicable to certain bands of Cherokees.
71A-3. Lumbee Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-4. Waccamaw Siouan Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-5. Haliwa Tribe of North Carolina; rights, privileges, immunities, obligations and duties.
71A-6. Coharie Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

§ 71A-1. Cherokee Indians of Robeson County; rights and privileges.

The persons residing in Robeson, Richmond, and Sampson counties, who have heretofore been known as "Croatan Indians" or "Indians of Robeson County," together with their descendants, shall hereafter be known and designated as "Cherokee Indians of Robeson County," and by that name shall be entitled to all the rights and privileges heretofore or hereafter conferred, by any law or laws of the State of North Carolina, upon the Indians heretofore known as the "Croatan Indians" or "Indians of Robeson County." In all laws enacted by the General Assembly of North Carolina relating to said Indians subsequent to the enactment of said Chapter 51 of the Laws of 1885, the words "Croatan Indians" and "Indians of Robeson County" are stricken out and the words "Cherokee Indians of Robeson County" inserted in lieu thereof. (1885, c. 51, s. 2; Rev., s. 4168; 1911, c. 215; P. L. 1911, c. 263; 1913, c. 123; C. S., s. 6257; 1977, 2nd Sess., c. 1193, s. 1.)

Cross References. — As to the North Carolina State Commission of Indian Affairs, see §§ 143B-404 to 143B-411.

§ 71A-2. Chapter not applicable to certain bands of Cherokees.

Neither this Chapter nor any other act relating to said "Cherokee Indians of Robeson County" shall be construed so as to impose on said Indians any powers, privileges, rights, or immunities, or any limitations on their power to contract, heretofore enacted with reference to the Eastern Band of Cherokee Indians residing in Cherokee, Graham, Jackson, Swain and other adjoining counties in North Carolina, or any other band or tribe of Cherokee Indians other than those now residing, or who have since the Revolutionary War resided, in Robeson County, nor shall said "Cherokee Indians of Robeson County," as herein designated, be subject to the limitations provided in the Chapter Contracts Requiring Writing, G.S. 22-3, entitled Contracts with Cherokee Indians. (1947, c. 978, s. 1; 1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-3. Lumbee Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now residing in Robeson and adjoining counties of North Carolina, originally found by the first white settlers on the Lumbee River in Robeson County, and claiming joint descent from remnants of early American Colonists and certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after April 20, 1953, be designated and officially recognized as Lumbee Tribe of North Carolina and shall continue to enjoy all rights, privileges and immunities enjoyed by them as citizens of the State as now provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1953, c. 874; 1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-4. Waccamaw Siouan Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now living in Bladen and Columbus and adjoining counties of North Carolina, originally found by the first white settlers in the region of the Cape Fear River, Lake Waccamaw, and the Waccamaw Indians, a Siouan Tribe which inhabited the areas surrounding the Waccamaw, Pee Dee, and Lumber Rivers in North and South Carolina, shall, from and after July 20, 1971, be designated and officially recognized as the Waccamaw Siouan Tribe of North Carolina and shall continue to enjoy all their rights, privileges and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-5. Haliwa Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now residing in Halifax, Warren and adjoining counties of North Carolina, originally found by the first permanent white settlers on the Roanoke River in Halifax and Warren Counties, and claiming descent from certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after April 15, 1965, be designated and officially recognized as the Haliwa Tribe of North Carolina, and they shall continue to enjoy all their rights, privileges and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1965, c. 254; 1977, 2nd Sess., c. 1193, s. 1.)

§ 71A-6. Coharie Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

The Indians now living in Harnett and Sampson and adjoining counties of North Carolina, originally found by the first white settlers on the Coharie River in Sampson County, and claiming descent from certain tribes of Indians originally inhabiting the coastal regions of North Carolina, shall, from and after July 20, 1971, be designated and officially recognized as the Coharie Tribe of North Carolina and shall continue to enjoy all their rights, privileges and immunities as citizens of the State as now or hereafter provided by law, and shall continue to be subject to all the obligations and duties of citizens under the law. (1977, 2nd Sess., c. 1193, s. 1.)

Chapter 72.

Inns, Hotels and Restaurants.

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Innkeepers.

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Article 1.

Innkeepers.

§ 72-1. Must furnish accommodations; contracts for termination valid.

(a) Every innkeeper shall at all times provide suitable lodging accommodations for persons accepted as guests in his inn or hotel.

(b) A written statement setting forth the time period during which a guest may occupy an assigned room, signed or initialed by the guest, shall be deemed a valid contract, and at the expiration of such time period the lodger may be restrained from entering and any property of the guest may be removed by the innkeeper without liability, except for damages to or loss of such property

attributable to its removal. (1903, c. 563; Rev., s. 1909; C. S., s. 2249; 1979, c. 532.)

Cross References. — As to possessory liens on personal property, see §§ 44A-1 to 44A-6. As to obtaining entertainment at hotels and boardinghouses without paying therefor, see § 14-110. As to fire protection, see §§ 69-26 to 69-38.

Effect of Amendments. — The 1979 amendment rewrote this section, which formerly read: "Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel."

CASE NOTES

This section does no more than state the common-law duty of an innkeeper. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

Duty to Protect from Unreasonable Risk of Physical Harm. — The proprietor of an inn or motel, although not an insurer of the safety of his guests, even his infant guests, is under an affirmative duty to protect his guests from an unreasonable risk of physical harm. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

The duty of an innkeeper to a guest who is an infant is a greater duty than that owing to his adult guests and he is bound to consider whether his premises, although safe enough for an adult, present any reasonably avoidable dangers to his infant guest. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

When a child of tender years is accepted as a guest, the inexperience and the natural tendencies of such a child become a part of the situation and must be considered by the innkeeper. This does not mean that the innkeeper becomes the nurse of the child, or assumes its control when accompanied by its parents, but only that he is bound to consider whether his premises, though safe enough for an adult, present any reasonably avoidable dangers to the child guest. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

Duty to Warn Infant Guests of Hidden Perils. — An innkeeper is required to give warning of hidden perils. His duty to give such warning is increased when infant guests are present. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

Negligence with Respect to Glass Panel. — An innkeeper, by failure to warn an infant guest of the hidden danger of a glass panel or to place thereon such markings as would indicate the presence of the glass to infant or failure to construct guards around the panels, was negligent. Waugh v. Duke Corp., 248 F. Supp. 626 (M.D.N.C. 1966).

What Constitutes Inn or Hotel. — A public inn or hotel is a public house of entertainment for all who choose to visit it, and where all transient persons who may choose to come will be received as guests, for compensation; and it does not lose its character as such by reason of its being located at a summer resort or a watering place, or by taking some as boarders by a special contract or for a definite time. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Sleeping Car Not an Inn. — Though a "sleeping car" is a place for the reception of travelers, it is not an "inn." Garrett v. Southern Ry., 172 N.C. 737, 90 S.E. 903 (1916).

Boardinghouse. — A boardinghouse is as well known and as distinguishable from every other house in every city, village, and the country as an inn or tavern. It is a house where the business of keeping boarders generally is carried on, and which is held out by the owner or keeper as a place where boarders are kept. State v. McRae, 170 N.C. 712, 86 S.E. 1039 (1915).

Distinction between Inn and Boardinghouse. — It is the publicly holding a place out as one where all transient persons who may choose to come will be received as guests for compensation that is the principal distinction between a hotel and a boardinghouse. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

What Constitutes Boardinghouse Keeper. — The keeper of a boardinghouse is one who reserves the right to select and choose his patrons and take them in only by special arrangement, and usually for a definite time. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Same — Not an Innkeeper. — One who entertains strangers only occasionally, although he receives compensation for it, is not an innkeeper. State v. Mathews, 19 N.C. 424 (1837).

Boarder and Guest Distinguished. — In 16 A. and E. Enc. (2d Ed.), it is said: "The essential difference between a boarder and a guest at an inn lies in the character in which the party comes — that is, whether he is a transient person or not, and, accordingly, one who stops at an inn as a transient or a guest, with all the rights, privileges, and liberties incident to that station. On the other hand, one who seeks accommodation with a view to permanency, as to make the place his home for the time being, is not a guest,

but a boarder. The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest as long as he remains in the transitory condition of that relation." Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

When Guest Can Be Ejected. — Guests of a hotel, and travelers or other persons entering it with the bona fide intent of becoming guests, cannot be lawfully prevented from going in, or be put out, by force, after entrance, provided they are able to pay the charges and tender the money necessary for that purpose, if requested by the landlord, unless they be persons of bad or suspicious character, or of vulgar habits, or so objectionable to the patrons of the house, on account of the race to which they belong, that it would injure the business to admit them to all portions of the house, or unless they attempt to take advantage of the freedom of the hotel to injure the landlord's chances of profit derived either from his inn or any other business incidental to or connected with its management and constituting a part of the provision for the wants or pleasure of his patrons. State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890).

Same — Breach of Rules. — A guest's right of occupancy of a hotel is dependent upon proper behavior and decent conduct and obedience to reasonable rules and regulations of the proprietors; for a breach of such implied conditions he may be summarily removed. Hutchins v. Town of Durham, 118 N.C. 457, 24 S.E. 723 (1896).

Remedy of Ejected Guest. — Guests at a hotel cannot maintain ejectment if evicted, but can only sue for damages if wrongfully turned out. Hutchins v. Town of Durham, 118 N.C. 457, 24 S.E. 723 (1896).

One Not a Guest Is a Licensee. — One who is in a hotel for social purposes, at the invitation of one of its guests, is a licensee, at the will of its management, and may be forbidden the premises for improper conduct. Money v. Travelers Hotel Co., 174 N.C. 508, 93 S.E. 964 (1917).

Same — Can Be Expelled. — When persons, unobjectionable on account of character or race, enter a hotel not as guests, but intent on pleasure or profit to be derived from intercourse with its inmates, they are there not of right, but under an implied license that the landlord may revoke at any time, because barring the limitation imposed by holding out inducements to the public to seek accommodation at his inn, the proprietor occupies it as his dwelling house, from which he may expel all who have not acquired rights growing out of the relation of guests, and must drive out all who, by their bad conduct, create a nuisance and prove an annoyance to his patrons. State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890).

Force Allowable in Expelling Licensee. — The board rule laid down by Wharton (1 Cr. L., sec. 625), is that the proprietor of a public house has a right to request a person who visits it, not as a guest or on business with guest to depart, and if he refuse, the innkeeper has a right to lay his hands gently on him and lead him out, and if resistance be made, to employ sufficient force to put him out. For so doing, he can justify his conduct on a prosecution for assault and battery. State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890).

Other Rights of Innkeeper. — An innkeeper has, unquestionably, the right to establish a newsstand or a barbershop in his hotel, and to exclude persons who come for the purpose of vending newspapers or books, or of soliciting employment as barbers, and, in order to render his business more lucrative, he may establish a laundry or a livery stable in connection with his hotel, or an innkeeper may contract with the proprietor of a livery stable in the vicinity to secure for the latter, as far as he legitimately can, the patronage of his guests in that line for a per centum of the proceeds or profits derived by such owner of vehicles and horses from dealing with the patrons of the public house. After concluding such contracts, the innkeeper may make, and, after personal notice to violators, enforce a rule excluding from his hotel the agents and representatives of other livery stables who enter to solicit the patronage of his guests. State v. Steele, 106 N.C. 766, 11 S.E. 478 (1890).

§ 72-2. Liability for loss of baggage.

Innkeepers shall not be liable for loss, damage or destruction of the baggage or property of their guests except in case such loss, damage, or destruction results from the failure of the innkeeper to exercise ordinary, proper and reasonable care in the custody of such baggage and property; and in case of such loss, damage or destruction resulting from the negligence and want of care of the said innkeeper he shall be liable to the owner of the said baggage and property to an amount not exceeding one hundred dollars. Any guest may, however, at any time before a loss, damage or destruction of his property, notify the innkeeper in writing that his property exceeds in value the said sum of one hundred dollars ($100.00), and shall upon demand of the innkeeper furnish

him a list or schedule of the same, with the value thereof, in which case the innkeeper shall be liable for the loss, damage or destruction of said property because of any negligence on his part for the full value of the same. Proof of the loss of any such baggage, except in case of damage or destruction by fire, shall be prima facie evidence of the negligence of said hotel or innkeeper. (1903, c. 563, s. 2; Rev., s. 1910; C. S., s. 2250.)

CASE NOTES

Boarder and Guest Distinguished. — See note to § 72-1.

Liability Extends to Guest. — When one is received at a public inn or hotel and entertained as a guest, without any prearrangement as to terms or time, but on the implied invitation held out to the public generally, he is a transient only — a guest and not a boarder — and entitled to recover of the defendant innkeeper as such. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Same — Common-Law Liability. — The decisions of this State are to the effect that, in the absence of statutory regulation, the keeper of a public inn, or hotel, which is the modern and more frequently used term, is responsible to his guest for the safety of the latter's goods, chattels, and money, when placed infra hospitum and which he has with him for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause except the act of God or the public enemy, or the fault of the guest himself or his agents or servants. Quinton v. Courtney, 2 N.C. 40 (1794); Neal v. Wilcox, 49 N.C. 146 (1856); Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Ordinary Care Now Required. — Even at a public inn or hotel, one who holds the position of a regular boarder or lodger can only hold the proprietor to the exercise of ordinary care on the part of himself and his employees. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Failure to comply with § 72-6 renders innkeeper liable as at common law. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

Liability for Personal Injuries. — The innkeeper is not insurer of his guest's personal safety, but his liability does extend to injuries received by the guest from being placed in an unsafe room. This is a matter peculiarly within the innkeeper's knowledge and entirely beyond the control of the guest. In that particular he is peculiarly within the innkeeper's power and protection. Patrick v. Springs, 154 N.C. 270, 70 S.E. 395 (1911).

Same — Negligence of Guest. — The guest must use reasonable care on his part to protect himself, and if he is himself negligent and could have avoided the injury by due care, he cannot recover. Patrick v. Springs, 154 N.C. 270, 70 S.E. 395 (1911).

§ 72-3. Safekeeping of valuables.

It is the duty of innkeepers, upon the request of any guest, to receive from said guest and safely keep money, jewelry and valuables to an amount not exceeding five hundred dollars ($500.00); and no innkeeper shall be required to receive and take care of any money, jewelry or other valuables to a greater amount than five hundred dollars ($500.00): Provided, the receipt given by said innkeeper to said guest shall have plainly printed upon it a copy of this section. No innkeeper shall be liable for the loss, damage or destruction of any money or jewels not so deposited. (1903, c. 563, s. 3; Rev., s. 1911; C. S., s. 2251.)

§ 72-4. Loss by fire.

No innkeeper shall be liable for loss, damage or destruction of any baggage or property caused by fire not resulting from the negligence of the innkeeper or by any other force over which the innkeeper had no control. Nothing herein contained shall enlarge the limit of the amount to which the innkeeper shall be liable as provided in preceding sections. (1903, c. 563, s. 4; Rev., s. 1912; C. S., s. 2252.)

Cross References. — As to fire protection, see §§ 69-26 to 69-38.

§ 72-5. Negligence of guest.

Any innkeeper against whom claim is made for loss sustained by a guest may show that such loss resulted from the negligence of such guest or of his failure to comply with the reasonable and proper regulations of the inn. (1903, c. 563, s. 7; Rev., s. 1914; C. S., s. 2253.)

Cross References. — As to liability for personal injuries and effect of negligence of guest, see note to § 72-2. As to possessory lien on personal property, see §§ 44A-1 to 44A-6.

§ 72-6. Copies of this Article to be posted.

Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this Article and of all regulations relating to the conduct of guests. This Chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted. (1903, c. 563, ss. 5, 6; Rev., s. 1913; C. S., s. 2254.)

CASE NOTES

Effect of Noncompliance with Section. — Where the provision of this section is not complied with the principle of the common law obtains and the keeper is liable as at common law. Holstein v. Phillips & Sims, 146 N.C. 366, 59 S.E. 1037 (1907).

§ 72-7. Admittance of dogs to bedrooms.

It shall be unlawful for any innkeeper or guest owning, keeping, or who has in his care a dog or dogs, to permit such a dog or dogs admittance to any bedroom or rooms used for sleeping purposes in any inn or hotel.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall pay a fine not to exceed fifty dollars ($50.00) or be imprisoned not more than 30 days. (1927, c. 67.)

Cross References. — As to special provisions for guide dogs, see §§ 168-4 and 168-7.

Article 2.

Sanitary Inspection and Conduct.

§§ 72-8 to 72-29: Repealed by Session Laws 1945, c. 829, s. 4.

Cross References. — For sanitation of establishments providing food and lodging, see §§ 72-46 to 72-49.

Article 3.

Immoral Practices of Guests of Hotels and Lodging Houses.

§ 72-30. Registration to be in true name; addresses; peace officers.

No person shall write, or cause to be written, or if in charge of a register knowingly permit to be written, in any register in any lodging house or hotel any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein. Any person occupying any room or rooms in any lodging house or hotel shall register or cause himself to be registered where registration is required by such lodging house or hotel. Any person registering or causing himself to be registered at any lodging house or hotel, shall write, or cause to be written, in the register of such lodging house or hotel the correct address of the person registering, or causing himself to be registered. Any person violating any provision of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding two hundred dollars ($200.00). This section shall not apply to any peace officer of this State who shall privately give his true name to the clerk or proprietor of such hotel or lodging house. (1921, c. 111; C. S., s. 2283(v).)

Article 4.

Licensing and Regulation of Tourist Camps and Homes, Cabin Camps, Roadhouses and Public Dance Halls.

§ 72-31. License required.

Every person, firm or corporation engaged in the business of operating outside the corporate limits of any city or town in this State a tourist camp, cabin camp, tourist home, roadhouse, public dance hall, or any other similar establishment by whatever name called, where travelers, transient guests, or other persons are or may be lodged for pay or compensation, shall, before engaging in such business, apply for and obtain from the board of county commissioners of the county in which such business is to be carried on a license for the privilege of engaging in such business and shall pay for such license an annual tax in the amount of two dollars ($2.00). (1939, c. 188, s. 1.)

Legal Periodicals. — For comment on this Article, see 17 N.C.L. Rev. 335.

CASE NOTES

What Must Be Shown to Convict of Operating a "Roadhouse". — This Article is regulatory, involving police power as well as taxing power, and the words, "tourist camp, cabin camp, tourist home, roadhouse, public dance hall, or other similar establishment," in this section are qualified by the words "where travelers, transient guests, or other persons are or may be lodged for pay," so that to convict a person operating a "roadhouse" and impose the penalties of § 72-43, it must be shown that such person lodged or offered to lodge transient guests. State v. Campbell, 223 N.C. 828, 28 S.E.2d 499 (1944).

§ 72-32. Exemptions.

This Article shall not apply to hotels and inns within the definition of G.S. 72-9, nor to persons who incidental to their principal business or occupation accept from time to time seasonal boarders in their private residences: Provided, however, this shall not be construed to exempt from the provisions of this Article residences maintained in connection with a store or other establishment operated for the sale of articles of merchandise. (1939, c. 188, s. 2.)

Editor's Note. — Section 72-9, referred to in this section, has been repealed. It defined "hotel" as "any inn or public lodginghouse where transient guests are lodged for pay." It also defined the term "transient guest" as "one who puts up for less than one week at a time at such hotel."

§ 72-33. Application to county commissioners for license.

Every person, firm or corporation making application for license to engage in the business described in G.S. 72-31 shall make application to the board of county commissioners in the county in which such business is to be engaged in and the application shall contain:

(1) The name and residence of the applicant and the length of the residence within the State of North Carolina.

(2) The address and place for which such license is desired.

(3) The name of the owner of the premises upon which the business licensed is to be carried on.

(4) That the applicant intends to carry on the business authorized by the license for himself or under his immediate supervision and direction.

(5) That such applicant is of good moral character and has never been convicted of a felony involving moral turpitude, or adjudged guilty of violating either the State or federal prohibition laws within the last two years prior to the filing of the application. (1939, c. 188, s. 3.)

§ 72-34. Verification of application; disqualifications for license.

The application prescribed in G.S. 72-33 must be verified by the affidavit of the petitioner made before a notary public or other person duly authorized by law to administer oaths. If it appears from the statement of the applicant, or otherwise, that such applicant has been convicted of a felony involving moral turpitude or adjudged guilty of violating either State or federal prohibition laws within the last two years prior to the filing of the application, or within two years from the completion of sentence thereon, the license herein provided for shall not be granted, unless it shall appear to the satisfaction of the board of county commissioners that the licensed premises will be operated in a lawful manner; in which case they may, in their discretion, issue such license. Before any such license shall be issued, the governing body of the county shall be satisfied that the statements required by G.S. 72-33 are true. Every establishment named in this Article shall be subject to inspection by the Department of Human Resources and the county health authorities in the county in which such business is carried on. (1939, c. 188, s. 4; 1973, c. 476, s. 128.)

§ 72-35. List of employees furnished to sheriff upon request.

At any time upon request of the sheriff of the county in which such business is carried on, the operator of every establishment named in this Article shall furnish said sheriff with a list of all employees who are employed by him in connection with said business; and, in every instance when such an operator goes out of business or there is a change of ownership or management thereof, such operator shall immediately file with the clerk of the board of county commissioners of the county in which such business is carried on a notice to this effect, giving the name and address of the purchaser or the new owner or manager thereof. (1939, c. 188, s. 5.)

§ 72-36. Registration of guest.

Any person or persons occupying any room or rooms in a tourist camp, cabin camp, tourist home, roadhouse, or any other similar establishment by whatever name called, shall register or cause himself to be registered before occupying the same, and if traveling by motor vehicle shall register at the same time the automobile license tag of such motor vehicle and the name of the manufacturer of such motor vehicle; and no person shall write or cause to be written, or, if in charge of a register, knowingly permit to be written in any register in any of the establishments herein named, any other or different name or designation than the true name or names in ordinary use of the person registering or causing himself to be registered therein, or the true name of the manufacturer of such motor vehicle or the correct license plate and number thereof. Every person to whom a license is issued under the provisions of this Article shall provide a permanent register for the purposes set forth herein. (1939, c. 188, s. 6.)

CASE NOTES

Cited in State v. Campbell, 223 N.C. 828, 28 S.E.2d 499 (1944); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

§ 72-37. False registration and use for immoral purposes made misdemeanor.

Any man or woman found occupying the same room in any establishment within the meaning of this Article for any immoral purpose, or any man or woman falsely registering as or otherwise representing themselves to be husband and wife in any such establishment shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 7.)

CASE NOTES

Cited in State v. Campbell, 223 N.C. 828, 28 S.E.2d 499 (1944).

§ 72-38. Operator knowingly permitting violations, guilty of misdemeanor.

Any person being the operator or keeper of any establishment within the meaning of this Article who shall knowingly permit any man or woman to occupy any room in any establishment within the meaning of this Article for any immoral purposes, or who shall knowingly permit any man or woman to falsely register as husband and wife in such an establishment, shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 8.)

CASE NOTES

Tourist Camp as Nuisance. — Under former § 19-2 the operation of a tourist camp in a disorderly manner may be enjoined or it may be abated as a nuisance against public morals. State ex rel. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938). See now §§ 19-2.1 to 19-2.5.

§ 72-39: Repealed by Session Laws 1975, c. 402.

CASE NOTES

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

§ 72-40. Revocation of operator's license.

In addition to the penalty herein prescribed for a violation of this Article, the court, before whom such person is tried and where a conviction is had, shall have the power to revoke the license to operate the establishment or establishments licensed under this Article, and whenever any person, firm or corporation has been so convicted, the court, if it shall appear that said premises were being operated in violation of the law with the knowledge, consent or approval of the owner thereof, shall have the authority to prohibit the issuance of any similar license for said premises to any person for a term of six months after the revocation of said license. (1939, c. 188, s. 10.)

§ 72-41. Tax imposed declared additional.

The tax imposed by this Article shall be in addition to all other licenses and taxes levied by law upon the business taxed hereunder. (1939, c. 188, s. 11.)

§ 72-42. Time of payment of license; expiration date.

Licenses issued under this Article shall be due and payable in advance annually on or before the first day of June of each year, or at the date of engaging in such business, and shall expire on the thirty-first day of May of each year, and shall be for the full amount of the tax prescribed, regardless of the date such business is begun. Upon the expiration of the license herein required, it shall be unlawful for any person, firm or corporation to continue such business until a new license is applied for and obtained for the privilege of engaging in such business, as in this Article required. (1939, c. 188, s. 12.)

§ 72-43. Operation without license made misdemeanor.

It shall be unlawful for any person, firm or corporation to engage in such business without first obtaining a license therefor. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 13.)

Cross References. — See note to § 72-31.

§ 72-44. Violations of Article made misdemeanor.

Unless another penalty is in this Article or by the laws of this State provided, any person violating any of the provisions of this Article shall, upon conviction thereof, be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1939, c. 188, s. 14.)

§ 72-45. Application of Article to municipalities.

The governing body of any city or town shall have the authority to make any or all of the provisions of this Article applicable to any business as defined herein which may be located in the limits of any such city or town. (1939, c. 188, s. 15.)

Local Modification. — Bladen, Caswell, Graham, Hyde, Moore: 1939, c. 188, s. 18; Guilford: 1939, c. 188, s. 16.

Article 5.

Sanitation of Establishments Providing Food and Lodging.

§ 72-46. Department of Human Resources and Commission for Health Services to regulate sanitary conditions of hotels, cafes, etc.

For the better protection of the public health, the State Commission for Health Services is hereby authorized, empowered and directed to prepare rules and regulations governing the sanitation of any hotel, cafe, restaurant, tourist home, motel, summer camp, food or drink stand, sandwich manufacturing establishment, and all other establishments where food or drink is prepared, handled, and served for pay, or where lodging accommodations are provided. The Department of Human Resources is hereby authorized and empowered to enforce these rules and regulations. The Commission for Health Services is also authorized, empowered and directed to

(1) Require that a permit be obtained from said Department before such places begin operation, said permit to be issued only when the establishment complies with the rules and regulations authorized hereunder, and

(2) To prepare a system of grading all such places as Grade A, Grade B, and Grade C.

No establishment shall operate which does not receive the permit required by this section and the minimum grade of C in accordance with the rules and regulations of the Commission for Health Services. The rules and regulations shall cover such matters as the cleanliness of floors, walls, ceilings, storage

spaces, utensils, and other facilities; adequacy of lighting, ventilation, water, lavatory facilities, food protection facilities, bactericidal treatment of eating and drinking utensils, and waste disposal; methods of food preparation, handling, storage, and serving; health of employees; and such other items and facilities as are necessary in the interest of the public health. (1941, c. 309, s. 1; 1955, c. 1030, s. 1; 1957, c. 1214, s. 1; 1973, c. 476, s. 128.)

OPINIONS OF ATTORNEY GENERAL

Distribution Programs for Elderly Citizens Are Subject to Inspection and Grading under This Article. — See opinion of Attorney General to Mr. L. Patten Mason, 43 N.C.A.G. 406 (1974).

Commission for Health Services Regulations. — Commission for Health Services may prepare more stringent regulations hereunder than those of Environmental Management Commission under §§ 130-160 and 143-215. Opinion of Attorney General to Stacy Covil, Sanitary Engineering Section, Division of Health Services, Department of Human Resources, 44 N.C.A.G. 18 (1974).

§ 72-47. Inspections; report and grade card.

The officers, sanitarians or agents of the Department of Human Resources are hereby empowered and authorized to enter any hotel, cafe, restaurant, tourist home, motel, summer camp, food or drink stand, sandwich manufacturing establishment, and all other establishments where food or drink is prepared, handled and/or served for pay, or where lodging accommodations are provided, for the purpose of making inspections, and it is hereby made the duty of every person responsible for the management or control of such hotel, cafe, restaurant, tourist home, motel, summer camp, food or drink stand, sandwich manufacturing establishment or other establishment to afford free access to every part of such establishment, and to render all aid and assistance necessary to enable the sanitarians or agents of the Department of Human Resources to make a full, thorough and complete examination thereof, but the privacy of no person shall be violated without his or her consent. It shall be the duty of the sanitarian or agent of the Department of Human Resources to leave with the management, or person in charge at the time of the inspection, a copy of his inspection and a grade card showing the grade of such place, and it shall be the duty of the management, or person in charge to post said card in a conspicuous place designated by the sanitarian where it may be readily observed by the public. Such grade card shall not be removed by anyone, except an authorized sanitarian or agent of the Department of Human Resources, or upon his instruction. (1941, c. 309, s. 2; 1955, c. 1030, s. 2; 1973, c. 476, s. 128.)

CASE NOTES

Inspection Report Depriving Restaurant Operator of Freedom of Choice. — An inspection report, promulgated under this article, making provisions for toilet facilities "for each sex and race" was held sufficient to constitute State action depriving the operator of a restaurant of a freedom of choice with respect to the patrons he could serve. State v. Fox, 263 N.C. 233, 139 S.E.2d 233 (1964) (reversing trespass convictions of "sit-in" demonstrators).

In accordance with mandate of the Supreme Court of the United States conviction of defendant of trespass in willfully refusing to leave the restaurant after being requested to do so by the management was reversed on the ground that the inspection form of the State Board of Health providing for toilet facilities separate for each race constituted State action depriving the operator of the restaurant of freedom of choice as to patrons he could serve. State v. Fox, 263 N.C. 233, 139 S.E.2d 233 (1964).

§ 72-48. Violation of Article a misdemeanor.

Any owner, manager, agent, or person in charge of a hotel, cafe, restaurant, tourist home, motel, summer camp, food or drink stand, sandwich manufacturing establishment, or any other establishment where food or drink is prepared, handled and/or served for pay, or where lodging accommodations are provided, or any other person who shall willfully obstruct, hinder or interfere with a sanitarian, agent, or officer of the Department of Human Resources in the proper discharge of his duty, or who shall be found guilty of violating any of the other provisions of this Article, or any of the rules and regulations that may be provided under this Article, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten dollars ($10.00), nor more than fifty dollars ($50.00), or imprisoned for not more than 30 days, and each day that he shall fail to comply with this Article, or operate a place with a rating of less than grade C shall be a separate offense. (1941, c. 309, s. 3; 1955, c. 1030, s. 3; 1973, c. 476, s. 128.)

Legal Periodicals. — For comment as to warrants required for administrative health inspections, see 4 Wake Forest Intra. L. Rev. 117 (1968).

§ 72-48.1. Injunctive relief against continued violation, etc.

If any person shall violate or threaten to violate the provisions of this Article or any rules and regulations adopted pursuant thereto, or if any person shall hinder or interfere with the proper performance of duty of a sanitarian, agent or officer of the Department of Human Resources or of any local board of health, the Secretary of Human Resources or local health director may institute an action in the superior court of the county in which the violation, threatened violation, hindrance or interference occurred for injunctive relief against such continued violation, threatened violation, hindrance or interference, irrespective of all other remedies at law, and upon the institution of such an action, the procedure shall be in accordance with the provisions of Article 37 of Chapter 1 of the General Statutes. (1957, c. 1214, s. 2; 1973, c. 476, s. 128; 1979, c. 432.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "and such violation, if continued, or such threatened violation, if committed, is or may be dangerous to the public health" following "adopted pursuant thereto" and deleted "and such hindrance or interference is or may be dangerous to the public health" following "board of health" near the beginning of the section.

§ 72-49. Private homes; temporary food and drink stands operated by church, etc.; boardinghouses, private clubs, picnics, camp meetings, etc.

This Article shall not apply to private homes providing food and/or lodging to permanent house guests. The term "permanent house guests" shall mean guests receiving food and/or lodging accommodations for periods of a week or longer and who pay for such accommodations and the visitors of said guests. Provided further that this Article shall not apply to food or drink stands operated by church, civic or charitable organizations for a period of one week or less. Provided, food or drink stands operated by church, civic or charitable organizations for a period of one week or less shall meet minimum sanitation requirements but shall not be subject to grading. Provided further, that this Article shall not apply to boardinghouses having regular boarders, private clubs, picnics, camp meetings, reunions, box suppers, field trials, occasional

fund-raising suppers and similar gatherings conducted from time to time by church, civic or charitable organizations. (1955, c. 1030, s. 4; 1957, c. 1214, s. 3.)

OPINIONS OF ATTORNEY GENERAL

Private Clubs — Defined. — Private clubs are establishments which maintain selective membership, are operated by the membership and are not profit oriented. Opinion of Attorney General to Mr. John Andrews, Head, Sanitation Branch, Division of Health Services, 44 N.C.A.G. 182 (1974).

Article 6.

Advertisements by Motor Courts, Tourist Camps, etc.

§ 72-50. Rate advertisements to contain additional data.

It shall be unlawful for any person, firm, or corporation, who owns, operates or who has control of the operation of any motor court, tourist court, tourist camp, or guest house to publish or cause to be displayed in writing, or by any other means, any advertisement which includes a statement relating to the rates or charges obtaining at such motor court, tourist court, tourist camp, or guest house, unless such advertisement shall, with equal prominence, contain additional data relating to such room rates, in the following particulars:

(1) Whether the rate advertised is for a single or multiple occupancy of the room;

(2) The number of rooms or units in each price level where such advertisement indicates varying rates; and

(3) The dates or period of time during which such advertised rates are available. (1955, c. 1200, s. 1.)

§ 72-51. Violation a misdemeanor.

Any person, firm, or corporation, violating the provisions of this Article shall be guilty of a misdemeanor and shall, upon conviction, be punished as provided by law in the case of misdemeanors. (1955, c. 1200, s. 2.)

§ 72-52. Article declared supplemental.

This Article is declared to be supplemental in nature and shall not be construed to repeal any existing law relating to the operation of any motor court, tourist court, tourist camp, or guest house. (1955, c. 1200, s. 3.)

Chapter 73.

Mills.

Article 1.

Public Mills.

Sec.

73-1. Public mills defined.
73-2. Miller to grind according to turn; tolls regulated.
73-3. Measures to be kept; tolls by weight or measure.
73-4. Keeping false toll dishes misdemeanor.

Article 2.

Condemnation for Mill by Owner of One Bank of Stream.

73-5. Special proceedings; parties; summons.
73-6. Commissioners to be appointed.
73-7. Meeting to be appointed and commissioners notified; witnesses examined.
73-8. Oath and duty of commissioners.
73-9. Contents of commissioners' report.
73-10. When building not to be allowed.
73-11. Power of court on return of report.
73-12. Time for beginning and building mill; to be kept up.
73-13. Rebuilding mill after destruction.

Article 3.

Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

Sec.

73-14. Special proceedings; summons.
73-15. Contents of petition.
73-16. Commissioners to be appointed.
73-17. Oath and duty of commissioners.
73-18. Assessment of damages.
73-19. When commissioners' report not to be affirmed.
73-20. When petitioner may enter on lands.
73-21. Owners of mills and millsites protected.
73-22. Report to be registered.
73-23. [Repealed.]
73-24. Obstructing millraces or dams a misdemeanor.

Article 4.

Recovery of Damages for Erection of Mill.

73-25. Action in superior court; procedure.
73-26. When dams, etc., abated as nuisances.
73-27. Judgment for annual sum as damages.
73-28. Final judgment; costs and execution.

Article 1.

Public Mills.

§ 73-1. Public mills defined.

Every grist or grain mill, however powered or operated, which grinds for toll is a public mill. (1777, c. 122, s. 1; R. C., c. 71, s. 1; Code, s. 1846; Rev., s. 2119; C. S., s. 2531; 1947, c. 781.)

CASE NOTES

Cited in Hyatt v. Myers, 73 N.C. 232 (1875); Branch v. Wilmington & W.R.R., 77 N.C. 347 (1877).

§ 73-2. Miller to grind according to turn; tolls regulated.

All millers of public mills shall grind according to turn, and shall well and sufficiently grind the grain brought to their mills, if the water will permit, and shall take no more toll for grinding than one-eighth part of the Indian corn and wheat, and one-fourteenth part for chopping grain of any kind; and every miller and keeper of a mill making default therein shall, for each offense, forfeit and pay five dollars ($5.00) to the party injured: Provided, that the owner may grind his own grain at any time. (1777, c. 122, s. 10; 1793, c. 402;

R. C., c. 71, s. 6; Code, s. 1847; 1905, c. 694; Rev., s. 2120; 1907, c. 367; C. S., s. 2532.)

Local Modification. — Bertie: 1933, c. 150; Chowan: 1937, c. 4; Cleveland: 1933, c. 158; Franklin: 1929, c. 129; Hertford: 1933, c. 150; Hyde: 1933, c. 150; Lenoir: 1929, c. 139; Northampton: 1929, c. 129; Pamlico: 1929, c. 311; Pender: 1933, c. 298; Robeson: 1929, c. 311; Sampson: 1937, c. 164.

§ 73-3. Measures to be kept; tolls by weight or measure.

All millers shall keep in their mills the following measures, namely, a half bushel and peck of full measure, and also proper toll dishes for each measure; but the toll allowed by law may be taken by weight or measure at the option of the miller and customer. (1777, c. 122, s. 11; R. C., c. 71, s. 7; Code, s. 1848; 1885, c. 202; Rev., s. 2121; C. S., s. 2533.)

§ 73-4. Keeping false toll dishes misdemeanor.

If any owner, by himself or servant, keeping any mill, shall keep any false toll dishes, he shall be guilty of a misdemeanor. (1777, c. 122, s. 11; R. C., c. 71, s. 7; Code, s. 1848; Rev., s. 3679; C. S., s. 2534.)

CASE NOTES

Words "False Toll Dish" Defined. — The words "false toll dish," as used in the statute, mean a toll dish measuring more than one-eighth of a half bushel. State v. Perry, 50 N.C. 252 (1858).

The measure kept need not be averred in the indictment. State v. Perry, 50 N.C. 252 (1858).

Sufficiency of Evidence. — An indictment for keeping false toll dishes was sufficiently supported by proving that measures of one seventh and one sixth of a half bushel were kept. State v. Perry, 50 N.C. 252 (1858).

But an indictment for keeping a false toll dish is not sustained by proof that the mill owner took one-sixth part of each half bushel with a half gallon toll dish. State v. Nixon, 50 N.C. 257 (1858).

Article 2.

Condemnation for Mill by Owner of One Bank of Stream.

§ 73-5. Special proceedings; parties; summons.

Any person wishing to build a water mill, who has land on only one side of a stream, shall issue a summons returnable to the superior court of the county in which the land sought to be condemned, or some part of it, lies, against the persons in possession and the owners of the land on the opposite side of the stream, and against such others as have an interest in the controversy, and the procedure shall be as is provided in other special proceedings, except so far as the same may be modified by this Chapter. (1868-9, c. 158, s. 1; Code, s. 1849; Rev., s. 2122; C. S., s. 2535.)

Cross References. — For full treatment of eminent domain proceedings, see § 40-1 et seq.

CASE NOTES

Corporation That Erects Mills. — The legislature, in providing for the condemnation of land for the purpose of erecting mills thereon, classifies a corporation that erects mills generally as one of those private corporations which enjoy a prerogative franchise because of some powers or duties, which they are to perform for the public, and to that extent such a corporation is quasi public. Bass v. Roanoke Nav. Water-Power Co., 111 N.C. 439, 16 S.E. 402 (1892).

Withdrawal of Verbal Consent to Maintaining Dam. — The plaintiff built a mill, and, with the verbal consent of the defendant, constructed a dam across a stream upon land of the latter. After the mill had been in operation for several years, the defendant withdrew his consent to the further use of the land for this purpose, and notified the plaintiff to level the dam, which he failed to do. Thereupon the defendant caused the obstruction to be removed. In an action by the plaintiff for damages, it was held that the plaintiff should have taken a conveyance of the easement, or pursued the remedy pointed out for the condemnation of land for mill purposes. Kivett v. McKeithan, 90 N.C. 106 (1884).

Cited in Benbow v. Robbins, 71 N.C. 338 (1874); Gwaltney v. Scottish Carolina Timber & Land Co., 111 N.C. 547, 16 S.E. 692 (1892).

§ 73-6. Commissioners to be appointed.

If no just cause is shown against the building of such mill, the court shall appoint three freeholders, one of whom shall be chosen by the plaintiff, another by the defendants, and the third by the court, or if the plaintiff or defendants refuse or fail, or unreasonably delay to name a commissioner, the court shall name one in lieu of such delinquent party. These commissioners may be changed from time to time by permission of the court for just cause shown. (1868-9, c. 158, s. 2; Code, s. 1850; Rev., s. 2123; C. S., s. 2536.)

CASE NOTES

Right of Appeal. — Defendants have a right to appeal from an interlocutory order of the court appointing freeholders to view, lay off and value land for a millsite. Minor v. Harris, 61 N.C. 322 (1867).

§ 73-7. Meeting to be appointed and commissioners notified; witnesses examined.

The third commissioner shall cause the others to be notified of the time and place of meeting, and shall preside at their meetings. They may, if necessary, summon and examine witnesses, who shall be sworn by the presiding commissioner. Any commissioner named by or for either of the parties who, without just cause, fails to attend any meeting notified by the president, shall forfeit and pay to the opposite party fifty dollars ($50.00); and if the president, in like manner, unreasonably delays to notify the other commissioners of a meeting, or fails to attend one that is appointed, he shall forfeit and pay to the plaintiff fifty dollars ($50.00), and to the defendant a like sum. (1868-9, c. 158, s. 3; Code, s. 1851; Rev., s. 2124; C. S., s. 2537.)

§ 73-8. Oath and duty of commissioners.

The commissioners shall be sworn by some officer qualified to administer an oath to act impartially between the parties, and to perform the duties herein imposed on them honestly and to the best of their ability. They shall view the premises where the mill is proposed to be built, and shall lay off and value a portion of the land of the plaintiff, not to exceed one acre in area, and an equal

area of land of the defendants opposite thereto, and report their proceedings to the court within a reasonable time, not exceeding 60 days. (1868-9, c. 158, s. 4; Code, s. 1852; Rev., s. 2125; C. S., s. 2538.)

§ 73-9. Contents of commissioners' report.

The report of the commissioners shall set forth:

(1) The location, quantities and value of the several areas laid off by them.

(2) Whether either of them includes houses, gardens, orchards or other immediate conveniences.

(3) Whether the proposed mill will overflow another mill or create a nuisance in the neighborhood.

(4) Any other matter upon which they have been directed by the court to report, or which they may think necessary to the doing of full justice between the parties. (1868-9, c. 158, s. 5; Code, s. 1853; Rev., s. 2126; C. S., s. 2539.)

§ 73-10. When building not to be allowed.

If the area laid off on the land of either party take away houses, gardens, orchards, or other immediate conveniences; or if the mill proposed will overflow another mill, or will create a nuisance in the neighborhood, the court shall not allow the proposed mill to be built. (1868-9, c. 158, s. 6; Code, s. 1854; Rev., s. 2127; C. S., s. 2540.)

Cross References. — As to restrictions on condemnation of dwelling houses, gardens and burial grounds, see § 40-10.

CASE NOTES

In General. — The court is forbidden to confirm a report which takes away houses, etc., put on the land by the owner, or on it before the proceedings were commenced. Burgess v. Clark, 35 N.C. 109 (1851).

Denial of Injunction. — An injunction will not be granted to restrain the erection of a dam when money damages will suffice. Burnett v. Nicholson, 72 N.C. 334 (1875).

§ 73-11. Power of court on return of report.

If the report is in favor of building the proposed mill, and is confirmed, then the court may, in its discretion, allow either the plaintiff or defendant to erect such mill at the place proposed, and shall order the costs, and the value of the opposite area, to be paid by the party to whom such leave is granted; and upon such payment, the party to whom such leave is granted shall be vested with title in fee to the opposite area. Such payment may be made into court for the use of the parties entitled thereto. (1868-9, c. 158, s. 7; Code, s. 1855; Rev., s. 2128; C. S., s. 2541.)

§ 73-12. Time for beginning and building mill; to be kept up.

The person to whom leave is granted shall, within one year, begin to build such water mill, and shall finish the same within three years; and thereafter keep it up for the use and ease of its customers, or such as shall be customers to it; otherwise, the said land shall return to the person from whom it was taken, or to such other person as shall have his right, unless the time for finishing the mill, for reasons approved by the court, be enlarged. (1868-9, c. 158, s. 8; Code, s. 1856; Rev., s. 2129; C. S., s. 2542.)

§ 73-13. Rebuilding mill after destruction.

If a water mill belonging to a person of unsound mind, a minor, or to one who is imprisoned, should fall, burn or be otherwise destroyed, such person and his heirs shall have three years from the removal of such disability within which to rebuild or repair such mill. (1868-9, c. 158, s. 9; Code, s. 1857; 1903, c. 74, ss. 1, 2; Rev., s. 2130; C. S., s. 2543; 1947, c. 781.)

Article 3.

Condemnation for Races, Waterways, etc., by Owner of Mill or Millsite.

§ 73-14. Special proceedings; summons.

Any person who has land on one or both sides of a stream and wishes to build a water mill, or has a water mill already built and may find it necessary for the better operation of said mill or the building of the said mill to convey water either to or from his mill by ditch, waterway, drain, millrace or tailrace, or in any other manner, over the lands of any other person, or erect a dam to pond said water over the lands of any other person, or raise any dam already built, may make application by petition in writing to the clerk of the superior court of the county in which the said lands to be affected, or a greater part thereof, are situated, for the right to so convey the said water or pond the same by the erection of a dam or the raising of any dam already built; and the procedure shall be as in other special proceedings. (1905, c. 534, s. 1a, k; Rev., s. 2131; C. S., s. 2544.)

§ 73-15. Contents of petition.

The petition shall specify the lands to be affected, the name of the owner of said lands, and the character of the ditch, race, waterway or drain or pond intended to be made, and said owner or owners shall be made parties defendant. The petition shall state the distance desired to be condemned on each side of the ditch, waterway or drain to be constructed or erected, and not more than 30 feet from each bank can be condemned. (1905, c. 534, s. 1b; Rev., s. 2132; C. S., s. 2545.)

§ 73-16. Commissioners to be appointed.

Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the said lands by the contemplated work, and shall issue a notice to them to meet upon the premises on a day specified, not to exceed 10 days from the date of said notice. (1905, c. 534, s. 1c; Rev., s. 2133; C. S., s. 2546.)

§ 73-17. Oath and duty of commissioners.

The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by the said work and assess the damage thereto and make report thereof under their hands and seals to the clerk from whom the notice issued, who shall have

power to confirm the same. (1905, c. 534, s. 1d; Rev., s. 2134; C. S., s. 2547.)

§ 73-18. Assessment of damages.

In determining the amount of such compensation to be paid to the owners of the said lands and assessing the damages thereto by reason of the erection or construction of such waterway, ditch, drain or dam, they shall make an allowance or deduction on account of any benefits which the parties in interest may derive from the construction or erection of such waterway, ditch, drain or dam, and shall ascertain the damages, as near as may be, to the extent it may damage each acre of land so appropriated or occupied by the said millowner. The damage assessed by the appraisers under this Article shall include all damages that the owners shall thereafter suffer or be entitled to by reason of the construction of the said waterways, races, ditches or dams. (1905, c. 534, s. 1e, m; Rev., s. 2135; C. S., s. 2548.)

§ 73-19. When commissioners' report not to be affirmed.

If the area laid off on the lands of either party take away houses, gardens, orchards or immediate conveniences, or if the mill proposed or erected will overflow another mill or pond water within 200 feet of another mill, or will overflow or pond water within 200 feet of the millsite or premises of a person who has the right under this chapter, or by the authority of law, to rebuild a mill after its destruction, or if the mill create a nuisance in the neighborhood, the court shall not allow the report of the appraisers to be affirmed. (1905, c. 534, s. 1g; Rev., s. 2136; C. S., s. 2549.)

§ 73-20. When petitioner may enter on lands.

After the return of the appraisers and the confirmation thereof the petitioner shall have full right and power to enter upon said lands and make such ditches, waterways, drains, races or other necessary works and construct such dams: Provided, he has first paid or tendered the damage assessed as above to the owner of such lands or his known or recognized agent in this State. If the owner is a nonresident and has no known agent in this State, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner: Provided, further, that the millowner shall not be compelled to pay said damages so assessed unless he shall enter upon such lands and make ditches, drains or other works or erect such dam. (1905, c. 534, s. 1f; Rev., s. 2137; C. S., s. 2550.)

§ 73-21. Owners of mills and millsites protected.

No other person shall have the right to erect or maintain any dam, ditch, waterway, drain or race that will overflow or pond water within 200 feet of the millsite or premises of any person or body corporate who shall have erected a mill, dam, ditch, drain or race under the provisions of this Chapter, or of any millsite owned by any person who has the right under this Chapter, or by the authority of law, to rebuild a mill after its destruction. When any person violates the provisions of this section the owner of said mill or millsite shall have a right of action against said person to tear down said dam or other works so built or erected to the extent herein forbidden and to abate the same as prescribed by law for the abatement of nuisances. (1905, c. 534, s. 1h; Rev., s. 2138; C. S., s. 2551.)

§ 73-22. Report to be registered.

The petitioner, or any other person interested, may have the said assessment registered upon the certificate of the clerk, and shall pay the register the usual legal fees for registering such instruments in his office. (1905, c. 534, s. 1i; Rev., s. 2139; C. S., s. 2552.)

§ 73-23: Repealed by Session Laws 1973, c. 108, s. 25.

§ 73-24. Obstructing millraces or dams a misdemeanor.

Any person who shall obstruct any drain, ditch or dam constructed under this Article shall be guilty of a misdemeanor. (1905, c. 534, s. 1l; Rev., s. 3381; C. S., s. 2554.)

Article 4.

Recovery of Damages for Erection of Mill.

§ 73-25. Action in superior court; procedure.

Any person conceiving himself injured by the erection of any gristmill, or mill for other useful purposes, may issue his summons returnable before the judge of the superior court of the county where the damaged land or any part thereof lies, against the persons authorized to be made parties defendant. In his complaint he shall set forth in what respect and to what extent he is injured, together with such other matters as may be necessary to entitle him to the relief demanded. The court shall then proceed to hear and determine all the questions of law and issues of fact arising on the pleadings as in other civil actions. (1876-7, c. 197, s. 1; Code, s. 1858; Rev., s. 2141; C. S., s. 2555.)

Cross References. — As to damages, see § 73-27 and note.

CASE NOTES

Exclusiveness of Remedy. — Ordinarily, in cases to which this section applies, the remedy given must be pursued. Kinsland v. Kinsland, 186 N.C. 760, 120 S.E. 358 (1923).

Section Does Not Apply to Trespass. — The remedy under this section does not apply to an action for damages for a trespass committed on the plaintiff's land. Henley v. Wilson, 77 N.C. 216 (1877).

Sufficiency of Description in Petition. — A petition for damages, caused by the erection of a mill upon the stream below, which described it as a "gristmill" without calling it a public mill, or a gristmill grinding for toll, was sufficient. Little v. Stanback, 63 N.C. 285 (1869).

Procedure to Assess Damages. — Under an early statute, it was held that, in a petition for damages for ponding water back, where in the county court the plaintiff's right to relief was denied, the proper course was to impanel a jury to try the allegations made in bar of such right, and if such allegations were found for the plaintiff, the proper course was then to order a jury on the premises to assess the damages, but in all cases where there was an appeal to the superior court, the facts were to be ascertained by a jury at bar, but in that court, those issues pertaining to the question of relief, and those issues as to that of damages, were to be separately submitted. Jones v. Clarke, 52 N.C. 418 (1860).

Proper Issue. — In an action for damages resulting from ponding water upon plaintiff's land, caused by the erection of defendant's milldam, an issue involving the amount of annual damage done thereby is the proper one to be submitted to the jury. Hester v. Broach, 84 N.C. 251 (1881).

Easement Limited to Mill Purposes. — Where the lower proprietor has acquired an easement in the lands of the upper proprietor to

pond water back thereon from a dam erected on his own land to operate a public mill, the exercise of this right under the easement does not affect the title to the submerged land of the upper proprietor or subject the lower proprietor to an action for damages so as to start the running of the statute of limitations, nor will this use of the water ponded on the land of the upper proprietor by the lower proprietor for fishing with hook and seine ripen into his exclusive use for these purposes. Thomas v. Morris, 190 N.C. 244, 129 S.E. 623 (1925).

Liability for Defect in Bridge. — Where water was thrown, by the erection of a milldam, upon the highway, and the former proprietor of the mill had built bridges over the water, which, during his ownership, he repaired, and which were also repaired by the present proprietor, who did no other work on the roads, it was held that the present proprietor was answerable in damages to an individual who sustained an injury by reason of a defect in one of the bridges. Mulholland v. Brownrigg, 9 N.C. 349 (1823).

Proof of Ownership. — In an action for overflowing the plaintiff's land, he need not prove his title, though it be set forth in the declaration, for possession alone is sufficient to support this action against a wrongdoer. Yeargain v. Johnston, 1 N.C. 56 (1800).

Plaintiff Entitled to Nominal Damage. — Instructions to a jury, that if a plaintiff sustains no injury from the ponding of water upon his mill wheel, still he is entitled to nominal damages, are correct. Little v. Stanback, 63 N.C. 285 (1869).

A motion for a new trial for failure of the court to instruct the jury to return at least nominal damages, because some overflow was admitted, it appearing that no such instruction was asked, that the admission was qualified and the testimony conflicting, and that there was evidence to show that no damage was actually done, was properly refused in the discretion of the court. McGee v. Fox, 107 N.C. 766, 12 S.E. 369 (1890).

Same — Injury Unnecessary. — In an action for damages for the maintenance of a dam across a stream, the plaintiff is entitled to recover nominal damages, without showing an injury capable of being estimated, or one that is perceptible in the sense that it is attended with some actual damage; for the mere fact of ponding back the water on plaintiff's premises is sufficient to entitle him to nominal damages. Chaffin v. Manufacturing Co., 135 N.C. 95, 47 S.E. 226 (1904), rehearing denied, 136 N.C. 364, 48 S.E. 770 (1904).

If the water be ponded back on the land of another by the erection of a milldam, he is entitled, in the remedy by petition, to nominal damages, whether there be actual damage or not. Wright v. Stowe, 49 N.C. 516 (1857).

Measure of Damages. — The measure of damages for backing water on land by means of a dam is the difference in the value of the land before and after the injury complained of. Borden v. Carolina Power & Light Co., 174 N.C. 72, 93 S.E. 442 (1917).

Permanent Damages. — In an action for backing water on plaintiff's land by means of a dam, the plaintiff is entitled to permanent damages, past, present, and prospective. Borden v. Carolina Power & Light Co., 174 N.C. 72, 93 S.E. 442 (1917). See § 73-27.

Damages to Health. — Damages may be given for injury to health as well as to land by overflowing. Gillet v. Jones, 18 N.C. 339 (1835). See also, Waddy v. Johnson, 27 N.C. 333 (1844).

Exemplary Damages. — In an action for overflowing plaintiff's land by the erection of a milldam, where a recovery has been had before, and the nuisance was not abated, plaintiff can recover sufficient exemplary damages to compel an abatement of the nuisance. Carruthers v. Tillman, 2 N.C. 501 (1797).

Where Damage Suffered Only When Stream Is Swollen. — Where the erection of a mill on a stream causes the water to overflow the land of a proprietor above only when the stream is swollen, that circumstance will not excuse such party from damages altogether, but will only diminish the quantum of such damages. Pugh v. Wheeler, 19 N.C. 50 (1836).

Decrease of Custom. — Where, in suit for damages for ponding water, it appeared that plaintiff sustained injury to his mill by reason of defendant's erecting another mill and dam lower down on the same stream, the measure of damages was the amount of the damages actually sustained by plaintiff up to the time of trial; and, in estimating the same, the decrease of custom (in the matter of toll) could not be considered. Burnett v. Nicholson, 86 N.C. 99 (1882).

Counterclaim Inadmissible. — In an action for damages for ponding water back on plaintiffs' land, it was no error for the judge to charge that defendants could not set up as offset and counterclaim any benefit which plaintiff had received thereby, and add that the jury should, upon all the evidence, ascertain if plaintiff had sustained any damage. McGee v. Fox, 107 N.C. 766, 12 S.E. 369 (1890).

Action May Be Brought at Any Time. — Ponding a stream so as to throw the water over the land of a proprietor above, which the water did not before cover, gives him a good cause of action at any time when he may wish to use his land, unless he has granted the easement, either actually, or by presumption of law from the length of time he has permitted the easement to be enjoyed. Pugh v. Wheeler, 19 N.C. 50 (1836).

Easement Not Purchased by Payment of Judgment. — The payment of a judgment for

ponding water by a milldam does not amount to the purchase by defendant of an easement to pond back water on plaintiff's land. Candler v. Electric Co., 135 N.C. 12, 47 S.E. 114 (1904).

§ 73-26. When dams, etc., abated as nuisances.

When damages are recovered in final judgment in such civil actions, and execution issues and is returned unsatisfied, and the plaintiff is not able to collect the same either because of the insolvency of the defendant or by reason of the exemptions allowed to defendant, the judge shall, on the facts being made to appear before him by affidavit or other evidence, order that the dam, or portion of the dam, or other cause creating the injury, shall be abated as a nuisance, and he shall have power to make all necessary orders to effect this purpose. (1876-7, c. 197, s. 3; Code, s. 1859; Rev., s. 2142; C. S., s. 2556.)

CASE NOTES

When Section Applicable. — This section applies where water is ponded upon the plaintiff's land by a dam constructed on the property of another or where a trespass of like character is committed, because at common law an action could be brought each day so long as the trespass continued. But the statute does not apply and was never intended to apply to an actual entry upon the complainant's premises and the construction thereon of a dam for the purpose of ponding water and retaining possession. Kinsland v. Kinsland, 188 N.C. 810, 125 S.E. 625 (1924).

Denial of Injunction. — An injunction will not be granted to restrain the erection of a dam whereby the mill wheel of the plaintiff is flooded so as to become useless. Burnett v. Nicholson, 72 N.C. 334 (1875).

For such an injury damages will adequately compensate, and should the annual damage exceed $20.00 the plaintiff is remitted to his common-law action, and can compel an abatement of the nuisance. Burnett v. Nicholson, 72 N.C. 334 (1875).

Where the owner of land adjoining an old millsite sought to enjoin the erection of a new mill, and it was ascertained by a verdict that the mill, though injurious to the health of the plaintiff's family, was advantageous to the public, relief was refused; especially as the old mill was erected before the plaintiff purchased. Attorney Gen. ex rel. Eason v. Perkins, 17 N.C. 38 (1831).

When Injunction Granted. — In the case of the erection of a milldam, a court of equity will not interfere by injunction, unless it be shown that it will be a public nuisance, or, if it will be a private nuisance only to an individual, unless it manifestly appears, that so great a difference will exist between the injury to the individual and the public convenience as will bear no comparison or that the erection of the dam will be followed by irreparable mischief. Attorney Gen. ex rel. Bradsher v. Lea's Heirs, 38 N.C. 301 (1844).

Existence of Another Remedy. — On application for an injunction to restrain the defendant from building a new mill, on the ground that the construction of the dam would injure the land of the plaintiff and the health of his family, testimony being heard, the court held that it is not every slight or doubtful injury that will justify the use of the extraordinary power of injunction to restrain a man from using his property as his interests may demand, especially as, if the injury apprehended should result, the complainant could resort to law for damages. Wilder v. Strickland, 55 N.C. 386 (1856).

When Demand and Allegation of Insolvency Unnecessary. — The demand for damages in the complaint for ponding water upon and injuring the lands of the upper proprietor, required by this section, is not necessary when the relief sought is to enjoin the maintenance of a dam on the plaintiff's own land by the defendant's trespass thereon, and the abatement of the nuisance thus caused, and the trespass being continuing, the allegation of defendant's insolvency is not necessary. Kinsland v. Kinsland, 188 N.C. 810, 125 S.E. 625 (1924).

Cited in Hester v. Broach, 84 N.C. 251 (1881).

§ 73-27. Judgment for annual sum as damages.

A judgment giving to the plaintiff an annual sum by way of damages shall be binding between the parties for five years from the issuing of the summons, if the mill is kept up during that time, unless the damages are increased by raising the water or otherwise.

In all cases where the final judgment of the court assesses the yearly damage of the plaintiff as high as twenty dollars ($20.00), nothing contained in this Chapter shall be construed to prevent the plaintiff, his heirs or assigns, from suing as heretofore, and in such case the final judgment aforesaid shall be binding only for the year's damage preceding the issuing of the summons. (1868-9, c. 158, ss. 12, 14; Code, ss. 1860, 1861; Rev., ss. 2143, 2144; C.S., s. 2557.)

Cross References. — See note to § 73-25.

CASE NOTES

Assessment Cannot Go Back Further than Preceding Year. — In proceedings under the statute for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the court only giving judgment for one year preceding the issuing of the summons. Goodson v. Mullen, 92 N.C. 207 (1885). See § 73-28.

Judgment May Be for Sum in Gross. — Where, in an action for damages to land by ponding water on it, the jury found that the land was damaged $80.00 per year, it was not erroneous for the court to give judgment for a sum in gross, and not for each year's damages. Goodson v. Mullen, 92 N.C. 207 (1885).

Recurring Causes of Action. — Case for nuisance in erecting a mill will lie for every fresh continuance after action brought; heavy damages are not usual in the first verdict, but in a second action the damages should be high to compel an abatement of the nuisance. —— v. Deberry, 2 N.C. 248 (1795).

Conclusiveness of Verdict and Judgment. — In a proceeding to recover damages for ponding water by a milldam, the verdict of the jury and the judgment of the court thereon are conclusive as to the assessment of damages, up to the time when such judgment was rendered. An application for relief from damages, assessed for a period subsequent to the time of the judgment, can only be heard if the dam is taken away or lowered. Beatty v. Conner, 34 N.C. 341 (1851).

Judgment Not Res Judicata. — An action to abate a dam and for damages to land caused by the ponding back of water was submitted to arbitrators to find whether plaintiffs were entitled to damages, and, if so, to distinguish in finding the same between damages from permanent injuries and annual damages for five years from a certain date. The arbitrators assessed "the permanent damage of the plaintiffs to this date to their lands" at a certain sum, and also awarded a certain annual damage for each of the five years. Judgment was entered on the award, the judgment providing that the execution should be subject to the provisions of § 73-26. The judgment was not res judicata of plaintiff's right to recover damages after the termination of the five-year period for all except a fresh injury, since the judgment contemplated the removal of the dam at the end of the five years. Candler v. Electric Co., 135 N.C. 12, 47 S.E. 114 (1904).

§ 73-28. Final judgment; costs and execution.

If the final judgment of the court is that the plaintiff has sustained no damage, he shall pay the costs of his proceeding; but if the final judgment is in favor of the plaintiff, he shall have execution against the defendant for one year's damage, preceding the issuing of the summons, and for all costs: Provided, that if the damage adjudged does not amount to five dollars ($5.00), the plaintiff shall recover no more costs than damages. And if the defendant does not annually pay the plaintiff, his heirs or assigns, before it falls due, the sum adjudged as the damages for that year, the plaintiff may sue out execution for

the amount of the last year's damage, or any part thereof which may remain unpaid. (1868-9, c. 158, s. 15; Code, s. 1862; Rev., s. 2145; C. S., s. 2558.)

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

Chapter 74.

Mines and Quarries.

Article 1.

Operation of Mines and Quarries.

Sec.

74-1 to 74-14. [Repealed.]

Article 2.

Inspection of Mines and Quarries.

74-15 to 74-24. [Repealed.]

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Mine Safety and Health Act.

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Article 1.

Operation of Mines and Quarries.

§§ 74-1 to 74-14: Repealed by Session Laws 1975, c. 206, s. 21.

Article 2.

Inspection of Mines and Quarries.

§§ 74-15 to 74-24: Repealed by Session Laws 1975, c. 206, s. 21.

Article 2A.

Mine Safety and Health Act.

§ 74-24.1. Short title and legislative purpose.

(a) This Article shall be known as the Mine Safety and Health Act of North Carolina.

(b) Legislative findings and purpose:

(1) The General Assembly finds that the burden of operators and miners of this State's mines resulting from personal injuries and illnesses arising out of work situations is substantial; that the prevention of these injuries and illnesses is an important objective of the government of this State; that the greatest hope in attaining this objective lies in programs of research, engineering, education, and enforcement, and in earnest cooperation of the federal and state governments, operators, and miners.

(2) The General Assembly of North Carolina declares it to be its purpose and policy through the exercise of its powers to assure so far as possible every worker in North Carolina's mines safe and healthful working conditions and to preserve our human resources:

a. By encouraging operators and miners in their effort to reduce the number of occupational safety and health hazards in mines and to stimulate and assist operators and miners to institute new programs and to perfect existing programs for providing safe and healthful working conditions through technical assistance and consultation;

b. By recognizing that operators and miners have separate but interdependent responsibilities and rights with respect to achieving safe and healthful working conditions;

c. By authorizing the Commissioner to develop occupational safety and health standards applicable to mines giving consideration to the needs of operators and miners and to adopt standards promulgated from time to time by the federal government;

d. By providing occupational health criteria which will assure insofar as practicable that no miner will suffer diminished health, functional capacity, or life expectancy as a result of his work experience in a mine;

e. By providing education and training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

f. By providing an effective enforcement program which shall include a prohibition against giving advance notice of a mine inspection;
g. By providing for appropriate reporting procedures with respect to occupational safety and health which will help achieve the objectives of this Article and accurately describe the nature of the occupational safety and health problems in mines;
h. By providing for research and technical assistance in the field of occupational safety and health in mines and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems in mines; and
i. By authorizing the Commissioner to enter into agreements and contracts with public and private agencies, including agencies of the United States government, organizations, and individuals in order to carry out the ends and purposes of this Article.

(c) The General Assembly of North Carolina appoints the North Carolina Department of Labor as the designated agency to administer the Mine Safety and Health Act of North Carolina. (1975, c. 206, s. 1.)

§ 74-24.2. Definitions.

In this Article, unless the context otherwise requires:

(1) The term "accident" means an unexpected event resulting in injury to, illness of, or death of a person or persons as a result of mining operations and any mine explosion, mine ignition, mine fire, mine inundation, mine cave-in, or other event which could have readily resulted in serious physical harm.
(2) The term "Advisory Council" shall mean the Advisory Council or body authorized to be established under this Article.
(3) The term "agent" means any person charged by the operator with responsibility for the operation of all or part of a mine or supervision of the miners in a mine, and for the purposes of this Article includes contractors, subcontractors, or independent contractors employed by the operator to perform any work or services at, in, or on the mine.
(4) The term "Commissioner" means the Commissioner of Labor of North Carolina.
(5) The term "Director" means the person authorized under G.S. 74-24.19 and appointed by the Commissioner for the purpose of assisting in the administration of this Article.
(6) The term "imminent danger" means the existence of any condition or practice in a mine which could reasonably be expected to cause death or serious physical harm immediately to any miner if such condition or practice is not abated at once.
(7) The term "mine" means an area of land and all private ways and roads appurtenant thereto, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed or constructed on, under, or above the surface of such land by any person, used in, or to be used in, or resulting from (including the reclamation of mined areas or the storage of materials in mined areas), or to facilitate the work of exploring for, developing of, or extracting by any means or method in such area all minerals, inorganic and organic, from their natural deposits. The term "mine" also includes all mineral processing and milling facilities except those used in the processing of source materials as defined in the Atomic Energy Act of 1954, as amended.
(8) The term "miner" means any individual, other than an operator or an agent, working in or about a mine.

(9) The term "operator" means an individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization owning, operating, leasing, controlling, or supervising a mining operation.

(10) The term "repeated violation" means a violation for which an operator was issued a notice or an order on an inspection and which is found to exist again on the next regular inspection, even though the violation was abated within the time fixed for abatement.

(11) The term "State" means the State of North Carolina. (1975, c. 206, s. 2.)

§ 74-24.3. Coverage.

Each mine shall be subject to the provisions of this Article, and each operator of such mine shall comply with all standards, rules, regulations, orders, and notices adopted or issued under this Article. The operator of such mine shall be responsible for the health and safety of all miners in a mine and shall assure insofar as practicable conditions of work and places of work free from hazards that are causing or are likely to cause death or serious physical harm. (1975, c. 206, s. 3.)

§ 74-24.4. Safety and health standards.

(a) The Commissioner shall develop, adopt, revise, and promulgate safety and health standards for the purpose of the protection of life, the promotion of safety and health, and the prevention of "accidents" in mines which are subject to this Article. In the development of safety and health standards, the Commissioner shall consult with the Advisory Council, interested federal agencies, appropriate representatives of other State agencies, appropriate representatives of mine operators and miners, and other interested persons and organizations whose participation would further the purposes of this Article.

(b) In developing and promulgating safety standards pursuant to this section, the Commissioner shall include standards with respect to the training of miners in first aid, safety, the proper use of rescue equipment available within mines, and periodic evacuation drills and disaster procedure training.

(c) The Division of Health Services of the Department of Human Resources shall have primary responsibility for research and the recommendation of health standards to the Commissioner to effectuate the purposes of this Article, and nothing in this subsection shall affect the authority of the Commissioner with respect to the promulgation and enforcement of both safety and health standards.

(d) The procedures utilized for the adoption and promulgation of safety and health standards, including notice and public hearings, shall be in accordance with the Administrative Procedure Act of North Carolina as the same appears in Chapter 150A of the General Statutes. (1975, c. 206, s. 4.)

§ 74-24.5. Modification of safety and health standards.

Upon petition by an operator, a representative of miners, or a miner, the Commissioner may modify the application of any safety and health standard to a mine if the Commissioner determines that an alternative method of protecting the miners will guarantee the same measure of protection afforded the miners by the standard, or will enhance the level of safety and health provided by that standard. Upon receipt of such petition the Commissioner shall give public notice thereof and give notice to the operator, the representative of miners, or the miner in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall

provide an opportunity for a public hearing, at the request of such operator, representative of the miners, or miner to enable the operator, the representative of miners, or miner in such mine or any interested party to present information relating to the modification of such standard. The Commissioner shall issue a decision incorporating his findings of fact therein and send a copy thereof to the operator, the representative of the miners, or miner as appropriate. Any such hearing shall be of record and shall be subject to judicial review in accordance with the Administrative Procedure Act of North Carolina as the same appears in Chapter 150A of the General Statutes. (1975, c. 206, s. 5.)

§ 74-24.6. Advisory Council.

(a) The Commissioner shall appoint an Advisory Council consisting of 11 members to assist him in the development of safety and health standards for mines which are subject to this Article and to advise him on matters relating to safety and health in such mines. Said Advisory Council shall include three members expressly qualified by experience and affiliation to present the viewpoint of operators of such mines, three persons similarly qualified to present the viewpoint of workers in such mines, and five members of the public sector with knowledge of mining operations or associated health and safety aspects thereof. The Commissioner of Labor shall annually designate one member to act as chairman. The members of the Advisory Council shall serve at the pleasure of the Commissioner and shall have no specific term of office.

(b) The Advisory Council shall hold not fewer than two meetings during each calendar year, and said meetings shall be open to the public. The Commissioner shall furnish to the Advisory Council such secretarial, clerical, and other services as he deems necessary to conduct its business.

(c) The members of the Advisory Council shall be compensated for travel expenses and per diem as authorized by the Advisory Budget Commission in accordance with those amounts paid to State boards under Chapter 138 of the General Statutes.

(d) The Commissioner may from time to time select representatives of professional organizations of technicians, professional persons specializing in occupational safety and health, and representatives of State agencies who by experience and affiliation are qualified to present the viewpoint of operators of mines and workers in mines to assist the Advisory Council in performing its duties. Such persons, except State employees, selected for temporary purposes may be paid such per diem and travel expenses for attending meetings as may be fixed by the Advisory Budget Commission and recommended by the Commissioner. (1975, c. 206, s. 6; 1977, c. 683.)

§ 74-24.7. Inspections and investigations.

(a) The Commissioner through the Director shall make as many inspections and investigations in mines each year as are deemed necessary to effectively and accurately fulfill the requirements of:

(1) Obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of "accidents" and causes of illnesses and physical impairments originating in such mines,

(2) Gathering information with respect to the necessity for health and safety standards,

(3) Determining whether an imminent danger exists,

(4) Determining whether or not there is compliance with safety and health standards or with any notice, order, or decision issued under this Article.

(5) In carrying out the requirements of (4) of this subsection, no advance notice of an inspection shall be provided to any mine operator, official,

miner, representative of the miners, or other person, except that the Commissioner or Director may authorize the giving of advance notice only when such notice is essential to the effectiveness of the inspection.

(b) For the purpose of making any inspection or investigation under this Article, the Commissioner or his authorized representative shall have a right of entry to, upon, or through any mine at reasonable times.

(c) For the purpose of making any investigation of any "accident" relating to safety and health in a mine, the Commissioner may, after notice, hold hearings, and may issue subpoenas for the attendance and testimony of persons and the production of relevant documents, and administer oaths in any investigation conducted by him. In case of contumacy or refusal to obey a subpoena served upon any person under this section, the general court of justice, superior court division, of the county in which such person is found or resides or transacts business, upon application by the Commissioner and after notice to such person, shall have jurisdiction to determine whether such person shall be punished as for contempt of court.

(d) In the event of an "accident" occurring in a mine, the operator shall notify the Commissioner or the Director thereof at such time as may be required and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any "accident" occurring in a mine where rescue and recovery work is necessary, the Commissioner through the Director shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine.

(e) In the event of any "accident" occurring in a mine, the Commissioner through the Director may issue such orders as he deems appropriate to insure the safety of any person in the mine, and the operator of such mine shall obtain the approval of the Commissioner or his authorized representative in consultation with appropriate federal representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal.

(f) Whenever any miner or representative of the miners has reasonable grounds to believe that a violation of a safety or health standard exists, or that an imminent danger exists, such miner or representative of the miners may request an inspection by giving notice to the Commissioner or the Director of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall show the name of the miner, be signed by the miner or representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. If, after receipt of such notification, the Commissioner finds that there are reasonable grounds to believe a violation may exist, a special inspection shall be made as soon as practicable to determine if, in fact, such violation or danger does exist under the provisions of this Article.

(g) At the commencement of any inspection of a mine by the Commissioner or his authorized representative, under subsection (a)(3) or subsection (a)(4) of this section, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the Commissioner or his authorized representative on such inspection, to inform the Commissioner or his authorized representative of conditions and practices in the mine, without loss or deduction in pay. Where there is no authorized representative of the miners, the Commissioner or his authorized representative shall have the right to consult with a reasonable number of miners concerning matters of safety and health in the work place. (1975, c. 206, s. 7.)

§ 74-24.8. Findings, notices, and orders.

(a) (1) If, upon any inspection of a mine, the Commissioner or his authorized representative finds that an imminent danger exists, he shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except as provided in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until the Commissioner or his authorized representative determines such imminent danger no longer exists.

(2) If, upon any inspection of a mine, the Commissioner or his authorized representative finds that an imminent danger exists with respect to the condition or manner of use of any equipment, machinery, article, or apparatus, he shall thereupon issue an order requiring the operator or his agent to cause immediately such equipment, machinery, article, or apparatus to be withdrawn from, and to be prohibited from, use or operation until the Commissioner or his authorized representative determines that such imminent danger no longer exists.

(3) As a result of any investigation of any "accident" or as a result of any other investigation or tests performed, the Commissioner or his authorized representative may cause to be withdrawn and prohibited from use or operation in any mine any equipment, machinery, article, or apparatus the use of which is likely to cause serious physical harm or an "accident" until the Commissioner or his authorized representative determines that such equipment, machinery, article, or apparatus has been repaired, modified, reconditioned, or altered in such manner that "accidents" or serious physical harm will thereafter be avoided.

(b) If, upon any inspection of a mine, the Commissioner or his authorized representative finds that there has been a violation of any safety and health standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period as originally fixed or subsequently extended, the Commissioner or his authorized representative finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except as provided in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until the Commissioner or his authorized representative determines that the violation has been abated.

(c) If, upon any inspection of a mine, the Commissioner or his authorized representative finds that there has been a repeated violation of a safety or health standard which could reasonably be expected to result in serious physical harm to any miner, he shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except as provided in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until the Commissioner or his authorized representative determines that the violation has been abated.

(d) The following persons may enter, upon approval of the Commissioner or his authorized representative, any area of a mine subject to an order issued under this section:

(1) Any person whose presence in such area is necessary, in the judgment of the operator or the Commissioner or his authorized representative, to eliminate the condition described in the order;

(2) A public official whose official duties require him to enter such area;

(3) A representative of the miners in such mine who, in the judgment of the operator or the Commissioner, or his authorized representative, is

qualified to make mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the condition described in the order;

(4) A consultant to any of the foregoing.

(e) Notices and orders issued pursuant to this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any safety or health standard and where appropriate, a description of the area of the mine from which persons must be withdrawn and prohibited from entering, and a description of the equipment, machinery, article, or apparatus which shall be withdrawn and prohibited from use or operation.

(f) A notice or order issued pursuant to this section may be modified, vacated, or terminated upon review by the Commissioner or his authorized representative. (1975, c. 206, s. 8.)

§ 74-24.9. Issuance and delivery of notices, orders, and decisions.

(a) All notices or orders issued under G.S. 74-24.8 shall be in writing, signed by the Commissioner or his authorized representative, and shall be given promptly to the operator of the mine.

(b) In order to insure prompt compliance with all notices, orders, or decisions issued under this Article, the Commissioner or his authorized representative may deliver such notices, orders, or decisions to an agent of the operator, and such agent shall immediately take appropriate measures to insure compliance with such notice, order, or decision.

(c) Each operator of a mine shall file with the Commissioner the name and address of such mine and the name and address of the operator of the mine. Any revisions in such names or addresses shall be promptly filed with the Commissioner. Each operator of a mine shall designate a responsible official, and shall file the name and address of said official with the Commissioner, as the principal officer in charge of safety and health at such mine, and such official shall receive a copy of any notice, order, or decision issued under this Article affecting such mine. In any case, where the mine is subject to the control of any person not directly involved in the daily operations of the mine, there shall be filed with the Commissioner the name and address of such person and the name and address of a principal official who shall have overall responsibility for the conduct of an effective safety and health program at any mine subject to the control of such person, and such official shall receive a copy of any notice, order, or decision issued affecting any such mine. The mere designation of a safety and health official under this subsection shall not be construed as making such official subject to any penalty under this Article. (1975, c. 206, s. 9.)

§ 74-24.10. Review by the Commissioner.

(a) An operator issued a notice or order pursuant to the provisions of G.S. 74-24.8 and 74-24.9 may apply to the Commissioner for review of the notice or order within 30 days of receipt thereof or within 30 days of its modification.

(1) The applicant, at the same time, shall send a copy of such application to the representative of the miners, if any, in the mine or all affected miners.

(2) Upon a receipt of such application, the Commissioner shall cause such investigations to be made as he deems appropriate. Such investigations shall provide an opportunity for a public hearing, at the request of the operator or the representative of the miners in such mine or affected miners, to enable the operator or the representative of the

miners in such mine or affected miners to present information relating to the issuance and continuance of such notice or order, or the modification, vacation, or termination thereof.

(3) The operator and the representative of the miners, if any, or affected miners shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to the rules of evidence applicable in the district and superior courts of this State. Interested parties shall have an opportunity to appear, present evidence, and examine witnesses.

(b) Upon receiving the report of such investigation, the Commissioner shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating any notice or order issued.

(c) In view of the urgent need for prompt decision of matters submitted to the Commissioner under this section, action shall be taken as promptly as practicable, consistent with adequate consideration of the issues involved.

(d) All notices and orders issued under this Article shall be stayed while such notice or order is under review, except that orders issued under G.S. 74-24.8(a) shall not be stayed. (1975, c. 206, s. 10.)

§ 74-24.11. Judicial review.

Any final order or decision issued by the Commissioner under this Article shall be subject to judicial review in accordance with the Administrative Procedure Act of North Carolina as the same appears in Chapter 150A of the General Statutes. (1975, c. 206, s. 11.)

§ 74-24.12. Injunctions.

The Commissioner through the Director may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the superior court of the county in which a mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent (i) violates or fails or refuses to comply with any final order or decision issued under this Article or (ii) interferes with, hinders, or delays the Commissioner in carrying out the provisions of this Article, or (iii) refuses to admit the Commissioner or his authorized representative to the mine, or (iv) refuses to permit the inspection of the mine, or the investigation of an accident or occupational illness occurring in, or connected with, such mine, or (v) refuses to furnish any information or report requested by the Commissioner in furtherance of the provisions of this Article. (1975, c. 206, s. 12.)

§ 74-24.13. Mandatory reporting.

Under such regulations as he may prescribe, the Commissioner shall require that:

(1) Operators of mines which are subject to this Article submit, at least annually and at such other times as he deems necessary, and in such form as he may prescribe, reports of "accidents," injuries, occupational disease, and related data, and the Commissioner through the Director shall compile, analyze, and publish, either in summary or detailed form, the information obtained; and all information, reports, orders, or findings, obtained or issued under this Article may be published and released to any interested person, and shall be made available for public inspection.

(2) All "accidents" shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. Records of such "accidents" and investigations shall be kept, and the information shall be made readily available for inspection by the Commissioner or his authorized representative. Such records shall include man-hours worked and shall be reported for periods determined by the Commissioner, but at least annually.

(3) The operators of mines which are subject to this Article shall notify the Commissioner, before starting operations, of the approximate or actual date mine operations will commence. The notification shall include mine name, location, the company name, mailing address, the person in charge, and whether operations will be continuous or intermittent. When any mine subject to this Article is closed, the operator shall notify the Commissioner of such closure and indicate whether the closure is temporary or permanent. (1975, c. 206, s. 13.)

§ 74-24.14. Criminal penalties.

Any person who (i) willfully violates any standard, order, notice, decision, rule, or regulation issued under authority of this Article, and said violation causes death or serious physical harm to another; (ii) knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Article or required by any order, notice, or decision issued under this Article; (iii) knowingly distributes, sells, offers for sale, introduces, or delivers any equipment, machinery, article, or apparatus which is represented as complying with the provisions of this Article, or with any specification or regulation of the Commissioner applicable to such equipment, machinery, article, or apparatus and knowing it does not so comply, shall be guilty of a misdemeanor and upon conviction thereof be punished for each such offense by a fine of not more than ten thousand dollars ($10,000), or by imprisonment not to exceed 60 days, or both. In any instance in which such offense is committed by a corporation, the officer or authorized representative of such corporation who knowingly permits such offense to be committed shall, upon conviction, be subject to the same fine or imprisonment, or both. (1975, c. 206, s. 14.)

§ 74-24.15. Rights and duties of miners.

(a) Miners shall comply with all safety and health standards and all rules, regulations, or orders issued pursuant to this Article which are applicable to their own actions and conduct.

(b) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (i) has notified the Commissioner of any alleged violation or danger, (ii) has filed, instituted, or caused to be filed or instituted any proceeding under this Article, or (iii) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Article.

(c) Any miner or a representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within 30 days after such violation occurs, apply to the Commissioner for a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Commissioner shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a hearing at the request of any party to enable the parties to present information relating to such violation. The parties shall be given

written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to the rules of evidence applicable in the district and superior courts of this State. Interested persons shall have an opportunity to appear, present evidence, and examine witnesses. Upon receiving the report of such investigation, the Commissioner shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the Commissioner deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay. If he finds that there was no such violation, he shall issue an order denying the application. Such order shall incorporate the Commissioner's findings therein. Any order issued by the Commissioner under this subsection shall be subject to judicial review in accordance with the Administrative Procedure Act of North Carolina as the same appears in Chapter 150A of the General Statutes. Enforcement of a final order or decision issued under this subsection shall be subject to the provisions of G.S. 74-24.12.

(d) Whenever an order is issued under this section at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commissioner to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation. (1975, c. 206, s. 15.)

§ 74-24.16. Education, training, technical assistance, and research.

(a) The Commissioner through the Director is authorized to develop and conduct expanded programs for the education, training, and technical assistance of operators and miners in the recognition, avoidance, and prevention of accidents or unsafe or unhealthful working conditions and to conduct such research as may be necessary in mines which are subject to this Article.

(b) The Commissioner is authorized to conduct, directly or by grants, short-term training of personnel engaged in work related to the Commissioner's responsibilities under this Article.

(c) In carrying out the provisions of this Article, the Commissioner is authorized to enter into agreements and contracts with, and accept grants from and make grants to, public and private agencies and organizations and individuals. (1975, c. 206, s. 16.)

§ 74-24.17. State-federal plan.

In order to promote sound and effective coordination in State and federal activities within the field covered by this Article, the Commissioner is hereby authorized to enter into and, from time to time, to amend or terminate a State-federal plant agreement with the federal agency charged with administering laws relating to safety and health in mines. (1975, c. 206, s. 17.)

§ 74-24.18. Legal representation.

It shall be the duty of the Attorney General of North Carolina to represent the Department of Labor in all actions or proceedings in connection with this Article. (1975, c. 206, s. 18.)

§ 74-24.19. Administrative provisions.

(a) The Commissioner shall appoint a Director to assist him in administering the provisions of this Article and, through the Director, shall have authority to appoint, subject to Chapter 126 of the General Statutes of North Carolina, such officers, engineers, inspectors, and employees as he deems requisite for the administration of this Article; and to prescribe powers, duties, and responsibilities of all officers, engineers, inspectors, and employees engaged in the administration of this Article.

(b) All persons appointed as representatives of the Commissioner shall be qualified by practical experience in mine safety and health administration or practical experience in mining or by experience as a practical mining engineer or by education. All persons so appointed shall be physically able to perform their duties predicated on their work assignments, and all persons subject to making inspections, investigations, or participating in rescue and recovery work shall be examined prior to their employment and annually thereafter by a physician who shall certify their physical ability to perform their duties in mines subject to this Article. The fee for the required annual examination shall be satisfied as recommended by the Commissioner.

(c) The Commissioner, the Director, or any other officer, engineer, inspector, or employee engaged in the administration of this Article shall not, upon taking office or being employed, or at any other time during the term of his office or employment, have any affiliation, financial or otherwise, with any operating mining company, operator's association, or labor union. (1975, c. 206, s. 19.)

§ 74-24.20. Construction of Article and severability.

This Article shall receive a liberal construction to the end that the safety and health of miners in the State may be effectuated and protected. If any provision of this Article or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (1975, c. 206, s. 20.)

Article 3.

Waterways Obtained.

§ 74-25. Water and drainage rights obtained.

Any person or body corporate engaged or about to engage in mining, who may find it necessary for the furtherance of his operations to convey water either to or from his mine or mines over the lands of any other person or persons, may make application by petition in writing to the clerk of the superior court of the county in which the lands to be affected or the greater part are situate, for the right so to convey such water. The owner of the lands to be affected shall be made a party defendant, and the proceedings shall be conducted as other special proceedings. (1871-2, c. 158, ss. 1, 3; Code, ss. 3293, 3294, 3300; Rev., s. 4953; C. S., s. 6920.)

§ 74-26. The petition, what to contain.

The petition shall specify the lands to be affected, the name of the owner of such lands, and the character of the ditch or drain intended to be made. (1871-2, c. 158, s. 3; Code, s. 3294; Rev., s. 4954; C. S., s. 6921.)

§ 74-27. Appraisers; appointment and duties.

Upon the hearing of the petition, if the prayer thereof be granted, the clerk shall appoint three disinterested persons, qualified to act as jurors, and not connected either by blood or marriage with the parties, appraisers to assess the damage, if any, that will accrue to the lands by the contemplated work, and shall issue a notice to them to meet upon the premises at a day specified, not to exceed 10 days from the date of such notice. The appraisers having met, shall take an oath before some officer qualified to administer oaths to faithfully perform their duty and to do impartial justice in the case, and shall then examine all the lands in any way to be affected by such work, and assess the damage thereto, and make report thereof under their hands and seals to the clerk from whom the notice issued. (1871-2, c. 158, ss. 4, 5, 9; Code, ss. 3295, 3296, 3299; Rev., s. 4955; C. S., s. 6922.)

§ 74-28. Confirmation of report; payment of damages; rights of petitioner.

After the filing of the report and confirmation thereof by the clerk, who shall have power to confirm or, for good cause, set aside the same, the petitioner shall have full right and power to enter upon such lands and make such ditches, drains, or other necessary work: Provided, he has first paid or tendered the damages, assessed as above, to the owner of such lands or his known and recognized agent, if he be a resident of this State, or have such agent in this State. If the owner be a nonresident and have no known agent in this State, the amount so assessed shall be paid by the petitioner into the office of the clerk of the superior court of the county for the use of such owner. (1871-2, c. 158, s. 12; Code, s. 3298; Rev., s. 4957; C. S., s. 6923.)

§ 74-29. Registration of report.

The petitioner, or any other person interested, may have the report of the appraisers registered upon the certificate of the clerk and shall pay the register a fee of twenty-five cents (25¢) therefor. (1871-2, c. 158, s. 8; Code, s. 3298; Rev., s. 4957; C. S., s. 6924.)

§ 74-30. Obstructing mining drains.

If any person shall obstruct any drain or ditch constructed under the provisions of this Chapter, he shall be guilty of a misdemeanor. (1871-2, c. 158, s. 12; Code, s. 3301; Rev., s. 3380; C. S., s. 6925.)

§ 74-31. Disposition of waste.

In getting out and washing the products of kaolin and mica mines, the persons engaged in such business shall have the right to allow the waste, water, and sediment to run off into the natural courses and streams. (1917, c. 123; C. S., s. 6926; 1937, c. 378.)

CASE NOTES

Strictly Construed. — This section being in derogation of the common law must be strictly construed. McKinney v. Deneen, 231 N.C. 540, 58 S.E.2d 107 (1950).

Modification of Stream Pollution Law in Interest of Miners. — While this section authorizes persons engaged in the business of mining kaolin and mica to discharge the water used in washing the products, together with the incidental waste and sediment, into the natural courses and streams of the State, it does not purport to relieve such persons from liability for any damages which may directly result therefrom. This section would seem to be nothing more than a modification of the prevailing stream pollution law in the interest of miners of kaolin and mica. McKinney v. Deneen, 231 N.C. 540, 58 S.E.2d 107 (1950); Phillips v. Hassett Mining Co., 244 N.C. 17, 92 S.E.2d 429 (1956).

ARTICLE 4.

Adjustment of Conflicting Claims.

§ 74-32. Liability for damage for trespass.

If any owner or person in possession of any mine or mining claim shall enter upon, either on the surface or underground, any mine or mining claim, the property of another, and shall mine or carry away any valuable mineral therefrom, he shall be liable to the owner of the mine so trespassed upon for double the value of all such mineral mined or carried away and for all other damages; and the value of the mineral mined or carried away shall be presumed to be the amount of the gross value ascertained by an average assay of the excavated material or vein or ledge from which it was taken. If such trespass is wrongfully and willfully made, punitive damages may be allowed. (1913, c. 51, s. 1; C. S., s. 6927.)

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Action by Cotenant. — Where tenants in common, under the erroneous impression that they owned the fee, removed valuable minerals from the property, upon suit by the other tenant in common for damages under this section and admission by the defendants of the cotenancy, removal and value, plaintiff was entitled to judgment on the pleadings, though not to the damages provided in this section. Jones v. McBee, 222 N.C. 152, 22 S.E.2d 226 (1942).

§ 74-33. Persons entitled to bring suit.

The owner of a mine in this State, or any person in possession under a lease or other contract, may maintain an action to recover damages to such property arising from the operation of any adjacent mine by the owner thereof or other person in possession and working the same under lease or contract, and also to prevent the continuance of the operation of the adjacent mine in such a manner as to injure or endanger the safety of the complainant's mine. (1913, c. 51, s. 1; C. S., s. 6928.)

§ 74-34. Application and order for survey.

The person entitled to bring an action, as provided in G.S. 74-33, may apply to any judge of the superior court having jurisdiction to grant injunctions and restraining orders, and obtain an order of survey in the following manner: He shall file an affidavit giving the names of the parties and the location as near as may be, of the mine complained of; the location of the plaintiff's mine, and that he has reason to believe that the defendant, or his agents or employees, are or have been trespassing upon his mine, or working the defendant's mine in such a manner as to damage or endanger the plaintiff's property. Upon the filing of the affidavit, the judge shall cause a notice to be issued to the defendant or his agents, stating the time and place and before whom the application will be heard, and requiring them to appear, in not less than 10 nor more than 20 days from the date thereof, and show cause why an order of survey should not be granted. Upon the hearing, and for good cause shown, the judge shall grant an order directed to some competent disinterested surveyor or mining engineer, or both, as the case may be, who shall proceed to make the necessary examination and surveys, as directed by the court, and report their action to the court. The persons selected by the judge to make the survey and examination shall be residents of the State, and, before entering upon the discharge of their duty, shall take and subscribe an oath that they will fairly and impartially survey the mines described in the petition. In all other respects, except as stated above, the surveyors appointed by the judge shall proceed as in surveys in disputed boundaries. (1913, c. 51, s. 2; C. S., s. 6929.)

CASE NOTES

Applied in Vance v. Guy, 224 N.C. 607, 31 S.E.2d 766 (1944).

Cited in Carolina Mineral Co. v. Young, 211 N.C. 387, 190 S.E. 520 (1937).

§ 74-35. Free access to mine for survey.

Upon the order made for the survey in the manner, at the time, and by the persons mentioned in the order, which shall include a representative of the party making the application, who shall not be one of the surveyors, there shall be given free access to the mine for the purpose of survey, and any interference with the persons acting under the order of survey shall be contempt of court and punished accordingly. If the persons named in the order of survey so require, they, with their instruments, shall be carefully lowered and raised in and out of the mine with the cage, bucket, or skip ordinarily used in the shafts of the mine; and they may demand of the owner of the mine, or his manager or agent, that they be so raised and lowered at a speed agreeable to them and not to endanger their comfort and safety or to injure the accuracy of their instruments. The owner of the mine, his managers or agents, shall be liable in damages to the persons making the examination for any injury to them or to their instruments, caused by the careless and negligent operation of any bucket, cage, or skip at such a high rate of speed as to injure the persons or their instruments while being lowered or raised in the mine. (1913, c. 51, s. 2; C. S., s. 6930.)

§ 74-36. Costs of the survey.

The costs of the order and survey shall be paid by the person making the application; but if he shall maintain an action and recover damages for the injury done or threatened prior to such survey and examination, the costs of the order and survey shall be taxed against the defendant as other costs in the action. The party obtaining the survey shall be liable for any unnecessary injury done to the property examined and surveyed in making the survey. (1913, c. 51, s. 2; C. S., s. 6931.)

Article 5.

Interstate Mining Compact.

§ 74-37. Compact enacted into law.

The Interstate Mining Compact is hereby enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows:

INTERSTATE MINING COMPACT

Article I. Findings and Purposes

(a) The party states find that:

(1) Mining and the contributions thereof to the economy and well-being of every state are of basic significance.

(2) The effects of mining on the availability of land, water and other resources for other uses present special problems which properly can be approached only with due consideration for the rights and interests of those engaged in mining, those using or proposing to use these resources for other purposes, and the public.

(3) Measures for the reduction of the adverse effects of mining on land, water and other resources may be costly and the devising of means to deal with them are of both public and private concern.

(4) Such variables as soil structure and composition, physiography, climatic conditions, and the needs of the public make impracticable the application to all mining areas of a single standard for the conservation, adaptation, or restoration of mined land, or the development of mineral and other natural resources; but justifiable requirements of law and practice relating to the effects of mining on land, water, and other resources may be reduced in equity or effectiveness unless they pertain similarly from state to state for all mining operations similarly situated.

(5) The states are in a position and have the responsibility to assure that mining shall be conducted in accordance with sound conservation principles, and with due regard for local conditions.

(b) The purposes of this Compact are to:

(1) Advance the protection and restoration of land, water and other resources affected by mining.

(2) Assist in the reduction or elimination or counteracting of pollution or deterioration of land, water and air attributable to mining.

(3) Encourage, with due recognition of relevant regional, physical, and other differences, programs in each of the party states which will achieve comparable results in protecting, conserving, and improving the usefulness of natural resources, to the end that the most desirable

conduct of mining and related operations may be universally facilitated.

(4) Assist the party states in their efforts to facilitate the use of land and other resources affected by mining, so that such use may be consistent with sound land use, public health, and public safety, and to this end to study and recommend, wherever desirable, techniques for the improvement, restoration or protection of such land and other resources.

(5) Assist in achieving and maintaining an efficient and productive mining industry and in increasing economic and other benefits attributable to mining.

ARTICLE II. Definitions

As used in this Compact, the term:

(1) "Mining" means the breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter; any activity or process constituting all or part of a process for the extraction or removal of minerals, ores, and other solid matter from its original location; and the preparation, washing, cleaning, or other treatment of minerals, ores, or other solid matter so as to make them suitable for commercial, industrial, or construction use; but shall not include those aspects of deep mining not having significant effect on the surface, and shall not include excavation or grading when conducted solely in aid of on site farming or construction.

(2) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

ARTICLE III. State Programs

Each party state agrees that within a reasonable time it will formulate and establish an effective program for the conservation and use of mined land, by the establishment of standards, enactment of laws, or the continuing of the same in force, to accomplish:

(1) The protection of the public and the protection of adjoining and other landowners from damage to their lands and the structures and other property thereon resulting from the conduct of mining operations or the abandonment or neglect of land and property formerly used in the conduct of such operations.

(2) The conduct of mining and the handling of refuse and other mining wastes in ways that will reduce adverse effects on the economic, residential, recreational or aesthetic value and utility of land and water.

(3) The institution and maintenance of suitable programs for adaptation, restoration, and rehabilitation of mined lands.

(4) The prevention, abatement and control of water, air and soil pollution resulting from mining, present, past and future.

ARTICLE IV. Powers

In addition to any other powers conferred upon the Interstate Mining Commission, established by Article V of this Compact, such Commission shall have power to:

(1) Study mining operations, processes and techniques for the purpose of gaining knowledge concerning the effects of such operations, processes and techniques on land, soil, water, air, plant and animal life, recreation, and patterns of community or regional development or change.

(2) Study the conservation, adaption, improvement and restoration of land and related resources affected by mining.
(3) Make recommendations concerning any aspect or aspects of law or practice and governmental administration dealing with matters within the purview of this Compact.
(4) Gather and disseminate information relating to any of the matters within the purview of this Compact.
(5) Cooperate with the federal government and any public or private entities having interests in any subject coming within the purview of this Compact.
(6) Consult, upon the request of a party state and within resources available therefor, with the officials of such state in respect to any problem within the purview of this Compact.
(7) Study and make recommendations with respect to any practice, process, technique, or course of action that may improve the efficiency of mining or the economic yield from mining operations.
(8) Study and make recommendations relating to the safeguarding of access to resources which are or may become the subject of mining operations to the end that the needs of the economy for the products of mining may not be adversely affected by unplanned or inappropriate use of land and other resources containing minerals or otherwise connected with actual or potential mining sites.

ARTICLE V. The Commission

(a) There is hereby created an agency of the party states to be known as the "Interstate Mining Commission," hereinafter called "the Commission." The Commission shall be composed of one commissioner from each party state who shall be Governor thereof. Pursuant to the laws of his party state, each Governor shall have the assistance of an advisory body (including membership from mining industries, conservation interests, and such other public and private interests as may be appropriate) in considering problems relating to mining and in discharging his responsibilities as the commissioner of his state on the Commission. In any instance where a Governor is unable to attend a meeting of the Commission or perform any other function in connection with the business of the Commission, he shall designate an alternate, from among the members of the advisory body required by this paragraph, who shall represent him and act in his place and stead. The designation of an alternate shall be communicated by the Governor to the Commission in such manner as its bylaws may provide.

(b) The commissioners shall be entitled to one vote each on the Commission. No action of the Commission making a recommendation pursuant to Article IV-3, IV-7, and IV-8 or requesting, accepting or disposing of funds, services, or other property pursuant to this paragraph, Articles V (g), V (h), or VII shall be valid unless taken at a meeting at which a majority of the total number of votes on the Commission is cast in favor thereof. All other action shall be by a majority of those present and voting: Provided that action of the Commission shall be only at a meeting at which a majority of the commissioners, or their alternates, is present. The Commission may establish and maintain such facilities as may be necessary for the transacting of its business. The Commission may acquire, hold, and convey real and personal property and any interest therein.

(c) The Commission shall have a seal.

(d) The Commission shall elect annually, from among its members, a chairman, a vice-chairman, and a treasurer. The Commission shall appoint an executive director and fix his duties and compensation. Such executive director shall serve at the pleasure of the Commission. The executive director, the

treasurer, and such other personnel as the Commission shall designate shall be bonded. The amount or amounts of such bond or bonds shall be determined by the Commission.

(e) Irrespective of the civil service, personnel or other merit system laws of any of the party states, the executive director with the approval of the Commission, shall appoint, remove or discharge such personnel as may be necessary for the performance of the Commission's functions, and shall fix the duties and compensation of such personnel.

(f) The Commission may establish and maintain independently or in conjunction with a party state, a suitable retirement system for its employees. Employees of the Commission shall be eligible for social security coverage in respect of old age and survivor's insurance provided that the Commission takes such steps as may be necessary pursuant to the laws of the United States, to participate in such program of insurance as a governmental agency or unit. The Commission may establish and maintain or participate in such additional programs of employee benefits as it may deem appropriate.

(g) The Commission may borrow, accept or contract for the services of personnel from any state, the United States, or any other governmental agency, or from any person, firm, association or corporation.

(h) The Commission may accept for any of its purposes and functions under this Compact any and all donations, and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any state, the United States, or any other governmental agency, or from any person, firm, association or corporation, and may receive, utilize and dispose of the same. Any donation or grant accepted by the Commission pursuant to this paragraph or services borrowed pursuant to paragraph (g) of this Article shall be reported in the annual report of the Commission. Such report shall include the nature, amount and conditions, if any, of the donation, grant or services borrowed and the identity of the donor or lender.

(i) The Commission shall adopt bylaws for the conduct of its business and shall have the power to amend and rescind these bylaws. The Commission shall publish its bylaws in convenient form and shall file a copy thereof and a copy of any amendment thereto, with the appropriate agency or officer in each of the party states.

(j) The Commission annually shall make to the Governor, legislature and advisory body required by Article V (a) of each party state a report covering the activities of the Commission for the preceding year, and embodying such recommendations as may have been made by the Commission. The Commission may make such additional reports as it may deem desirable.

ARTICLE VI. Advisory, Technical and Regional Committees

The Commission shall establish such advisory and technical, and regional committees as it may deem necessary, membership on which shall include private persons and public officials, and shall cooperate with and use the services of any such committees and the organizations which the members represent in furthering any of its activities. Such committees may be formed to consider problems of special interest to any party states, problems dealing with particular commodities or types of mining operations, problems related to reclamation, development, or use of mined land, or any other matters of concern to the Commission.

ARTICLE VII. Finance

(a) The Commission shall submit to the Governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that party state for presentation to the legislature thereof.

(b) Each of the Commission's budgets of estimated expenditures shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. The total amount of appropriations requested under any such budget shall be apportioned among the party states as follows: One half in equal shares; and the remainder in proportion to the value of minerals, ores, and other solid matter mined. In determining such values, the Commission shall employ such available public source or sources of information as, in its judgment, present the most equitable and accurate comparisons among the party states. Each of the Commission's budgets of estimated expenditures and requests for appropriations shall indicate the source or sources used in obtaining information concerning value of minerals, ores, and other solid matter mined.

(c) The Commission shall not pledge the credit of any party state. The Commission may meet any of its obligations in whole or in part with funds available to it under Article V (h) of this Compact: Provided that the Commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the Commission makes use of funds available to it under Article V (h) hereof, the Commission shall not incur any obligation prior to the allotment of funds by the party states adequate to meet the same.

(d) The Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become part of the annual report of the Commission.

(e) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the party states and by any persons authorized by the Commission.

(f) Nothing contained herein shall be construed to prevent Commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the Commission.

ARTICLE VIII. Entry into Force and Withdrawal

(a) This Compact shall enter into force when enacted into law by any four or more states. Thereafter, this Compact shall become effective as to any other state upon its enactment thereof.

(b) Any party state may withdraw from this Compact by enacting a statute repealing the same, but no such withdrawal shall take effect until one year after the Governor of the withdrawing state has given notice in writing of the withdrawal to the Governors of all other party states. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

ARTICLE IX. Effect on Other Laws

Nothing in this Compact shall be construed to limit, repeal or supersede any other law of any party state.

ARTICLE X. Construction and Severability

This Compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this Compact shall be severable and if any phrase, clause, sentence or provision of this Compact is declared to be contrary to the constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this

Compact shall be held contrary to the constitution of any state participating herein, the Compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters. (1967, c. 946, s. 1.)

Legal Periodicals. — For note on "Governmental Regulation of Surface Mining Activities," see 46 N.C.L. Rev. 103 (1967).

§ 74-38. Commission to file copies of bylaws with Department of Natural Resources and Community Development.

(a), (b) Repealed by Session Laws 1973, c. 1262, s. 33.

(c) In accordance with Article V(i) of the Compact, the Commission shall file copies of the bylaws and any amendments thereto with the Department of Natural Resources and Community Development. (1967, c. 946, s. 2; 1973, c. 1262, s. 33; 1977, c. 771, s. 4.)

State Government Reorganization. — The administration of the Interstate Mining Compact was transferred to the Department of Natural and Economic Resources (now the Department of Natural Resources and Community Development) by former § 143A-127, enacted by Session Laws 1971, c. 864.

Article 6.

Mining Registration.

§§ 74-39, 74-40: Repealed by Session Laws 1977, c. 712, s. 2, effective July 1, 1979.

Cross References. — As to the organization of the Department of Natural Resources and Community Development, see §§ 143B-275 through 143B-279. As to the North Carolina Mining Commission, see §§ 143B-290 through 143B-293.

Editor's Note. — This Article is repealed, effective July 1, 1979, by the "Sunset Law," Session Laws 1977, c. 712, s. 2, codified as § 143-34.11. Session Laws 1977, c. 712, s. 5, codified as § 143-34.14, provides:

"Upon termination, each program or function shall continue in operational existence until July 1 of the next succeeding year as a winding-up period. During the winding-up period, termination shall not reduce or otherwise limit the powers or authority of the responsible agencies. Upon the expiration of the one-year period after termination, each such program or function shall cease operation entirely."

§ 74-41: Repealed by Session Laws 1973, c. 1262, s. 33.

§§ 74-42 to 74-45: Repealed by Session Laws 1977, c. 712, s. 2, effective July 1, 1979.

Editor's Note. — This Article is repealed, effective July 1, 1979, by the "Sunset Law," Session Laws 1977, c. 712, s. 2, codified as § 143-34.11. Session Laws 1977, c. 712, s. 5, codified as § 143-34.14, provides:

"Upon termination, each program or function shall continue in operational existence until July 1 of the next succeeding year as a winding-up period. During the winding-up period, termination shall not reduce or

otherwise limit the powers or authority of the responsible agencies. Upon the expiration of the one-year period after termination, each such program or function shall cease operation entirely."

ARTICLE 7.

The Mining Act of 1971.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 74-46. Title.

This Article may be known and cited as "The Mining Act of 1971." (1971, c. 545, s. 1.)

Cross References. — As to the organization of the Department of Natural Resources and Community Development, see §§ 143B-275 through 143B-279. As to the North Carolina Mining Commission, see §§ 143B-290 through 143B-293.

§ 74-47. Findings.

The General Assembly finds that the extraction of minerals by mining is a basic and essential activity making an important contribution to the economic well-being of North Carolina and the nation. Furthermore, it is not practical to extract minerals required by our society without disturbing the surface of the earth and producing waste materials, and the very character of certain surface mining operations precludes complete restoration of the land to its original condition. However, it is possible to conduct mining in such a way as to minimize its effects on the surrounding environment. Furthermore, proper reclamation of mined land is necessary to prevent undesirable land and water conditions that would be detrimental to the general welfare, health, safety, beauty, and property rights of the citizens of the State. The General Assembly finds that the conduct of mining and reclamation of mined lands as provided by this Article will allow the mining of valuable minerals and will provide for the protection of the State's environment and for the subsequent beneficial use of the mined and reclaimed land. (1971, c. 545, s. 2.)

§ 74-48. Purposes.

The purposes of this Article are to provide:

(1) That the usefulness, productivity, and scenic values of all lands and waters involved in mining within the State will receive the greatest practical degree of protection and restoration.

(2) That from June 11, 1971, no mining shall be carried on in the State unless plans for such mining include reasonable provisions for protection of the surrounding environment and for reclamation of the area of land affected by mining. (1971, c. 545, s. 3.)

§ 74-49. Definitions.

Wherever used or referred to in this Article, unless a different meaning clearly appears from the context:

(1) "Affected land" means the surface area of land that is mined, the surface area of land on which overburden and waste is deposited, and the surface area of land used for processing or treatment plant, stockpiles, and settling ponds.

(2) "Borrow pit" means an area from which soil or other unconsolidated materials are removed to be used, without further processing, for highway construction and maintenance.

(3) "Commission" means the Mining Commission created by G.S. 143B-290.

(4) "Department" means the Department of Natural Resources and Community Development. Whenever in this Article the Department is assigned duties, they may be performed by the Secretary or by such of his subordinates as he may designate.

(5) "Land" shall include submerged lands underlying any river, stream, lake, sound, or other body of water and shall specifically include, among others, estuarine and tidal lands.

(6) "Minerals" means soil, clay, coal, stone, gravel, sand, phosphate, rock, metallic ore, and any other solid material or substance of commercial value found in natural deposits on or in the earth.

(7) "Mining" means

a. The breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter,

b. Any activity or process constituting all or part of a process for the extraction or removal of minerals, ores, soils, and other solid matter from its original location,

c. The preparation, washing, cleaning, or other treatment of minerals, ores, or other solid matter so as to make them suitable for commercial, industrial, or construction use.

It shall not include those aspects of deep mining not having significant effect on the surface, where the affected land does not exceed one acre in area. It shall not include mining operations where the affected land does not exceed one acre in area. It shall not include plants engaged in processing minerals produced elsewhere and whose refuse does not affect more than one acre of land. It shall not include excavation or grading when conducted solely in aid of on-site farming or of on-site construction for purposes other than mining. Removal of overburden and mining of limited amounts of any ores or mineral solids shall not be considered mining when done only for the purpose and to the extent necessary to determine the location, quantity, or quality of any natural deposit, provided that no ores or mineral solids removed during such exploratory excavation or mining are sold, processed for sale, or consumed in the regular operation of a business, and provided further that the affected land resulting from any such exploratory excavation does not exceed one acre in area.

(8) "Neighboring" means in close proximity, in the immediate vicinity, or in actual contact.

(9) "Operator" means any person or persons, any partnership, limited partnership, or corporation, or any association of persons, engaged in mining operations, whether individually, jointly, or through subsidiaries, agents, employees, or contractors.

(10) "Overburden" means the earth, rock, and other materials that lie above the natural deposit of minerals.

(11) "Peak" means overburden removed from its natural position and deposited elsewhere in the shape of conical piles or projecting points.

(12) "Reclamation" means the reasonable rehabilitation of the affected land for useful purposes, and the protection of the natural resources of the surrounding area. Although both the need for and the practicability of reclamation will control the type and degree of reclamation in any specific instance, the basic objective will be to establish on a continuing basis the vegetative cover, soil stability, water conditions and safety conditions appropriate to the area.

(13) "Reclamation plan" means the operator's written proposal as required and approved by the Department for reclamation of the affected land, which shall include but not be limited to:

a. Proposed practices to protect adjacent surface resources;

b. Specifications for surface gradient restoration to a surface suitable for the proposed subsequent use of the land after reclamation is completed, and proposed method of accomplishment;

c. Manner and type of revegetation or other surface treatment of the affected areas;

d. Method of prevention or elimination of conditions that will be hazardous to animal or fish life in or adjacent to the area;

e. Method of compliance with State air and water pollution laws;

f. Method of rehabilitation of settling ponds;

g. Method of control of contaminants and disposal of mining refuse;

h. Method of restoration or establishment of stream channels and stream banks to a condition minimizing erosion, siltation, and other pollution;

i. Such maps and other supporting documents as may be reasonably required by the Department; and

j. A time schedule that meets the requirements of G.S. 74-53.

(14) "Refuse" means all waste soil, rock, mineral, scrap, tailings, slimes, and other material directly connected with the mining, cleaning, and preparation of substances mined and shall include all waste materials deposited on or in the permit area from other sources.

(15) "Ridge" means overburden removed from its natural position and deposited elsewhere in the shape of a long, narrow elevation.

(16) "Spoil bank" means a deposit of excavated overburden or refuse.

(17) "Termination of mining" means cessation of mining operations with intent not to resume, or cessation of mining operations as a result of expiration or revocation of the permit of the operator. Whenever the Department shall have reason to believe that a mining operation has terminated, it shall give the operator written notice of its intention to declare the operation terminated, and he shall have an opportunity to appear within 30 days and present evidence that the operation is continuing; where the Department finds that such evidence is satisfactory, it shall not make such a declaration. (1971, c. 545, s. 4; 1973, c. 1262, ss. 33, 86; 1977, c. 771, s. 4; c. 845, s. 1.)

CASE NOTES

Stated in Builders Supplies Co. v. Gainey, 282 N.C. 261, 192 S.E.2d 449 (1972).

Cited in Sanders v. Wilkerson, 20 N.C. App. 331, 201 S.E.2d 571 (1974).

§ 74-50. Permits — general.

After July 1, 1972, no operator shall engage in mining without having first obtained from the Department an operating permit which covers the affected land and which has not terminated, been revoked, been suspended for the period in question, or otherwise become invalid. An operating permit may be modified from time to time to include land neighboring the affected land, in accordance with procedures set forth in G.S. 74-52. A separate permit shall be required for each mining operation that is not on land neighboring a mining operation for which the operator has a valid permit.

No permit shall be issued except in accordance with the procedures set forth in G.S. 74-51, nor modified or renewed except in accordance with the procedures set forth in G.S. 74-52.

An appeal from the Department's denial of a permit may be taken to the Mining Commission, as provided by G.S. 74-61.

No permit shall become effective until the operator has deposited with the Department an acceptable performance bond or other security pursuant to G.S. 74-54. If at any time said bond or other security, or any part thereof, shall lapse for any reason other than a release by the Department, and said lapsed bond or security is not replaced by the operator within 30 days after notice of the lapse, the permit to which it pertains shall automatically become void and of no further effect.

An operating permit shall be granted for a period not exceeding 10 years. If the mining operation terminates and the reclamation required under the approved reclamation plan is completed prior to the end of said period, the permit shall terminate. Termination of a permit shall not have the effect of relieving the operator of any obligations which he has incurred under his approved reclamation plan or otherwise. Where the mining operation itself has terminated, no permit shall be required in order to carry out reclamation measures under the reclamation plan.

An operating permit may be renewed from time to time, pursuant to procedures set forth in G.S. 74-52.

An operating permit may be suspended or revoked for cause, pursuant to procedures set forth in G.S. 74-58. (1971, c. 545, s. 5; 1973, c. 1262, s. 33.)

§ 74-51. Permits — application, granting, conditions.

Any operator desiring to engage in mining shall make written application to the Department for a permit. Such application shall be upon a form furnished by the Department and shall fully state the information called for; in addition, the applicant may be required to furnish such other information as may be deemed necessary by the Department in order adequately to enforce this Article.

The application shall be accompanied by a reclamation plan which meets the requirements of G.S. 74-53. No permit shall be issued until such plan has been approved by the Department.

The application shall be accompanied by a signed agreement, in a form specified by the Department, that in the event a bond forfeiture is ordered pursuant to G.S. 74-59, the Department and its representatives and its contractors shall have the right to make whatever entries on the land and to take whatever actions may be necessary in order to carry out reclamation which the operator has failed to complete.

The Department shall grant or deny the permit requested as expeditiously as possible but in no event later than 60 days after the application form and any supplemental information required shall have been filed with the Department. Priority consideration shall be given to applicants who submit evidence that the mining proposed will be for the purpose of supplying materials to the Board of Transportation.

The Department may deny such permit upon finding:

(1) That any requirement of this Article or any rule or regulation promulgated hereunder will be violated by the proposed operation;

(2) That the operation will have unduly adverse effects on wildlife or fresh water, estuarine, or marine fisheries;

(3) That the operation will violate standards of air quality, surface water quality, or groundwater quality which have been promulgated by the Department of Natural Resources and Community Development;

(4) That the operation will constitute a substantial physical hazard to a neighboring dwelling house, school, church, hospital, commercial or industrial building, public road or other public property;

(5) That the operation will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area;

(6) That previous experience with similar operations indicates a substantial possibility that the operation will result in substantial deposits of sediment in stream beds or lakes, landslides, or acid water pollution; or

(7) That the operator has not corrected all violations which he may have committed under any prior permit and which resulted in,

a. Revocation of his permit,

b. Forfeiture of part or all of his bond or other security,

c. Conviction of a misdemeanor under G.S. 74-64, or

d. Any other court order issued under G.S. 74-64.

In the absence of any such findings, a permit shall be granted.

Any permit issued shall be expressly conditioned upon compliance with all requirements of the approved reclamation plan for the operation and with such further reasonable and appropriate requirements and safeguards as may be deemed necessary by the Department to assure that the operation will comply fully with the requirements and objectives of this Article. Such conditions may, among others, include a requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas, where the Department finds such screening to be feasible and desirable. Violation of any such conditions shall be treated as a violation of this Article and shall constitute a basis for suspension or revocation of the permit.

Any operator wishing any modification of the terms and conditions of his permit or of the approved reclamation plan shall submit a request for modification in accordance with the provisions of G.S. 74-52.

If the Department denies an application for a permit, it shall notify the operator in writing, stating the reasons for its denial and any modifications in the application which would make it acceptable. The operator may thereupon modify his application or file an appeal, as provided in G.S. 74-61, but no such appeal shall be taken more than 60 days after notice of disapproval has been mailed to him at the address shown on his application.

Upon approval of an application, the Department shall set the amount of the performance bond or other security which is to be required pursuant to G.S. 74-54. The operator shall have 60 days following the mailing of such notification in which to deposit the required bond or security with the Department. The operating permit shall not be issued until receipt of this deposit.

When one operator succeeds to the interest of another in any uncompleted mining operation, by virtue of a sale, lease, assignment, or otherwise, the Department may release the first operator from the duties imposed upon him by this Article with reference to such operation and transfer the permit to the successor operator; provided, that both operators have complied with the requirements of this Article and that the successor operator assumes the duties of the first operator with reference to reclamation of the land and posts a suitable bond or other security. (1971, c. 545, s. 6; 1973, c. 507, s. 5; 1977, c. 771, s. 4; c. 845, s. 2.)

§ 74-52. Permits — modification, renewal.

Any operator engaged in mining under an operating permit may apply at any time for modification of said permit, and at any time during the two years prior to its expiration date for renewal of the permit. Such application shall be in writing upon forms furnished by the Department and shall fully state the information called for; in addition, the applicant may be required to furnish such other information as may be deemed necessary by the Department in order adequately to enforce the Article. However, it shall not be necessary to resubmit information which has not changed since the time of a prior application, where the applicant states in writing that such information has not changed.

The procedure to be followed and standards to be applied in renewing a permit shall be the same as those for issuing a permit; provided, however, that in the absence of any changes in legal requirements for issuance of a permit since the date on which the prior permit was issued, the only basis for denying a renewal permit shall be an uncorrected violation of the type listed in G.S. 74-51(7), or failure to submit an adequate reclamation plan in light of conditions then existing.

A modification under this section may affect the land area covered by the permit, the approved reclamation plan coupled with the permit, or other terms and conditions of the permit. A permit may be modified to include land neighboring the affected land, but not other lands. The reclamation plan may be modified in any manner, so long as the Department determines that the modified plan fully meets the standards set forth in G.S. 74-53 and that the modifications would be generally consistent with the bases for issuance of the original permit. Other terms and conditions may be modified only where the Department determines that the permit as modified would meet all requirements of G.S. 74-50 and 74-51. No modification shall extend the expiration date of any permit issued under this Article.

In lieu of a modification or a renewal, an operator may apply for a new permit in the manner prescribed by G.S. 74-50 and 74-51.

No modification or renewal of a permit shall become effective until any required changes have been made in the performance bond or other security posted under the provisions of G.S. 74-54, so as to assure the performance of obligations assumed by the operator under the permit and reclamation plan. (1971, c. 545, s. 7.)

§ 74-53. Reclamation plan.

The operator shall submit with his application for an operating permit a proposed reclamation plan. Said plan shall include as a minimum, each of the elements specified in the definition of "reclamation plan" in G.S. 74-49, plus such other information as may be reasonably required by the Department. The reclamation plan shall provide that reclamation activities, particularly those relating to control of erosion, shall to the extent feasible be conducted simultaneously with mining operations and in any event be initiated at the earliest practicable time after completion or termination of mining on any segment of the permit area. The plan shall provide that reclamation activities shall be completed within two years after completion or termination of mining on each segment of the area for which a permit is requested unless a longer period is specifically permitted by the Department.

The Department may approve, approve subject to stated modifications, or reject the plan which is proposed. The Department shall approve a reclamation plan (as submitted or as modified) only where it finds that it adequately provides for those actions necessary to achieve the purposes and requirements of this Article, and that in addition, the plan meets the following minimum standards:

(1) The final slopes in all excavations in soil, sand, gravel, and other unconsolidated materials shall be at such an angle as to minimize the possibility of slides and be consistent with the future use of the land.
(2) Provisions for safety to persons and to adjoining property must be provided in all excavations in rock.
(3) In open cast mining operations, all overburden and spoil shall be left in a configuration which is in accordance with accepted conservation practices and which is suitable for the proposed subsequent use of the land.
(4) In no event shall any provision of this section be construed to allow small pools of water that are, or are likely to become, noxious, odious, or foul to collect or remain on the mined area. Suitable drainage ditches or conduits shall be constructed or installed to avoid such conditions. Lakes, ponds, and marsh lands shall be considered adequately reclaimed lands when approved by the Department.
(5) The type of vegetative cover and methods of its establishment shall be specified, and in every case shall conform to accepted and recommended agronomic and reforestation restoration practices as established by the North Carolina Agricultural Experiment Station and Department of Natural Resources and Community Development. Advice and technical assistance may be obtained through the State soil and water conservation districts.

The Department shall be authorized to approve a reclamation plan despite the fact that such plan does not provide for reclamation treatment of every portion of the affected land, where the Department finds that because of special conditions such treatment would not be feasible for particular areas and that the plan takes all practical steps to minimize the extent of such areas. (1971, c. 545, s. 8; 1973, c. 1262, s. 86; 1977, c. 771, s. 4.)

§ 74-54. Bonds.

Each applicant for an operating permit, or for the renewal thereof, shall file with the Department following approval of his application and shall thereafter maintain in force a bond in favor of the State of North Carolina, executed by a surety approved by the Commissioner of Insurance, in the amount set forth below. The bond herein provided for must be continuous in nature and shall remain in force until cancelled by the surety. Cancellation by the surety shall be effectuated only upon 60 days written notice thereof to the Department and to the operator.

The applicant shall have the option of filing a separate bond for each operating permit or of filing a blanket bond covering all mining operations within the State for which he holds permits. The amount of each bond shall be based upon the area of affected land to be reclaimed under the approved reclamation plan or plans to which it pertains, less any such area whose reclamation has been completed and released from coverage by the Department pursuant to G.S. 74-56. Where such area totals less than five acres, the bond shall be in the amount of two thousand five hundred dollars ($2,500); where it is five or more, but less than 10 acres, the bond shall be in the amount of five thousand dollars ($5,000); where it is 10 or more, but less than 25 acres, the bond shall be in the amount of twelve thousand five hundred dollars ($12,500); where it is 25 or more acres, the bond shall be in the amount of twenty-five thousand dollars ($25,000).

The bond shall be conditioned upon the faithful performance of the requirements set forth in this Article and of the rules and regulations adopted pursuant thereto. Liability under the bond shall be maintained as long as reclamation is not completed in compliance with the approved reclamation plan unless released only upon written notification from the Department. Noti-

fication shall be given upon completion of compliance or acceptance by the Department of a substitute bond. In no event shall the liability of the surety exceed the amount of the surety bond required by this section.

In lieu of the surety bond required by this section, the operator may file with the Department a cash deposit, negotiable securities, a mortgage of real property acceptable to the Department, or an assignment of a savings account in a North Carolina bank on an assignment form prescribed by the Department.

If the license to do business in North Carolina of any surety upon a bond filed pursuant to this Article should be suspended or revoked, the operator shall, within 60 days after receiving notice thereof, substitute for such surety a good and sufficient corporate surety authorized to do business in this State. Upon failure of the operator to make such substitution, his permit shall automatically become void and of no effect. (1971, c. 545, s. 9.)

§ 74-55. Reclamation report.

Within 30 days after completion or termination of mining on an area under permit or within 30 days after each anniversary of the issuance of the operating permit, whichever is earlier, or at such later date as may be provided by rules and regulations of the Department, and each year thereafter until reclamation is completed and approved, the operator shall file a report of activities completed during the preceding year on a form prescribed by the Department, which shall:

(1) Identify the mine, the operator and the permit number;
(2) State acreage disturbed by mining in the last 12-month period;
(3) State and describe amount and type of reclamation carried out in the last 12-month period;
(4) Estimate acreage to be newly disturbed by mining in the next 12-month period;
(5) Provide such maps as may be specifically requested by the Department. (1971, c. 545, s. 10.)

§ 74-56. Inspection and approval of reclamation; bond release or forfeiture.

Upon receipt of the operator's annual report or report of completion of reclamation and at any other reasonable time the Department may elect, the Department shall cause the permit area to be inspected to determine whether the operator has complied with the reclamation plan, the requirements of this Article, any rules and regulations promulgated hereunder, and the terms and conditions of his permit. Accredited representatives of the Department shall have the right at all reasonable times to enter upon the land subject to the permit for the purpose of making such inspection and investigation.

The operator shall proceed with reclamation as scheduled in the approved reclamation plan. Following its inspection, the Department shall give written notice to the operator of any deficiencies noted. The operator shall thereupon commence action within 30 days to rectify these deficiencies and shall diligently proceed until they have been corrected. The Department may extend performance periods referred to in this section and in G.S. 74-53 for delays clearly beyond the operator's control, but only in cases where the Department finds that the operator is making every reasonable effort to comply.

Upon completion of reclamation of an area of affected land, the operator shall notify the Department. The Department shall make an inspection of the area, and if it finds that reclamation has been properly completed, it shall notify the operator in writing and release him from further obligations regarding such affected land. At the same time it shall release all or the appropriate portion

of any performance bond or other security which he has posted under G.S. 74-54.

If at any time the Department finds that reclamation of the permit area is not proceeding in accordance with the reclamation plan and that the operator has failed within 30 days after notice to commence corrective action, or if the Department finds that reclamation has not been properly completed in conformance with the reclamation plan within two years, or longer if authorized by the Department, after termination of mining on any segment of the permit area, it shall initiate forfeiture proceedings against the bond or other security filed by the operator under G.S. 74-59. In addition, such failure shall constitute grounds for suspension or revocation of the operator's permit, as provided in G.S. 74-58. (1971, c. 545, s. 11.)

§ 74-57. Departmental modification of permit or reclamation plan.

If at any time it appears to the Department from its inspection of the affected land that the activities under the reclamation plan and other terms and conditions of the permit are failing to achieve the purposes and requirements of this Article, it shall give the operator written notice of that fact, of its intention to modify the reclamation plan and other terms and conditions of the permit in a stated manner, and of the operator's right to a hearing on the proposed modification at a stated time and place. The date for such hearing shall be not less than 30 nor more than 60 days after the date of the notice unless the Department and the operator shall mutually agree on another date. Following the hearing the Department shall have the right to modify the reclamation plan and other terms and conditions of the permit in the manner stated in the notice or in such other manner as it deems appropriate in view of the evidence submitted at the hearing. (1971, c. 545, s. 12.)

§ 74-58. Suspension or revocation of permit.

Whenever the Department shall have reason to believe that a violation of (i) this Article, (ii) any rules and regulations promulgated hereunder, or (iii) the terms and conditions of a permit, including the approved reclamation plan, has taken place, it shall serve written notice of such fact upon the operator, specifying the facts constituting such apparent violation and informing the operator of his right to a hearing at a stated time and place. The date for such hearing shall be not less than 30 nor more than 60 days after the date of the notice, unless the Department and the operator shall mutually agree on another date. The operator may appear at the hearing, either personally or through counsel, and present such evidence as he may desire in order to prove that no violation has taken place or exists. If the operator or his representative does not appear at the hearing, or if the Department following the hearing finds that there has been a violation, the Department may suspend the permit until such time as the violation is corrected or may revoke the permit where the violation appears to be willful.

The effective date of any such suspension or revocation shall be 30 days following the date of the decision. An appeal to the Mining Commission under G.S. 74-61 shall stay such effective date until the Commission's decision. A further appeal to superior court under G.S. 74-62 shall stay such effective date until the date of the superior court judgment. If the Department finds at the time of its initial decision that any delay in correcting a violation would result in imminent peril to life or danger to property or to the environment, it shall promptly initiate a proceeding for injunctive relief under G.S. 74-64 hereof and Rule 65 of the Rules of Civil Procedure. The pendency of any appeal from a suspension or revocation of a permit shall have no effect upon such action.

Any operator whose permit has been suspended or revoked shall be denied a new permit or a renewal of the old permit to engage in mining until he gives evidence satisfactory to the Department of his ability and intent to fully comply with the provisions of this Article, rules and regulations promulgated hereunder, and the terms and conditions of his permit, including the approved reclamation plan, and that he has satisfactorily corrected all previous violations. (1971, c. 545, s. 13; 1973, c. 1262, s. 33; 1979, c. 252, s. 1.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

Effect of Amendments. — The 1979 amendment substituted "30" for "60" in the first sentence of the second paragraph.

§ 74-59. Bond forfeiture proceedings.

Whenever the Department determines the necessity of a bond forfeiture under the provisions of G.S. 74-56, or whenever it revokes an operating permit under the provisions of G.S. 74-58, it shall request the Attorney General to initiate forfeiture proceedings against the bond or other security filed by the operator under G.S. 74-54; provided, however, that no such request shall be made for forfeiture of a bond until the surety has been given written notice of the violation and a reasonable opportunity to take corrective action. Such proceedings shall be brought in the name of the State of North Carolina. In such proceedings, the face amount of the bond or other security, less any amount released by the Department pursuant to G.S. 74-56, shall be treated as liquidated damages and subject to forfeiture. All funds collected as a result of such proceedings shall be placed in a special fund and used by the Department to carry out, to the extent possible, the reclamation measures which the operator has failed to complete. If the amount of the bond or other security filed pursuant to this section proves to be insufficient to complete the required reclamation pursuant to the approved reclamation plan, the operator shall be liable to the Department for any excess above the amount of the bond or other security which may be required to defray the cost of completing the required reclamation. (1971, c. 545, s. 14.)

§ 74-60. Notice.

Whenever in this Article written notice is required to be given by the Department, such notice shall be mailed by registered or certified mail to the permanent address of the operator set forth in his most recent application for an operating permit or for a modification or renewal of such permit. No other notice shall be required. (1971, c. 545, s. 15.)

§ 74-61. Appeals.

An appeal may be taken to the Mining Commission from any decision or determination of the Department refusing, modifying, suspending, revoking, or terminating an operating permit or reclamation plan, or imposing any term or condition on said permit or reclamation plan or assessing a civil penalty pursuant to G.S. 74-64. The person taking such appeal shall within 60 days after the Department's decision give written notice to the Mining Commission through the Department of Natural Resources and Community Development that he desires to take an appeal, at the same time filing a copy of such notice with the Department. The chairman of the Mining Commission shall fix a reasonable time and place for a hearing, giving reasonable notice thereof to the appellant and to the Department. The Mining Commission, or a committee thereof designated by the Commission's rules of procedure, shall thereupon

conduct a full and complete hearing as to the matters in controversy, after which it shall within a reasonable time give a written decision setting forth its findings of fact and its conclusions. The Commission or its designated committee may affirm, affirm with modifications, or overrule the decision of the Department and may direct the Department to take such action as may be required to effectuate its decision. A further appeal may be taken from the Commission's decision to a superior court, as provided below. (1971, c. 545, s. 16; 1973, c. 1262, s. 33; 1977, c. 771, s. 4; 1979, c. 252, s. 3.)

Effect of Amendments. — The 1979 amendment added "or assessing a civil penalty pursuant to G.S. 74-64" at the end of the first sentence.

§ 74-62. Judicial review.

An appeal to the courts may be taken from any decision of the Mining Commission, in the manner provided by Chapter 150A of the General Statutes of North Carolina. Such an appeal may also lie against the Department's refusal to release part or all of a bond or other security posted under G.S. 74-54, as provided in G.S. 74-56. Any such appeal may be filed in the Superior Court of Wake County or in the superior court of the county in which the mining operation is to be conducted. (1971, c. 545, s. 17; 1973, c. 1262, s. 33; c. 1331, s. 3.)

§ 74-63. Rules and regulations.

The Mining Commission is hereby given authority to promulgate such rules and regulations as may be reasonably necessary respecting the administration of this Article and in conformity herewith. Any such rules and regulations shall be published in accordance with the provisions of Chapter 150A of the General Statutes of North Carolina. (1971, c. 545, s. 18; 1973, c. 1262, s. 33; c. 1331, s. 3.)

§ 74-64. Penalties for violations.

(a) Civil Penalties.

(1) A civil penalty of not more than five thousand dollars ($5,000) may be assessed by the Department against any person who fails to secure a valid operating permit prior to engaging in mining, as required by G.S. 74-50. No civil penalty shall be assessed until the operator has been given notice of the violation pursuant to G.S. 74-60. Each day of a continuing violation shall constitute a separate violation and a civil penalty of not more than five thousand dollars ($5,000) per day may be assessed for each day the violation continues.

(2) The Department shall determine the amount of the civil penalty to be assessed pursuant to G.S. 74-64(a)(1) and shall give notice to the operator of the assessment of the civil penalty pursuant to G.S. 74-60. Said notice shall set forth in detail the violation or violations for which the civil penalty has been assessed. The operator may appeal the assessment of any civil penalty assessed pursuant to this section in accordance with the procedures set forth in G.S. 74-61.

(3) If payment of any civil penalty assessed pursuant to this section is not received by the Department within 30 days following notice to the operator of the assessment of the civil penalty, or within 30 days following the denial of any appeal by the operator pursuant to G.S. 74-61 and 74-62, the Department shall refer the matter to the Attorney General for the institution of a civil action in the name of the State

in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the penalty.

(4) All funds collected pursuant to this section shall be placed in the special fund created pursuant to G.S. 74-59 and shall be used to carry out the purposes of this Article.

(5) In addition to other remedies, the Department may request the Attorney General to institute any appropriate action or proceedings to prevent, restrain, correct or abate any violation of this Article or any rules and regulations promulgated hereunder.

(b) Criminal Penalties. — In addition to other penalties provided by this Article, any operator who engages in mining in willful violation of the provisions of this Article or of any rules and regulations promulgated hereunder or who willfully misrepresents any fact in any action taken pursuant to this Article or willfully gives false information in any application or report required by this Article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense. Each day of continued violation after written notification shall be considered a separate offense. (1971, c. 545, s. 19; 1979, c. 252, s. 2.)

Effect of Amendments. — The 1979 amendment rewrote this section, which formerly consisted of two paragraphs, of which the first was substantially identical to subsection (b), and the second was similar to subdivision (a)(5), in the section as amended.

§ 74-65. Effect on local zoning regulations.

No provision of this Article shall be construed to supersede or otherwise affect or prevent the enforcement of any zoning regulation or ordinance duly adopted by an incorporated city or county or by any agency or department of the State of North Carolina, except insofar as a provision of said regulation or ordinance is in direct conflict with this Article. (1971, c. 545, s. 20.)

§ 74-66. Private relief against nuisance or hazard.

No provision of this Article shall be construed to restrict or impair the right of any private or public person, association, corporation, partnership, officer, or agency to bring any legal or equitable action for redress against nuisances or hazards. (1971, c. 545, s. 21.)

§ 74-67. Exemptions.

The provisions of this Article shall not apply to those activities of the Department of Transportation, nor of any person, firm, or corporation acting under contract with said Department of Transportation, on highway rights-of-way or borrow pits maintained solely in connection with the construction, repair, and maintenance of the public road systems of North Carolina; provided, that this exemption shall not become effective until the Department of Transportation shall have adopted reclamation standards applying to such activities and such standards have been approved by the Mining Commission. The provisions of this Article shall not apply to mining on federal lands under a valid permit from the U.S. Forest Service or the U.S. Bureau of Land Management. (1971, c. 545, s. 22; 1973, c. 507, s. 5; c. 1262, s. 33; 1977, c. 464, s. 34.)

§ 74-68. Cooperation with other agencies; contracts and grants.

The Department, with the approval of the Governor, and in order to accomplish any of the purposes of the Department, may apply for, accept, and expend grants from the federal government and its agencies and from any foundation, corporation, association, or individual; may enter into contracts relating to such grants; and may comply with the terms, conditions, and limitations of any such grant or contract. The Department may engage in such research as may be appropriate to further its ability to accomplish its purposes under this Article, and may contract for such research to be done by others. The Department may cooperate with any federal, state, or local government or agency, of this or any other state, in mutual programs to improve the enforcement of this Article or to accomplish its purposes more successfully. (1971, c. 545, s. 23.)

Chapter 74A.

Company Police.

Sec.
74A-1. Attorney General may appoint and commission special police; civil liability of companies or corporations for which appointed.
74A-2. Oath, powers, and bond of company police; exceptions as to railroad police.
74A-3. Company police to wear badges.
74A-4. Compensation of company police.
74A-5. Police powers cease on company's filing notice.
74A-6. Railway conductors and station agents declared special police.

§ 74A-1. Attorney General may appoint and commission special police; civil liability of companies or corporations for which appointed.

Any educational institution or hospital, whether State or private, or any other State institution, public utility company, construction company, manufacturing company, auction company, incorporated security patrols or corporations engaged in providing security or protection services for persons or property, may apply to the Attorney General to commission such persons as the institution, corporation or company may designate to act as policemen for it. The Attorney General upon such application may appoint such persons or so many of them as he may deem proper to be such policemen, and shall issue to the persons so appointed a commission to act as such policemen. Nothing contained in the provisions of this section shall have the effect to relieve any such company or corporation from any civil liability for the acts of such policemen, in exercising or attempting to exercise the powers conferred by this Chapter. (1871-2, c. 138, ss. 51, 52; Code, ss. 1988, 1989; Rev., ss. 2605, 2606; 1907, c. 128, s. 1; C. S., s. 3484; 1923, c. 23; 1933, c. 61; 1943, c. 676, ss. 1, 4; 1947, c. 390; 1963, c. 1165, s. 2; 1965, cc. 297, 581; 1977, c. 148, s. 4.)

Local Modification. — New Hanover: 1979, c. 354.

Cross References. — As to venue of action against railroad, see § 1-81.

State Government Reorganization. — The special and company police were transferred to the Department of Justice by § 143A-54, enacted by Session Laws 1971, c. 864.

CASE NOTES

A railroad policeman appointed pursuant to this section is prima facie a public officer, but the question of whether a particular act is done as an employee of the railroad company or as a public officer is a question to be determined from the nature of the act, whether it relates to vindication and enforcement of public justice or whether it is in the scope of duties owed to the company by reason of employment. Tate v. Southern Ry., 205 N.C. 51, 169 S.E. 816 (1933), decided under former § 60-83.

Applied in North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

§ 74A-2. Oath, powers, and bond of company police; exceptions as to railroad police.

(a) Every policeman so appointed shall, before entering upon the duties of his office, take and subscribe the usual oath.

(b) Such policemen, while in the performance of the duties of their employment, shall severally possess all the powers of municipal and county police officers to make arrests for both felonies and misdemeanors:

(1) Upon property owned by or in the possession and control of their respective employers; or

(2) Upon property owned by or in the possession and control of any person or persons who shall have contracted with their employer or employers to provide security for protective services for such property; or

(3) Upon any other premises while in hot pursuit of any person or persons for any offense committed upon property vested in subdivisions (1) and (2) above.

(c) Every policeman appointed under this Chapter shall, before entering upon the duties of his office, file in the Attorney General's office a bond in the sum of twenty-five hundred dollars ($2,500), payable to the State of North Carolina, conditioned upon the faithful performance of the duties of his office. Such bonds shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8.

(d) The limitations on the power to make arrests contained in subdivisions (1), (2) [and] (3) of subsection (b) shall not be applicable to policemen appointed for any railroad company. Policemen appointed for railroad companies shall be required to post a bond in the sum of five hundred dollars ($500.00) in lieu of the bond required by subsection (c). (1871-2, c. 138, s. 53; Code, s. 1990; Rev., s. 2607; 1907, c. 128, s. 2; c. 462; C. S., s. 3485; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1943, c. 676, s. 2; 1959, c. 124, s. 1; 1963, c. 1165, s. 2; 1965, c. 872; 1969, c. 844, s. 8; 1977, c. 148, s. 4.)

Cross References. — As to oath required, see § 11-11.

CASE NOTES

Applied in North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

OPINIONS OF ATTORNEY GENERAL

Jurisdiction of Company or Special Police to Make Arrests off Campus Grounds. — Special policemen appointed pursuant to this Chapter have territorial limits placed upon their power to arrest as set forth in this section. Opinion of Attorney General to Mr. William S. Mason, Jr., Business Manager, Pembroke State University, 40 N.C.A.G. 164 (1970).

§ 74A-3. Company police to wear badges.

Such policemen shall, when on duty, severally wear a shield with the words "Railway Police" or "Company Police" and the name of the corporation for which appointed inscribed thereon, and this shield shall always be worn in plain view except when such police are employed as detectives. (1871-2, c. 138, s. 54; Code, s. 1991; Rev., s. 2608; C. S., s. 3486; 1963, c. 1165, s. 2.)

Cross References. — As to badges of conductor and certain other railroad employees, see § 62-244.

§ 74A-4. Compensation of company police.

The compensation of such police shall be paid by the companies for which the policemen are respectively appointed, as may be agreed on between them. (1871-2, c. 138, s. 55; Code, s. 1992; Rev., s. 2609; C. S., s. 3487; 1963, c. 1165, s. 2.)

§ 74A-5. Police powers cease on company's filing notice.

Whenever any company shall no longer require the services of any policeman so appointed as aforesaid, it may file a notice to that effect in the office of the Attorney General and thereupon the power of such officer shall cease and determine. (1871-2, c. 138, s. 56; Code, s. 1993; Rev., s. 2610; C. S., s. 3488; 1943, c. 676, s. 3; 1959, c. 124, s. 2; 1963, c. 1165, s. 2; 1977, c. 148, s. 5.)

§ 74A-6. Railway conductors and station agents declared special police.

All passenger conductors of railroad trains and station or depot agents are hereby declared to be special police of the State of North Carolina, with full power and authority to make arrests for offenses committed in their presence or view, or for felony, or on sworn complaint for misdemeanor, except that the conductors shall have such power only on their respective trains or their railroad right-of-way, and the agents at their respective stations; and such conductors and agents may cause any person so arrested by them to be detained and delivered to the proper authority for trial as soon as possible. Nothing contained in the provisions of this section shall have the effect to relieve any such railroad company from any civil liability for the acts of such conductors, station or depot agents, in unlawfully exercising or attempting to exercise the powers herein conferred. (1907, c. 470, ss. 3, 4; C. S., s. 3483; 1963, c. 1165, s. 2.)

Legal Periodicals. — For article discussing arrest without a warrant, see 15 N.C.L. Rev. 101.

CASE NOTES

Conductor Has Power of Peace Officer. — A conductor on a railroad passenger train is held to a high degree of care in looking after and protecting passengers on his train, and he is clothed, to some extent, with the powers of a peace officer. Brown v. Atlantic Coast Line R.R., 161 N.C. 573, 77 S.E. 777 (1913), decided under former § 60-82.

Chapter 74B.

Private Protective Services Act.

§§ 74B-1 to 74B-16: Repealed by Session Laws 1979, c. 818, s. 1, effective July 1, 1979.

Cross References. — For present provisions as to the Private Protective Services Act, see §§ 74C-1 to 74C-20.

Chapter 74C.

Private Protective Services Act.

Sec.
74C-1. Title.
74C-2. Licenses required.
74C-3. Private protective services business defined.
74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.
74C-5. Powers of the Board.
74C-6. Position of administrator created.
74C-7. Investigative powers of the Attorney General.
74C-8. Applications for an issuance of license.
74C-9. Form of license; term; renewal; posting; branch offices; not assignable; late renewal fee.
74C-10. Bond and certificate of liability insurance required; form and approval; action on bonds; suspension for noncompliance.
74C-11. Registration of persons employed; temporary employment.
74C-12. Suspension or revocation of licenses; appeal.
74C-13. Firearms.
74C-14. Mace.
74C-15. Identification cards; badges; and shields.
74C-16. Prohibited acts.
74C-17. Enforcement.
74C-18. Reciprocity; temporary permit.
74C-19. Severability.
74C-20. Repeal of Chapter.

§ 74C-1. Title.

This Chapter may be cited as the Private Protective Services Act. (1979, c. 818, s. 2.)

Editor's Note. — Session Laws 1979, c. 818, s. 3, makes this Chapter effective July 1, 1979, except that §§ 74C-10 and 74C-13 are made effective Jan. 1, 1980.

§ 74C-2. Licenses required.

(a) No private person, firm, association, or corporation shall engage in, perform any services as, or in any way represent or hold itself out as engaging in a private protective service business or activity in this State without having first complied with the provisions of this Chapter. Compliance with licensing requirements of this Chapter shall not relieve any person, firm, association or corporation from compliance with any other licensing law.

(b) An individual in possession of a valid private protective services license or private detective trainee permit issued prior to July 1, 1973, shall not be subject to forfeiture of such license by virtue of this Chapter. Such license shall, however, remain subject to suspension, denial, or revocation in the same manner in which all other licenses issued pursuant to this Chapter are subject to suspension, denial, or revocation.

(c) In its discretion, the Private Protective Services Board may issue a trainee permit in lieu of a private investigator license provided that the applicant works under the direct supervision of a licensee. (1973, c. 528, s. 1; 1979, c. 818, s. 1.)

§ 74C-3. Private protective services business defined.

(a) As used in this Chapter, the term "private protective services business" means and includes the following:

(1) "Armored car business" means any person, firm, association, or corporation which provides secured transportation and protection from one place or point to another place or point of money, currency, coins, bullion, securities, checks, documents, stocks, bonds, jewelry,

paintings, and other valuables for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer.

(2) "Alarm system business" means any person, firm, association, or corporation which installs, services, or responds to electrical, electronic, or mechanical alarm signal devices, burglar alarms, television cameras or still cameras used to detect burglary, breaking or entering or intrusion, shoplifting, pilferage, or theft, for a fee or other valuable consideration. Provided, however, it shall not include a business which merely sells or manufactures alarm systems unless such business services, installs, or responds to alarm systems at the protected premises. Provided further, this definition does not include a person, firm, association, or corporation which merely owns and installs an alarm system on property owned or leased by itself. Provided further, the regulation of alarm system businesses shall not include installation, servicing, or responding to fire alarm systems or any alarm device which is installed in a motor vehicle, aircraft, or boat. Provided further, the regulation of alarm system businesses shall be exclusive to the Board, but any city or county shall not be prevented from requiring within its jurisdiction to register the alarm system companies' names and to file copies of board certification or from adopting an ordinance to require users of alarm systems to obtain permits when usage involves automatic signal transmission to a law enforcement agency.

(3) "Counterintelligence service business" means any person, firm, association, or corporation which discovers, locates, or disengages by electronic, electrical, or mechanical means any listening or other monitoring equipment surreptitiously placed to gather information concerning any individual, firm, association, or corporation for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer.

(4) "Courier service business" means any person, firm, association, or corporation which transports or offers to transport from one place or point to another place or point documents, papers, maps, stocks, bonds, checks, or other small items of value which require expeditious service for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer.

(5) "Detection of deception examiner" means any person, firm, association, or corporation which uses any device or instrument, regardless of its name or design, for the purpose of detection of deception.

(6) "Security guard and patrol business" means any person, firm, association, or corporation engaging in the business of providing a private watchman, guard, or street patrol service on a contractual basis for another person, firm, association, or corporation for a fee or other valuable consideration and performing one or more of the following functions:

a. Prevention and/or detection of intrusion, entry, larceny, vandalism, abuse, fire, or trespass on private property;

b. Prevention, observation, or detection of any unauthorized activity on private property; and

c. Protection of patrons and persons lawfully authorized to be on the premises of the person, firm, association, or corporation for whom he contractually obligated to provide security services; and

d. Control, regulation, or direction of the flow or movement of the public, whether by vehicle or otherwise, only to the extent and for the time directly and specifically required to assure the protection of properties.

This definition does not include a person employed regularly and exclusively as an employee by an employer in connection with the business affairs of such employer; provided, however, that nothing in this Chapter shall be construed to prohibit a law-enforcement officer from being employed during his off-duty hours by a licensed security guard and patrol company on an employer-employee basis; provided further, that the police officer shall not wear his police officer's uniform or use police equipment while working for a security guard and patrol company. This definition does not include a law-enforcement officer who provides security guard and patrol services on an individual employer-employee basis to a person, firm, association, or corporation which is not engaged in a security guard and patrol business.

(7) "Guard-dog service business" means any person, firm, association, or corporation which contracts with another person, firm, association, or corporation to place, lease, rent, or sell a trained dog for the purpose of protecting lives or property for a fee or other valuable consideration. This definition does not include a person employed regularly and exclusively as an employee by one employer in connection with the business affairs of such employer.

(8) "Private detective" or "private investigator" means any person who engages in the business of or accepts employment to furnish, agrees to make, or makes an investigation for the purpose of obtaining information with reference to:

a. Crime or wrongs done or threatened against the United States or any state or territory of the United States;

b. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person;

c. The location, disposition, or recovery of lost or stolen property;

d. The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties, provided that scientific research laboratories and consultants shall not be included in this definition;

e. Securing evidence to be used before any court, board, officer, or investigation committee; or

f. Protection of individuals from serious bodily harm or death.

However, the employee of a security department of a private business which conducts investigations exclusively on matters internal to the business affairs of the business shall not be required to be licensed as a private detective or investigator under this Chapter.

(b) "Private protective services" shall not mean:

(1) Insurance adjusters legally employed as such and who engage in no other investigative activities unconnected with adjustment or claims against an insurance company;

(2) An officer or employee of the United States, this State, or any political subdivision of either while such officer or employee is engaged in the performance of his official duties within the course and scope of his employment with the United States, this State, or any political subdivision of either;

(3) A person engaged exclusively in the business of obtaining and furnishing information as to the financial rating or credit worthiness

of persons; and a person who provides consumer reports in connection with:

a. Credit transactions involving the consumer on whom the information is to be furnished and involving the extensions of credit to the consumer,
b. Information for employment purposes,
c. Information for the underwriting of insurance involving the consumer,
d. Information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility, or
e. A legitimate business need for the information in connection with a business transaction involving the consumer;

(4) An attorney at law licensed to practice in North Carolina while engaged in such practice and his agent, provided said agent is performing duties only in connection with his master's practice of law;
(5) The legal owner or lien holder, and his agents and employees, of personal property which has been sold in a transaction wherein a security interest in personal property has been created to secure the sales transaction, who engage in repossession of said personal property;
(6) Company police or railroad police as defined in Chapter 74A of the General Statutes of North Carolina;
(7) Persons, firms, associations, or corporations operating under a motor carrier permit or certificate issued by the North Carolina Utilities Commission; or
(8) Employees of a licensee who are employed exclusively as undercover agents; provided that for purposes of this section, undercover agent means an individual hired by another person, firm, association, or corporation to perform a job in and/or for that person, firm, association, or corporation and, while performing such job, to act as an undercover operative, employee, or independent contractor of a licensee, but under the supervision of a licensee. (1973, c. 528, s. 1; 1977, c. 481; 1979, c. 818, s. 2.)

§ 74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

(a) The Private Protective Services Board is hereby established in the Department of Justice to administer the licensing and set educational and training requirements for persons, firms, associations, and corporations engaged in the private protective services businesses within this State.

(b) The Board shall consist of eight members: the Attorney General or his designated representative, two persons appointed by the Attorney General, one person appointed by the Governor, one person appointed by the Lieutenant Governor, one person appointed by the President pro tem of the Senate and two persons appointed by the Speaker of the House of Representatives. Those persons appointed by the President pro tem of the Senate and the Speaker of the House of Representatives shall be licensees under this Chapter. All other persons appointed to the Board may not be licensees of the Board nor licensed by the Board while serving as a Board member. The terms of the Board members shall begin as follows: the Attorney General shall appoint two persons to serve terms of two years beginning July 1, 1979; the person appointed by the Governor shall serve a term of four years beginning July 1, 1979; the person

appointed by the Lieutenant Governor shall serve a term of four years beginning July 1, 1979; the person appointed by the President pro tem of the Senate shall serve a term of two years beginning July 1, 1979, and the Speaker of the House of Representatives shall appoint one person to serve a term of four years and one person to serve a term of two years beginning July 1, 1979. No person shall be eligible for reappointment to the Board after eight years of continuous service as a member of the Board established herein.

(c) Vacancies on the Board occurring for any reason shall be filled by the authority making the original appointment of the person causing the vacancy.

(d) Each member of the Board, before assuming the duties of his office, shall take an oath for the faithful performance of his duties. A Board member may be removed at the pleasure of the authority making the original appointment or by the Board for misconduct, incompetence, or neglect of duty.

(e) Members of the Board who are State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Board who are full-time salaried public officers or employees other than State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6 in the same manner as State officers or employees. All other Board members shall receive per diem compensation and reimbursement in accordance with G.S. 93B-5.

(f) The Board shall elect a chairman, vice-chairman, and other officers and committee chairmen from among its members as the Board deems necessary and desirable at the first meeting after July 1 of each year. The chairman and vice-chairman shall be selected by the members of the Board for a term of one year and shall be eligible for reelection. The Board shall meet at the call of the chairman or a majority of the members of the Board at such time, date, and location as may be decided upon by a majority of the Board.

(g) All decisions heretofore made by the Private Protective Services Board, established pursuant to Chapter 74B, shall remain in full force and effect unless and until repealed or suspended by action of the Private Protective Services Board established herein. All rules and regulations heretofore adopted pursuant to the provisions of Chapter 150A of the General Statutes by the Private Protective Services Board, established pursuant to Chapter 74B, shall remain in full force and effect until, but not later than January 1, 1980, or until repealed or suspended by action of the Private Protective Services Board established herein. (1973, c. 528, s. 1; 1975, c. 592, ss. 8, 9; 1977, c. 535; 1979, c. 818, s. 2.)

§ 74C-5. Powers of the Board.

In addition to the powers conferred upon the Board elsewhere in this Chapter, the Board shall have the power to:

(1) Promulgate rules necessary to carry out and administer the provisions of this Chapter including the authority to require the submission of reports and information by licensees under this Chapter;

(2) Determine minimum qualifications and establish minimum education, experience, and training standards for applicants and licensees under this Chapter;

(3) Conduct investigations regarding alleged violations and to make evaluations as may be necessary to determine if licensees and trainees under this Chapter are complying with the provisions of this Chapter;

(4) Adopt and amend bylaws, consistent with law, for its internal management and control;

(5) Approve individual applicants to be licensed or registered according to this Chapter;

(6) Deny, suspend, or revoke any license issued or to be issued under this Chapter to any applicant or licensee who fails to satisfy the requirements of this Chapter and/or the rules established by the Board. The denial, suspension, or revocation of such license shall be in accordance with Chapter 150A of the General Statutes of North Carolina;
(7) Issue subpoenas to compel the attendance of witnesses and the production of pertinent books, accounts, records, and documents. The district court shall have the power to impose punishment pursuant to G.S. 5A-21 et seq. for acts occurring in matters pending before the Private Protective Services Board which would constitute civil contempt if the acts occurred in an action pending in court;
(8) The chairman of the Board or his representative designated to be a hearing officer may conduct any hearing called by the Board for the purpose of denial, suspension, or revocation of a license or trainee permit under this Chapter; and
(9) Establish rules governing detection of deception schools located in this State. (1973, c. 528, s. 1; c. 1331, s. 3; 1979, c. 818, s. 2.)

§ 74C-6. Position of administrator created.

The position of Administrator of the Private Protective Services Board is hereby created within the State Bureau of Investigation. The Attorney General shall appoint a person to fill this full-time position. The Administrator's duties shall be to administer the directives contained in this Chapter and the rules promulgated by the Board to implement this Chapter and to carry out the administrative duties incident to the functioning of the Board in order to actively police the private protective services industry to ensure compliance with the law in all aspects. (1973, c. 528, s. 1; 1979, c. 818, s. 2.)

§ 74C-7. Investigative powers of the Attorney General.

The Attorney General for the State of North Carolina shall have the power to investigate or cause to be investigated any complaints, allegations, or suspicions of wrongdoing or violations of this Chapter involving individuals licensed, or to be licensed, under this Chapter. (1973, c. 528, s. 1; 1979, c. 818, s. 2.)

§ 74C-8. Applications for an issuance of license.

(a) Any person, firm, association, or corporation desiring to carry on or engage in a private protective services business in this State of a kind defined in G.S. 74C-3 shall make a verified application in writing to the Board.
(b) The application shall include:
(1) Full name and business address of the applicant;
(2) The name under which the applicant intends to do business;
(3) A statement as to the general nature of the business in which the applicant intends to engage;
(4) If an applicant is a person other than an individual, the full name and address of each of its partners, principal officers, directors, and its business manager, if any;
(5) The names of not less than three unrelated and disinterested persons as references of whom inquiry can be made as to the character, standing, and reputation of the persons making the application;
(6) Such other information, evidence, statements, or documents as may be required by the Board; and
(7) Accompanying trainee permit applications only, a notarized statement signed by the applicant and his employer stating that the trainee

applicant will at all times work with and under the direct supervision of a licensed private detective.

(c) A business entity other than a sole proprietorship shall not do business under this Chapter unless the business entity has in its employ a designated qualifying agent who meets the requirements for a license issued under this Chapter and who is in fact licensed under the provisions of this Chapter. For the purposes of this Chapter, a qualifying agent means an individual in a management position who is licensed under this Chapter and whose name and address have been registered with the Administrator. In the event that the qualifying agent upon whom the business entity relies in order to do business ceases to perform his duties as qualifying agent, the business entity shall notify the Administrator within 10 working days. The business entity must obtain a substitute qualifying agent within 30 days after the original qualifying agent ceases to serve as qualifying agent unless the Board, in its discretion, extends this period for good cause for a period of time not to exceed three months. The certificate authorizing the business entity to engage in a private protective service shall list the name of at least one designated qualifying agent.

(d) Upon receipt of an application, the Board shall cause a background investigation to be made during the course of which the applicant shall be required to show that he meets all the following requirements and qualifications hereby made prerequisite to obtaining a license:

(1) That he is at least 18 years of age;

(2) That he is of good moral character and temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking and/or entering, burglary, larceny, any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty or a verdict rendered in open court by a judge and/or jury;

(3) For a private detective license, that he has had at least three years experience within the past five years in private investigative work, or in lieu thereof, at least two years experience within the past five years in an investigative capacity as a member of the Federal Bureau of Investigation, the State Bureau of Investigation, any municipal police department, or any county sheriff's department; and

(4) That he has the necessary training, qualifications, and/or experience in order to determine the applicant's competency and fitness as the Board may determine by rule for all licenses to be issued by the Board.

(e) The Board may require the applicant to demonstrate his qualifications by oral or written examination, or both.

(f) Upon a finding that the application is in proper form, the completion of the background investigation, and the completion of an examination required by the Board, the Administrator shall submit to the Board the application and his recommendations. The Board shall determine whether to approve or deny the application for a license. Upon approval by the Board, a license will be issued to the applicant upon payment by the applicant of the initial license fee and furnishing of the required cash bond or surety bond, and certificate of liability insurance. The grounds for the denial of a license include:

(1) Commission of some act which if committed by a licensee, would be grounds for the suspension or revocation of a license under this Chapter;

(2) Conviction of a crime involving fraud;

(3) Lack of good moral character or temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking and/or entering, burglary, larceny; any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty or a verdict rendered in open court by a judge and/or jury;

(4) Previous denial of a license under this Chapter or previous revocation of a license for cause;

(5) Knowingly making any false statement or misrepresentation in his application. (1973, c. 47, s. 2; c. 528, s. 1; 1975, c. 592, s. 1; 1977, c. 570, s. 2; 1979, c. 818, s. 2.)

§ 74C-9. Form of license; term; renewal; posting; branch offices; not assignable; late renewal fee.

(a) The license when issued shall be in such form as may be determined by the Board and shall state:

(1) The name of the licensee,

(2) The name under which the licensee is to operate, and

(3) The number and expiration date of the license.

(b) The license shall be issued for a term of two years. A trainee permit shall be issued for a term of one year. All licenses must be renewed prior to the expiration of the term of the license. Following issuance, the license shall at all times be posted in a conspicuous place in the principal place of business of the licensee. A license issued under this Chapter is not assignable.

(c) No licensee shall conduct a private protective services business under a name other than the name under which his license was obtained under the provisions of this Chapter or the name of the business entity under which the licensee is doing business and which name and address of such business entity has been registered with the Administrator.

(d) The operator or manager of any branch office shall be properly licensed, and his license shall be posted at all times in a conspicuous place in the branch office. Every business covered under the provisions of this Chapter shall file in writing with the Board the addresses of each of its branch offices, if any, within 10 working days after the establishment, closing, or changing of the location of any branch office.

(e) The Board is authorized to charge reasonable application and license fees as follows:

(1) A nonrefundable initial application fee in an amount not to exceed seventy-five dollars ($75.00);

(2) A new or renewal license fee in an amount not to exceed two hundred fifty dollars ($250.00);

(3) A new or renewal trainee permit fee in an amount not to exceed seventy-five dollars ($75.00);

(4) A new or renewal fee for each license in addition to the basic license referred to in subsection (2) in an amount not to exceed twenty-five dollars ($25.00);

(5) A late renewal fee to be paid in addition to the renewal fee due in an amount not to exceed one hundred dollars ($100.00), if the license has not been renewed on or before the expiration date of the licensee.

All fees collected pursuant to this section shall be expended, under the direction of the Board, for the purpose of defraying the expense of administering this Chapter. All fees collected pursuant to G.S. 74B-11 which have not been expended upon the effective date of this Chapter shall be transferred to the Board established by this Chapter to be expended, under the direction of the Board, for the purpose of defraying the expenses of administering this Chapter.

(f) A license or trainee permit granted under the provisions of this Chapter may be renewed by the Private Protective Services Board upon notification by the licensee or permit holder to the Administrator of intended renewal and the payment of the proper fee. The renewal shall be finalized before the expiration date of the license. In no event will renewal be granted more than three months after the date of expiration of a license or trainee permit.

(g) Upon notification of approval of his application by the Board, an applicant must furnish evidence that he has obtained the necessary bond and liability insurance required by G.S. 74C-10 and obtain the license applied for or his application shall lapse.

(h) Trainee permits shall not be issued to applicants that satisfy the experience requirement in G.S. 74C-8(d)(3). A licensed private detective may supervise no more than five trainees at any given time. (1973, c. 528, s. 1; c. 1428; 1975, c. 592, ss. 2-4; 1979, c. 818, s. 2.)

§ 74C-10. Bond and certificate of liability insurance required; form and approval; action on bonds; suspension for noncompliance.

(a) No licensee or applicant for a license shall be licensed under this Chapter unless the licensee or applicant for a license files with the Board and maintains a surety bond executed by a surety company authorized to do business in this State in a sum of not less than five thousand dollars ($5,000) or a cash bond, in lieu of the surety bond in a sum of not less than five thousand dollars ($5,000), to protect the public from the wrongful or illegal acts of the bond principal or his agents operating in the course and scope of his or her agency. Only one bond shall be required of a licensee regardless of the number of licenses which he is issued under this Chapter.

(b) The bond shall be taken in the name of the people of the State of North Carolina. Every person injured by wrongful or illegal acts of the principal or his agents operating in the course and the scope of his or her agency may bring an action on the bond in his or her name to recover damages suffered by reason of such wrongful act. Provided, however, the aggregate liability of the surety for all breaches of the condition of bond shall, in no event, exceed the sum of said bond.

(c) Persons registered pursuant to G.S. 74C-11 shall not be required to obtain a surety bond or certificate of liability insurance. The holder of a private detective trainee permit must satisfy the bond requirements of this section within 90 days of the issuance of said permit.

(d) The surety on said bond shall have a right to cancel such bond upon giving a 30-day notice to the Board. Provided, however, that such cancellation shall not affect any liability on the bond which accrued prior thereto. The bond shall be approved by the Board as to form, execution, and sufficiency of the sureties thereon.

(e) No license shall be issued under this Chapter unless the applicant files with the Board evidence of a policy of liability insurance which policy must provide for the following minimum coverage: fifty thousand dollars ($50,000) because of bodily injury or death of one person as a result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his employment; subject to said limit for one person, one hundred thousand dollars ($100,000) because of bodily injury or death of two or more persons as the result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his or her agency; twenty thousand dollars ($20,000) because of injury to or destruction of property of others as the result of the negligent act or acts of the principal insured or his agents operating in the course and scope of his or her agency.

(f) An insurance carrier shall have the right to cancel such policy of liability insurance upon giving a 30-day notice to the Board. Provided, however, that such cancellation shall not affect any liability on the policy which accrued prior thereto. The policy of liability shall be approved by the Board as to form, execution, and terms thereon.

(g) The holder of a private detective trainee permit and persons registered pursuant to G.S. 74C-11 shall not be required to obtain a certificate of liability insurance.

(h) Every licensee shall at all times maintain on file with the Board the surety bond and certificate of insurance required by this Chapter in full force and effect and upon failure to do so, the license of such licensee shall be automatically suspended and shall not be reinstated until an application therefor, in the form prescribed by the Board, is filed together with a proper bond, insurance certificate, or both.

(i) The Board may deny the application notwithstanding the applicant's compliance with this section:

(1) For any reason which would justify refusal to issue or a suspension or revocation of a license; or

(2) For the performance by applicant of any practice while under suspension for failure to keep this bond or insurance certificate in force, for which a license under this Chapter is required. (1973, c. 528, s. 1; 1979, c. 818, s. 2.)

Editor's Note. — Session Laws 1979, c. 818, s. 3, makes this section effective Jan. 1, 1980.

§ 74C-11. Registration of persons employed; temporary employment.

(a) All licensees, within 10 days of the beginning of employment of an employee who will be engaged in the providing of private protective services covered by this Chapter unless the Administrator, in his discretion, extends the time period for good cause, shall furnish the Board with the following: two sets of classifiable fingerprints on standard F.B.I. applicant cards; two recent photographs of acceptable quality for identification; and statements of any criminal records obtained from the county sheriff, chief of police, or clerk of superior court in each county in North Carolina where the employee has resided within the immediately preceding 24 months.

(b) A security guard and patrol company may not employ a guard, watchman, or other patrol personnel unless the guard, watchman, or patrol personnel is properly registered in compliance with this section, unless otherwise exempted by another provision of this Chapter.

(c) The Administrator shall be notified in writing of the termination of any employee registered under this Chapter within 10 days after said termination.

(d) A security guard, watchman, or patrol personnel shall make application to the Administrator for a registration card which the Administrator shall issue to said applicant after receipt of the information required to be submitted by his employer pursuant to subsection (a), and after meeting any additional requirements which the Board, in its discretion, deems to be necessary. The security guard registration card shall be in the form of a pocket card designed by the Board, shall be issued in the name of the applicant, and shall have the applicant's photograph affixed thereto. The security guard registration card shall expire two years after its date of issuance and shall be renewed every two years. If a registered security guard changes employment to another security guard and patrol company, the security guard registration card shall remain valid. The Board is authorized to charge the applicant a reasonable registration fee for initial registration, in an amount not to exceed fifteen dollars ($15.00), and a renewal fee, in an amount not to exceed ten dollars ($10.00).

(e) Notwithstanding the provisions of this section, a licensee may employ a person properly registered or licensed as an unarmed security guard in another state for a period not to exceed 10 days in any given month; provided that such licensee, prior to employing such security guard, submits to the Administrator the name, address, and social security number of such guard, the name of the state of current registration or licensing, and the Administrator approves the employment of the guard in this State.

(f) Notwithstanding the provisions of this section, a licensee may employ a person as an unarmed security guard for a period not to exceed 30 days in any given calendar year without registering said employee in accordance with this section; provided that the licensee submits to the Administrator a quarterly report which provides the Administrator with the name, address, social security number, and dates of employment of such employee. (1979, c. 818, s. 2.)

§ 74C-12. Suspension or revocation of licenses; appeal.

(a) The Board may, after notice and an opportunity for hearing, suspend or revoke a license issued under this Chapter if it is determined that the licensee has:

(1) Made any false statement or given any false information in connection with any application for a license or trainee permit or for the renewal or reinstatement of a license or trainee permit;
(2) Violated any provision of this Chapter;
(3) Violated any rule promulgated by the Board pursuant to the authority contained in this Chapter;
(4) Been convicted of any crime involving moral turpitude or any other crime involving violence or the illegal use, carrying, or possession of a dangerous weapon;
(5) Impersonated or permitted or aided and abetted any other person to impersonate a law-enforcement officer of the United States, this State, or any of its political subdivisions;
(6) Engaged in or permitted any employee to engage in a private protective services business when not lawfully in possession of a valid license issued under the provisions of this Chapter;
(7) Willfully failed or refused to render to a client service or a report as agreed between the parties and for which compensation had been paid or tendered in accordance with the agreement of the parties;
(8) Knowingly made any false report to the employer or client for whom information is being obtained;
(9) Committed an unlawful breaking or entering, assault, battery, or kidnapping;
(10) Knowingly violated or advised, encouraged, or assisted the violation of any court order or injunction in the course of business as a licensee;

(11) Committed any other act which is a ground for the denial of an application for a license under this Chapter;
(12) Undertaken to give legal advice or counsel or to in any way falsely represent that he is representing any attorney or he is appearing or will appear as an attorney in any legal proceeding;
(13) To issue, deliver, or utter any simulation of process of any nature which might lead a person or persons to believe that such simulation — written, printed, or typed — may be a summons, warrant, writ or court process, or any pleading in any court proceeding;
(14) Failure to maintain the cash bond, surety bond, or certificate of liability insurance required by this Chapter;
(15) Violation of the firearm provisions set forth in this Chapter;
(16) Committed any act prohibited under G.S. 74C-16;
(17) Failure to notify the administrator by a business entity other than a sole proprietorship licensed pursuant to this Chapter of the cessation of employment of the business entity's qualifying agent within the time set forth in this Chapter;
(18) Failure to obtain a substitute qualifying agent by a business entity within 30 days after its qualifying agent has ceased to serve as the business entity's qualifying agent;
(19) Any judgment of incompetency by a court having jurisdiction under Chapter 35 of the General Statutes or commitment to a mental health facility for treatment of mental illness, as defined in G.S. 122-36(d), by a court having jurisdiction under Article 5A of Chapter 122 of the General Statutes.

(b) The revocation or suspension of a license by the Board as provided in subsection (a) shall be in writing, signed by the Administrator of the Board stating the grounds upon which the Board decision is based. The aggrieved person shall have the right to appeal from such decision as provided in Chapter 150A of the General Statutes. (1979, c. 818, s. 2.)

§ 74C-13. Firearms.

(a) It shall be unlawful for any person performing the duties of an armed private security officer to carry a firearm in the performance of those duties without first having met the qualifications as set forth in this section and having been issued a firearm registration permit by the Board. For the purposes of this section, the following terms are defined:

(1) "Armed private security officer" means an individual employed by a contract security company or a proprietary security organization whose principal duty is that of an armed security guard, patrol, or watchman; armed armored car service guard; alarm system company responder; private detective; or armed courier service guard who at any time wears, carries, or possesses a firearm in the performance of his or her duties.
(2) "Contract security company" means any person, firm, association, or corporation engaging in a private protective services business as defined in this Chapter which provides said services on a contractual basis for a fee or other valuable consideration to any other person, firm, association, or corporation.
(3) "Proprietary security organization" means any person, firm, association, or corporation or department thereof which employs watchmen, security guards or patrol personnel, alarm responders, armored car personnel, or couriers who are employed regularly and exclusively as an employee by an employer in connection with the business affairs of such employer.

(b) It shall be unlawful for any person, firm, association, or corporation and its agents and employees to employ an armed private security officer and knowingly authorize or permit him to carry a firearm during the course of performing his duties as an armed private security officer if the Board has not issued him a firearm registration permit under this section or if the person, firm, association, or corporation permits an armed private security officer to carry a firearm during the course of performing his duties whose firearm registration permit has been suspended, revoked, or has otherwise expired:

(1) A firearms registration permit will grant authority to the armed security officer, while in the performance of his duties or travelling directly to and from work, to carry a standard .38 caliber or .32 caliber revolver or any other firearm approved by the Board and not otherwise prohibited by law. The use of any firearm not approved by the Board is prohibited.

(2) All firearms carried by authorized armed security officers in the performance of their duties shall be owned or leased by the employer. Personally owned firearms shall not be carried by an armed security officer in the performance of his duties.

(c) The applicant for an armed private security officer firearm registration permit shall submit an application to the Board on a form provided by the Board. The Board is authorized to charge a reasonable initial application fee, in an amount not to exceed ten dollars ($10.00).

(d) Each armed private security officer firearm registration permit issued under this section shall be in the form of a pocket card designed by the Board and shall identify the contract security company or proprietary security organization by whom the holder of the firearm registration permit is employed. An armed private security officer firearm registration permit expires one year after the date of its issuance and must be renewed annually unless the permit holder's employment terminates before the expiration of the permit. The Board is authorized to charge a reasonable renewal fee, in an amount not to exceed five dollars ($5.00).

(e) If the holder of an armed private security officer firearm registration permit terminates his employment with the contract security company or proprietary security organization, the firearm registration permit expires and must be returned to the Board within 15 working days of the date of termination of the employee.

(f) A contract security company or proprietary security organization shall be allowed to employ an individual for 30 days as an armed private security officer pending completion of the firearms training required by this Chapter, if the contract security company or proprietary security organization obtains prior approval from the Administrator. The Board and the Attorney General shall provide by rule the procedure by which a contract security company or a proprietary security organization applicant may be issued a temporary firearm registration permit by the Administrator of the Board pending a determination by the Board of whether to grant or deny an applicant a firearm registration permit.

(g) The Board may suspend, revoke, or deny a firearm registration permit if the holder or applicant has been convicted of any crime involving moral turpitude or any crime involving the illegal use, carrying, or possession of a deadly weapon or for violation of this section and/or rules promulgated by the Board to implement this section. The Administrator may summarily suspend a firearm registration permit pending resolution of charges involving the illegal use, carrying, or possession of a firearm lodged against an armed private security officer.

(h) The Board and the Attorney General shall establish a training program to be conducted by agencies and institutions approved by the Board and the Attorney General. The Board and the Attorney General may approve training

programs conducted by contract security companies and the security department of a proprietary security organization, if the contract security companies or security department of a propriety [proprietary] security organization offers the courses listed in subsection (1) of this paragraph (h) and if the instructors of the training program are qualified instructors approved by the Board and the Attorney General:

(1) The basic training course approved by the Board and the Attorney General shall consist of a minimum of four hours of classroom training which shall include:
   a. Legal limitations on the use of hand guns and on the powers and authority of an armed private security officer,
   b. Familiarity with this section,
   c. Range firing and procedure and hand gun safety and maintenance, and
   d. Any other topics of armed private security officer training curriculum which the Board deems necessary.

(2) An applicant for an armed security officer firearm registration permit must fire a minimum qualifying score to be determined by the Board and the Attorney General on any approved target course approved by the Board and the Attorney General.

(3) An armed security officer must complete a refresher course and shall requalify on the prescribed target course prior to the renewal of his firearm registration permit.

(4) The Board and the Attorney General shall have the authority to promulgate all rules necessary to administer the provisions of this section concerning the training requirements of this section.

(i) The Board may not issue an armed private security officer registration permit to an applicant until the applicant's employer submits evidence satisfactory to the Board that:

(1) He has satisfactorily completed an approved training course.

(2) He meets all the qualifications established by this section and by the rules promulgated to implement this section.

(3) He is mentally and physically capable of handling a firearm within the guidelines set forth by the Board and the Attorney General.

(j) The Board and the Attorney General are authorized to prescribe reasonable rules to implement this section, including rules for periodic requalification with the firearm and for the maintenance of records relating to persons issued a firearm registration card by the Board.

(k) All fees collected pursuant to G.S. 74C-13(c) and (d) shall be expended, under the direction of the Board, for the purpose of defraying the expense of administering the firearms provisions of this Chapter. The Board is authorized to charge a reasonable fee, in an amount not to exceed one hundred dollars ($100.00), for the expenses of administering the firearms provisions of this Chapter when the Board determines the fees collected pursuant to G.S. 74C-13(c) and (d) are not adequate to defray the expenses of administering the firearms provisions of this Chapter. (1979, c. 818, s. 2.)

Editor's Note. — Session Laws 1979, c. 818, s. 3, makes this section effective Jan. 1, 1980.

§ 74C-14. Mace.

It shall be lawful for security guards registered pursuant to the provisions of this Chapter to possess and use tear gas (mace) to the extent allowed under the provisions of G.S. 14-401.6. (1979, c. 818, s. 2.)

§ 74C-15. Identification cards; badges; and shields.

(a) Upon the issuance of a license or trainee permit, a pocket identification card of design, size, and content approved by the Board shall be issued by the Board without charge to each licensee or trainee. The holder must have this card in his possession at all times when he is on duty and working within the scope of his employment. When a licensee or trainee to whom a card has been issued terminates his position as a licensee or trainee, the card must be surrendered to the administrator of the Board within 10 working days thereafter.

(b) No person licensed under the provisions of this Chapter as a private detective shall wear, carry, or accept any badge or shield purporting to indicate that such person is a private detective or a private investigator. (1979, c. 818, s. 2.)

§ 74C-16. Prohibited acts.

(a) Any licensee or officer, director, partner, or manager of a licensee may divulge to any law-enforcement officer or district attorney or his representative any information the law-enforcement officer may require incident to investigation of any criminal offense. However, he shall not divulge to any other person, except as he may be required by law, any information acquired by him except at the direction of the employer or client for whom the information was obtained.

(b) Every advertisement by a licensee soliciting or advertising for business shall contain his name as it appears in the records of the Board and the name in which the license was issued.

(c) It shall be unlawful for anyone not licensed and/or registered as required under this Chapter to:

(1) Advertise or to hold himself out to be a licensee;

(2) Advertise or to hold himself out to perform services for which a license is required; or

(3) Perform or aid and abet any other individual to perform services for which a license or registration under this Chapter is required, when, in fact, the individual is not licensed and/or registered in accordance with this Chapter.

(d) No law-enforcement officer of the United States, this State, or any of its political subdivisions shall be licensed as a private detective or security guard and patrol business licensee under this Chapter; provided no law-enforcement officer of the United States, this State, or any of its political subdivisions may use any motor vehicle owned or leased by a law-enforcement agency in the course and scope of any private employment which is subject to regulation by the provisions of this Chapter; provided that nothing in this section shall be construed to prohibit the holder of a company police commission under Chapter 74A of the General Statutes from being licensed under this Chapter or being employed by a licensee under this Chapter. (1979, c. 818, s. 2.)

§ 74C-17. Enforcement.

(a) The Board is authorized to apply in its own name to any judge of the superior court of the General Court of Justice for an injunction in order to prevent any violation or threatened violation of the provisions of this Chapter.

(b) Any person, firm, association, or corporation or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a misdemeanor and punishable by a fine of up to five hundred dollars ($500.00), by imprisonment for a term not to exceed one year, or by both, in the discretion

of the court. The Attorney General, or his representative, shall have concurrent jurisdiction with the district attorneys of this State to prosecute violations of this Chapter. (1979, c. 818, s. 2.)

§ 74C-18. Reciprocity; temporary permit.

(a) To the extent that other states which provide for licensing of any private protective services business provide for similar action for citizens of this State, the Board, in its discretion, may grant a private protective services business license to a nonresident who holds a valid private protective services business license of the same type from another state upon satisfactory proof furnished to the Board that the standards of licensure in such other states are at least substantially equivalent to those prevailing in this State. Applicants shall make application to the Board on the form prescribed by the Board for all applicants, shall comply with the provisions of G.S. 74C-10, and shall pay the fees required of all applicants.

(b) The administrator, in his discretion and subject to the approval of the Board, may issue a temporary permit to a nonresident who has complied with the provisions of G.S. 74C-10 and who is validly licensed in another state to engage in a private protective service activity incidental to a specific case originating in another state. A temporary permit may be issued for a period of no more than 30 days and may be renewed. A temporary permit may contain such restrictions which the Board, in its discretion, deems appropriate. The Board is authorized to charge a reasonable fee for a nonresident temporary permit, in an amount not to exceed fifty dollars ($50.00). (1979, c. 818, s. 2.)

§ 74C-19. Severability.

If any provision of this Chapter or the application thereof to any person or circumstance is for any reason held invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable. (1979, c. 818, s. 2.)

§ 74C-20. Repeal of Chapter.

This Chapter is repealed effective July 21, 1983, by substitution of this Chapter in G.S. 143-34.13 and the other general provisions of Article 2 of Chapter 143 of the General Statutes, which requires periodic review of certain State agencies for Chapter 74B, which this Chapter supersedes. (1979, c. 818, s. 2.)

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

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75-1. Combinations in restraint of trade illegal.
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Sec.
75-18. Lender may require nondiscriminatory approval of insurer.
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75-30. Automatic dialing and recorded message players; restriction on use of.
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Article 2.

Prohibited Acts by Debt Collectors.

75-50. Definitions.
75-51. Threats and coercion.
75-52. Harassment.
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Article 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation shall be fined in the discretion of the court not less than one thousand dollars ($1,000). (1913, c. 41, s. 1; C. S., s. 2559.)

Cross References. — As to civil action for damages and injunction against violation of this Chapter, see note to § 75-5. For provision declaring certain agreements between employers and labor organizations to be illegal combinations in restraint of trade, see § 95-79.

Legal Periodicals. — For note on the law of unfair competition in North Carolina, see 46 N.C.L. Rev. 856 (1968).

For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For note on price discrimination in North Carolina, see 53 N.C.L. Rev. 135 (1974).

CASE NOTES

I. General Consideration.
II. What Combinations and Contracts Illegal.
III. Pleading and Practice.

I. GENERAL CONSIDERATION.

History of Chapter. — See Shute v. Shute, 176 N.C. 462, 97 S.E. 392 (1918).

Common Law. — At common law in England, and later in this country, only combinations or agreements which operate to the prejudice of the public by unduly or unreasonably restricting competition or restraining trade are illegal. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Under the common law at a remote period in England, the term "contract in restraint of trade" meant an individual's voluntary contractual restraint on his right to carry on his trade or calling. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

The common law on restraint of trade is determinative of at least the minimum scope of this section. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

This section was based upon section one of the Sherman Act, 15 U.S.C. § 1 (1971). Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

The North Carolina antitrust enforcement mechanism almost completely mirrors its federal counterpart, especially with respect to the availability of treble damages. Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978).

Law Applying Sherman Act Instructive in Determining Full Reach of Section. — The body of law applying the Sherman Act, although not binding upon the Supreme Court in applying this section, is nonetheless instructive in determining the full reach of this section. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Trade Practices Law Has No Application to Labor Contracts. — North Carolina's unfair and deceptive trade practices law regulates conduct between businesses and between sellers or lenders and consumers; it has no application to contracts between employers and employees. Roberson v. Dale, 464 F. Supp. 680 (M.D.N.C. 1979).

Stated in Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Quoted in Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Cited in Patterson v. Southern Ry., 219 N.C. 23, 12 S.E.2d 652 (1941); Harris v. Atlantic-Richfield Co., 469 F. Supp. 759 (E.D.N.C. 1978); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

II. WHAT COMBINATIONS AND CONTRACTS ILLEGAL.

Monopoly Defined. — In the modern and wider sense monopoly denotes a combination, organization, or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market, and to secure the power to control prices to the public harm with respect to any commodity which people are under a practical compulsion to buy. State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

An actionable conspiracy to restrain trade must operate to the prejudice of the public, in keeping with the common law's "Rule of Reason." United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

A combination is not objectionable if the restraint is such only as to afford fair protection to the parties thereto and not broad enough to interfere with the interest of the public. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Public damage must be alleged and proven. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

But Actual Competition Need Not Be Shown. — So long as the defendant in a restraint of trade case willfully engaged in acts that are calculated to destroy competition in a particular market, it is irrelevant whether the defendant is actually engaged in the market. Only an intention and capacity to compete against is essential; actual competition need not be shown. United Roasters, Inc. v.

Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Agreements in Partial Restraint of Trade May Be Upheld. — Agreements in partial restraint of trade will be upheld when they are founded on valuable considerations, are reasonably necessary to protect the interest of the parties in whose favor they are imposed, and do not unduly prejudice the public interest. Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961); Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

The true test now generally applied to agreements in partial restraint of trade is whether the restraint is such as to afford a fair protection to the interests of the party in whose favor it is given, and not so large as to interfere with the interests of the public. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

An individual's voluntary contractual restraint on his right to carry on his trade or calling is prima facie illegal and must be shown to be reasonable by the party seeking to enforce it. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

And Agreement Not to Compete May Be Forbidden. — Persons and corporations cannot be ordered to compete, but they properly can be forbidden to give directions, or make agreements, not to compete. State v. Craft, 168 N.C. 208, 83 S.E. 772 (1914).

Enforceability of Covenant Not to Compete. — To be enforceable, a covenant not to compete must protect some substantial interest of the employer. Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971), cert. denied, 208 N.C. 305, 186 S.E.2d 178 (1972).

By this section, contracts in restraint of trade are made illegal in North Carolina; however, in this State a covenant not to compete is enforceable in equity if it is (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties and (6) not against public policy. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

If covenants not to compete are included in contracts of employment, when the employment preexists the execution of the contracts, there must be some additional consideration to the employee to support his covenant not to compete. Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971), cert. denied, 208 N.C. 305, 186 S.E.2d 178 (1972).

A restrictive covenant not to compete which is the main purpose of a contract and not a subordinate feature is not protected as to enforceability by the exceptions afforded ancillary contracts in restraint of trade permissible in connection with the sale of a going business, a contract of employment, or a lease. Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971), cert. denied, 208 N.C. 305, 186 S.E.2d 178 (1972).

Agreement Not to Sell to Particular Individual. — A complaint alleging that defendants conspired and agreed not to sell plaintiff ice, and that as a result thereof plaintiff's business was ruined, fails to state a cause of action, this and the following sections not being applicable. Lineberger v. Colonial Ice Co., 220 N.C. 444, 17 S.E.2d 502 (1941).

A contract establishing a price discrimination is not illegal per se. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Contracts to Assure Adequate Supply for Definite Price over Specified Period. — Business contracts by which a buyer assures himself of adequate supplies for a definite price over a specified period of time thus providing protection against future price increases are quite common and are not illegal per se. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Reduction of Prices to Consuming Public No Defense. — Plaintiff, a carrier by truck, instituted this action against certain railroad companies, to recover damages to his business, which he alleged resulted from an unlawful conspiracy between defendants to reduce transportation rates in order to eliminate plaintiff as a competitor, with the purpose of raising rates after competition had been removed. Defendants alleged that the reduction in rates resulted in lower prices to the consuming public on the products on which the rates had been reduced. It was held that the matter alleged does not constitute a defense to the action, since the express policy of the State is against both the raising and lowering of prices by unlawful means for an unlawful purpose, and since the law is interested in preserving competition rather than obtaining for the public temporary benefits from price wars in which competition is extinguished. Patterson v. Southern Ry., 214 N.C. 38, 198 S.E. 364 (1938).

A contract between public utilities, approved by the Utilities Commission, is not violative of this section, if the Commission could have lawfully made an order to the same effect upon application and after hearing in an adverse proceeding. State ex rel. Utilities Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

III. PLEADING AND PRACTICE.

A general averment without allegation of specific facts is insufficient to constitute a cause of action, under this and the following sections. State v. Standard Oil Co., 205 N.C. 123, 170 S.E. 134 (1933).

Burden of Proving Unreasonableness of Business Practices in Restraint of Trade. — As to business practices, not within the scope of the original common-law rule of restraint of trade but alleged to be in restraint of trade on the ground that they are unreasonable restrictions on competition, the burden is on the one asserting their illegality to prove their unreasonableness. Such restraints are not prima facie illegal and must be shown to be so. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Evidence Necessary to Show Contract Violates Rule of Reason. — Without evidence of facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable, a contract cannot be said to be in violation of the rule of reason. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(c) Nothing in this section shall apply to acts done by the publisher, owner, agent, or employee of a newspaper, periodical or radio or television station, or other advertising medium in the publication or dissemination of an advertisement, when the owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement and when the newspaper, periodical or radio or television station, or other advertising medium did not have a direct financial interest in the sale or distribution of the advertised product or service.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim. (1969, c. 833; 1977, c. 747, ss. 1, 2.)

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For a note discussing this section, see 12 Wake Forest L. Rev. 484 (1976).

For comment entitled, "Attacking the 'Forfeiture as Liquidated Damages' Clause in North Carolina Installment Land Sales Contracts as an Equitable Mortgage, Penalty and Unfair and Deceptive Trade Practice," see 7 N.C. Cent. L.J. 370 (1976).

For comment on retaliatory eviction in landlord-tenant relations, see 54 N.C.L. Rev. 861 (1976).

For note discussing the role of the jury in applying deceptive trade practices legislation, see 54 N.C.L. Rev. 963 (1976).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For comment discussing the effect of the 1977 amendment to this section, see 56 N.C.L. Rev. 547 (1978).

For a survey of 1977 law on trade regulation, see 56 N.C.L. Rev. 934 (1978).

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For article, "The Ombudsman, or Citizens' Defender — The North Carolina Experience," see 10 N.C. Cent. L.J. 227 (1979).

CASE NOTES

I. General Consideration.
II. Scope of Section.
III. Pleading and Practice.

I. GENERAL CONSIDERATION.

Legislative Intent. — It was the clear intention of the General Assembly in enacting this section and § 75-16, among other things, to declare deceptive acts or practices in the conduct of any trade or commerce in North Carolina unlawful, to provide civil means to maintain ethical standards of dealings between persons engaged in business and the consuming

public within this State and to enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer. Hardy v. Toler, 24 N.C. App. 625, 211 S.E.2d 809, modified on other grounds, 288 N.C. 303, 218 S.E.2d 342 (1975).

The intent of the General Assembly in enacting this section was to enable a person damaged by deceptive acts or practices to recover treble damages from the wrongdoer, and to declare deceptive acts or practices in the conduct of any trade or commerce to be unlawful, and to provide civil legal means to maintain ethical standards of dealings between persons in business and the consuming public of North Carolina. State ex rel. Edmisten v. J.C. Penney Co., 30 N.C. App. 368, 227 S.E.2d 141 (1976), rev'd on other grounds, 292 N.C. 311, 233 S.E.2d 895 (1977).

The 1977 amendments to this section constituted a substantive revision intended to expand the potential liability for certain proscribed acts. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1979).

The language of this section closely parallels that of Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1973 Ed.), which prohibits "unfair or deceptive acts or practices in commerce." Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975); State ex rel. Edmisten v. J.C. Penney Co., 30 N.C. App. 368, 227 S.E.2d 141 (1976), rev'd on other grounds, 292 N.C. 311, 233 S.E.2d 895 (1977).

The federal decisions construing the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), may furnish some guidance to the meaning of this section, but federal court decisions are not controlling in construing this section. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Unlike other state trade regulation statutes, this section does not require or direct reference to the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), for its interpretation. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Applied in Smith v. Ford Motor Co., 26 N.C. App. 181, 215 S.E.2d 376 (1975); Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379 (1975); Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 245 S.E.2d 801 (1978); Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979); Kleinfelter v. Northwest Bldrs. & Developers, Inc., 44 N.C. App. 561, 261 S.E.2d 498 (1980).

Quoted in Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979).

Cited in Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976); Powell Mfg. Co. v. Harrington Mfg. Co., 30 N.C. App. 97, 226 S.E.2d 173 (1976); Parsons v. Bailey, 30 N.C. App. 497, 227 S.E.2d 166 (1976); Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 238 S.E.2d 193 (1977); Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977); Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978); Fitzgerald v. Wolf, 40 N.C. App. 197, 252 S.E.2d 523 (1979); Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977); B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979); Shields v. Bobby Murray Chevrolet, Inc., 44 N.C. App. 427, 261 S.E.2d 238 (1980); Burgess v. North Carolina Farm Bureau Mut. Ins. Co., 44 N.C. App. 441, 261 S.E.2d 234 (1980); Taylor v. Hayes, 45 N.C. App. 119, 262 S.E.2d 383 (1980); CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 614 F.2d 33 (4th Cir. 1980).

II. SCOPE OF SECTION.

This section applies to disputes between competitors, and not only to dealings between buyers and sellers. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Actual Competition Not Necessary. — This section nowhere states a requirement that the plaintiff and defendant be in actual competition with each other in a particular market. Actual competition is not necessary. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts; however, the converse is not always true. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

Inducing a Sale Not Required. — In order for an activity to be covered by the Unfair Trade Practices Act, it need only "surround" or "affect" a sale; it need not meet the stricter standard of also inducing a sale. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

The "passing off" of one's goods as those of a competitor has long been regarded as unfair competition. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Where one company used another company's actual product in demonstrations to potential customers, at the same time falsely representing to the potential customers that the product had been manufactured by itself, although such conduct did not fit the mold to which the term "passing off" has traditionally been applied, it did constitute an unfair method of competition within the purview of this section. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Application of Section to Advertisements. — Publishing an advertisement which is neither false nor misleading is not an unfair method of competition or unfair or deceptive act or practice within the meaning of this section. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Whether puffing in the case of particular advertisement exceeds the bounds of fairness must be determined by viewing it against the background of all of the relevant facts of that case. One relevant fact concerns the market which the advertisement is designed to influence. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Application to Bulk Sale of Business' Assets. — This section would apply to a bulk sale of a business' assets as much as it would to a consumer sale. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Activity Regulated Under Commodity Exchange Act. — This section will not support a cause of action against a commodity broker for activity which is regulated under the Commodity Exchange Act, 7 U.S.C.A. § 1 et seq. Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 32 (1979).

Recovery for Unfair Methods of Competition Perpetrated By Insurers. — Plaintiff can recover damages under this section even though unfair methods of competition perpetrated by persons engaged in the business of insurance are regulated by the insurance statutes, § 58-54.1 et seq., which do not provide for civil damage actions. Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977).

The rental of residential housing is trade or commerce under this section. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 299 N.C. 441, 241 S.E.2d 843 (1978).

Jury Decides Facts. — In cases under this section it is ordinarily the province of the jury to find the facts. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Mere allegation of intentional refusal to procure and deliver natural gas, without any suggestion of deception or any claim of injury to competition, does not state a claim under this section. CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978).

Debt Collection Activities Not Covered By Section Prior to 1977 Amendment. — Under this section as it stood before the 1977 amendment it was held that debt collection activities of a department store chain did not come within this section because such activities are not trade in the ordinary sense although they could be considered a species of commerce. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

III. PLEADING AND PRACTICE.

Stipulated Facts Constituting Violation. — Ordinarily it would be for the jury to determine the facts, and based on the jury's finding, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. However, where the parties stipulated certain facts, the Supreme Court, based on these facts, held as a matter of law that the false representations made by defendants to plaintiff constituted unfair or deceptive acts or practices in commerce contrary to the provisions of this section, and treble damages should have been awarded as provided by § 75-16 in the amount of $1800. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

And Court Determines Whether Practice Violates Section. — Whether an act or practice is unfair or deceptive within the meaning of this section is a question of law for the court to determine. CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980).

Based on the jury's findings of fact, the court must determine as a matter of law whether a defendant's conduct violates this section. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Determination of Unfairness of Conduct. — Unfair competition has been referred to in terms of conduct which a court of equity would consider unfair. Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

No precise definition of the term "unfair methods of competition" as used in this section is possible. Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 469 (1979).

Statute of Limitations Prior to Enactment of § 75-16.2. — See Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

OPINIONS OF ATTORNEY GENERAL

The phrase "learned profession" applies to physicians, attorneys, clergy, and related professions. Opinion of Attorney General to Representative Robert L. Farmer, 47 N.C.A.G. 118 (1977).

§ 75-2. Any restraint in violation of common law included.

Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of G.S. 75-1. (1913, c. 41, s. 2; C. S., s. 2560.)

CASE NOTES

Common Law. — Under the common law at a remote period in England, the term contract in restraint of trade meant an individual's voluntary contractual restraint on his right to carry on his trade or calling. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

At common law in England, and later in this country, only combinations or agreements which operate to the prejudice of the public by unduly or unreasonably restricting competition or restraining trade are illegal. The combination is not objectionable if the restraint is such only as to afford fair protection to the parties thereto and not broad enough to interfere with the interest of the public. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Distinction between Common-Law and Modern Rules. — Originally at common law, agreements in restraint of trade were held void as being against public policy. The position, however, has been more and more modified by the decisions of the courts until it has come to be the very generally accepted principle that agreements in partial restraint of trade will be upheld when they are "founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest." Mar-Hof Co. v. Rosenbacker, 176 N.C. 330, 97 S.E. 169 (1918). The distinction may now be made between "general restraint" and "partial restraint." Morehead Sea Food Co. v. Way, 169 N.C. 679, 86 S.E. 603 (1915).

The common law is determinative of at least the minimum scope of § 75-1. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1041 (E.D.N.C. 1979).

Applied in Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971); Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

Stated in Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

§ 75-3: Repealed by Session Laws 1961, c. 1153.

§ 75-4. Contracts to be in writing.

No contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing duly signed by the party who agrees not to enter into any such business within such territory: Provided, nothing herein shall be construed to legalize any contract or agreement not to enter into business in the State of North Carolina, or at any point in the State of North Carolina, which contract is now illegal, or which contract is made illegal by any other section of this Chapter. (1913, c. 41, s. 4; C. S., s. 2562.)

Cross References. — For cases decided under the provisions of this section and § 75-5, see note to § 75-5.

CASE NOTES

What Contracts Enforceable. — Where affidavits disclose that defendants in the course of their employment acquired knowledge which would give them an unfair advantage over plaintiff in a competitive business, under such circumstances equity will enforce a covenant not to compete if it is: (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties, and (6) not against public policy. Orkin Exterminating Co. of Raleigh, Inc. v. Griffin, 258 N.C. 179, 128 S.E.2d 139 (1962).

A covenant not to compete is enforceable in equity if it is (1) in writing, (2) entered into at the time and as a part of the contract of employment, (3) based on valuable considerations, (4) reasonable both as to time and territory embraced in the restrictions, (5) fair to the parties and (6) not against public policy. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

This section is consistent with the other "statute of frauds" provisions in the law which require only that the writing be "signed by the party charged therewith," § 22-1, or require that the writing be signed by "the party against whom enforcement is sought," § 25-2-201(a). Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

Oral Contract Void and Unenforceable. — An oral contract which prohibits defendant's right to do business except through plaintiff as its exclusive distributor, limits substantially defendant's right to do business in North Carolina. Hence, under this section, the oral contract is void and unenforceable. Radio Electronics Co. v. Radio Corp. of America, 244 N.C. 114, 92 S.E.2d 664 (1956).

New Contract Required. — When the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

Person Seeking Enforcement Not Required to Sign. — A covenant not to compete in a contract signed by defendant was valid since this section establishes that contracts or agreements limiting the rights of persons to do business in this State may be enforceable if put in writing "duly signed by the party who agrees not to enter into any such business within such territory" and it is not necessary that the person seeking enforcement of the terms required to be in writing also sign the writing. Manpower of Guilford County, Inc. v. Hedgecock, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

Applied in Sonotone Corp. v. Baldwin, 227 N.C. 387, 42 S.E.2d 352 (1947); Maola Ice Cream Co. of N.C., Inc. v. Maola Milk and Ice Cream Co., 238 N.C. 317, 77 S.E.2d 910 (1953); Beck Distrib. Corp. v. Imported Parts, Inc., 7 N.C. App. 483, 173 S.E.2d 41 (1970); Wilmar, Inc. v. Liles, 13 N.C. App. 71, 185 S.E.2d 278 (1971).

§ 75-5. Particular acts prohibited.

(a) As used in this section:

(1) "Person" includes any person, partnership, association or corporation;

(2) "Goods" include goods, wares, merchandise, articles or other things of value.

(b) In addition to the other acts declared unlawful by this Chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:

(1) To agree or conspire with any other person to put down or keep down the price of any goods produced in this State by the labor of others which goods the person intends, plans or desires to buy.

(2) To sell any goods in this State upon condition that the purchaser thereof shall not deal in the goods of a competitor or rival in the business of the person making such sales.

(3) To willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed.

(4) While engaged in buying or selling any goods within the State, through himself or together with or through any allied, subsidiary or

dependent person, to injure or destroy or undertake to injure or destroy the business of any rival or competitor, by unreasonably raising the price of any goods bought or by unreasonably lowering the price of any goods sold with the purpose of increasing the profit on the business when such rival or competitor is driven out of business, or his business is injured.

(5) While engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at the one place than at the other, or to give away such goods, with a view to injuring the business of another.

(6) While engaged in buying or selling any goods in this State, to have any agreement or understanding, express or implied, with any other person not to buy or sell such goods within certain territorial limits within the State, with the intention of preventing competition in selling or to fix the price or prevent competition in buying such goods within these limits.

(7) Except as may be otherwise provided by Article 10 of Chapter 66, entitled "Fair Trade," while engaged in buying or selling any goods in this State to make, enter into, execute or carry out any contract, obligation or agreement of any kind by which the parties thereto or any two or more of them bind themselves not to sell or dispose of any goods or any article of trade, use or consumption, below a common standard figure, or fixed value, or establish or settle the price of such goods between them, or between themselves and others, at a fixed or graduated figure, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale of such goods.

(c) Nothing herein shall be construed to make it illegal for an agent to represent more than one principal, but this provision shall not be deemed to authorize two or more principals to employ a common agent for the purpose of suppressing competition or preventing the lowering of prices.

(d) This section does not make it illegal for a person to sell his business and goodwill to a competitor, and agree in writing not to enter business in competition with the purchaser in a limited territory if such agreement does not violate the principles of the common law against trusts and does not otherwise violate the provisions of this Chapter. (1913, c. 41, s. 5; C. S., s. 2563; 1953, c. 113; 1961, c. 407, s. 1.)

Editor's Note. — Article 10 of Chapter 66, referred to in this section, was repealed by Session Laws 1975, c. 172.

Legal Periodicals. — For note on "requirements contracts" as violations of this section, see 29 N.C.L. Rev. 316.

For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For note on price discrimination in North Carolina, see 53 N.C.L. Rev. 135 (1974).

CASE NOTES

Statutes on monopolies and trusts are addressed to the sale and movement in commerce of goods, wares, merchandise and other things of value. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

And cases arising under such statutes ordinarily involve a vendor and a purchaser. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Thus, the prohibited acts are usually connected with a purchase and sale. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Restrictive Stipulations in Sale. — Transactions involving the sale and disposition

of a business, trade or profession between individuals with stipulations restrictive of competition on the part of the vendor do not, as a rule, tend to unduly harm the public and are ordinarily sustained to the extent required to afford reasonable protection to the vendee in the enjoyment of property or proprietary rights he has bought and paid for, and to enable a vendor to dispose of his property at its full and fair value. Mar-Hof Co. v. Rosenbacker, 176 N.C. 330, 97 S.E. 169 (1918).

A limitation or restriction upon a person's right to engage in a lawful occupation or business is deemed detrimental to the public interest, unless the restraint imposed is reasonable under the proper tests. Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961).

Test as to Reasonableness. — A valid contract in partial restraint of trade, while primarily for the advantage of the purchaser of a business, inures to the benefit of the seller by enhancing the value of the goodwill and enabling him to obtain a better price for the sale of his business, the test as to territory being whether the restraint agreed upon is such as to afford a fair protection to the interest of the party in whose favor it is given, and not so large as to interfere with the interest of the public; and such will not be held to be unreasonable when they do not affect the public and go no further than to remove the danger to the purchaser of competition with the seller. Morehead Sea Food Co. v. Way, 169 N.C. 679, 86 S.E. 603 (1915).

In connection with the sale of a business, including goodwill, the validity of a covenant providing that the seller will not engage in business in competition with the buyer is determinable by these tests: (1) Is it reasonably necessary to protect the legitimate interest of the purchaser? (2) Is the limitation or restriction reasonable in respect of both time and territory? Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961).

Contracts in restraint of trade were formerly held to be invalid as against public policy, but the more modern doctrine sustains them when the restraint is only partial and reasonable. The test is to consider whether it is such only as will afford a fair protection to the interests of the party in favor of whom it is given, and not so large or extensive as to interfere with the interests of the public. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Contracts tending only to partially restrain trade are enforceable where: (1) They are founded on a valuable consideration; (2) the restrictions imposed are reasonably necessary to protect the legitimate interest of the covenantee; and (3) the limitations or restrictions are reasonable as to time and area. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Contract Not to Engage in Competing Business. — A provision of an agreement for the sale of a partner's interest that he would not again engage in the mercantile business in a certain town or near enough thereto to interfere with plaintiff's business was not in violation of this section. Wooten v. Harris, 153 N.C. 43, 68 S.E. 898 (1910).

An exchange of the defendant's fish business for stock in the plaintiff company, with an agreement not to engage in similar business for 10 years within 100 miles is valid, and not in violation of this section. Morehead Sea Food Co. v. Way, 169 N.C. 679, 86 S.E. 603 (1915).

It is the rule today that when one sells a trade or business and, as an incident of the sale, covenants not to engage in the same business in competition with the purchaser, the covenant is valid and enforceable (1) if it is reasonably necessary to protect the legitimate interest of the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest of the public. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Although a valid covenant not to compete must be reasonable as to both time and area, these two requirements are not independent and unrelated aspects of the restraint. Each must be considered in determining the reasonableness of the other. Furthermore, neither is conclusive of the validity of the covenant, but both are important factors in settling that question. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

A covenant by the owner of a jewelry store not to engage in jewelry business competition with the purchaser within 10 miles of the city where the seller's jewelry store is located for a period of 10 years, is not void as being unreasonable as to time or territory. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Covenants restricting the use of property for purposes competitive with those of the covenantees have generally been held to be enforceable where they involve only partial restraints of trade, are found on sufficient consideration and are reasonably limited as to duration and area covered. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Same — By Employee. — The validity of a covenant in a contract of employment providing that, upon termination of the employer-employee relationship, the employee will not engage in a business in competition with the employer, is determinable by these tests: (1) Is it founded on a valuable consideration? (2) Is it reasonably necessary to protect the legitimate interests of the employer? (3) Is the limitation or restriction reasonable in respect of both time and territory? Waldron

Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961).

An exclusive dealership in one make of automobile in a particular city, while it necessarily involves a limited monopoly to sell this product of the manufacturer in the area covered thereby, is not invalid as an unreasonable restraint on trade, the agreement not being between competitors but imposing restraint upon a manufacturer and in favor of its dealer. Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961).

The reasonableness of a restraining covenant is a matter of law for the court to decide. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

And Depends on Circumstances of Particular Case. — The reasonableness of the restraint depends upon the circumstances of the particular case. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Reasonableness of Restraints As to Time. — Covenants in restraint of trade are not unreasonable as to time if their duration is no longer than reasonably necessary to afford fair protection to the covenantee and not so long as to be injurious to the public. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Where the duration of the restraint is limited as to time, the mere length of the period of time during which the restraint is to operate, standing alone, is never sufficient to render the restrictive covenant not to compete ipso facto unenforceable. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

A period of 25 years is not an unduly long time to expect property purchased for gasoline service station purposes to continue to be applied to such use. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

For covenants not to compete which accompanied the sale of a trade or business and contained limitations of 10, 15, and 20 years, as well as limitations for the life of one of the parties, see Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Combination of Railroads to Eliminate Motor Truck Competition. — A combination of railroads for the purpose of reducing rates on gasoline transportation within a certain area with the intent to eliminate motor truck competition and with the further purpose of raising and fixing a higher rate on the same commodity after the elimination of competition is a violation of this section. Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Reasonableness of Agreement to Raise Price Immaterial. — An agreement among dealers in a necessary article of food, to raise its price, is an indictable offense at the common law, and evidence that dealers controlling a large part of the supply of milk in a town having by agreement raised its price, testimony is irrelevant that a dealer not a party to the agreement had also raised the price of his milk to his customers, or whether the agreement was reasonable or necessary for the article to yield a profit in its sale. State v. Craft, 168 N.C. 208, 83 S.E. 772 (1914).

Same — Intent Immaterial. — The intent of milk dealers combining to raise the price of milk is immaterial. State v. Craft, 168 N.C. 208, 83 S.E. 772 (1914).

Illegal Division of Territory. — Under a contract dividing a county into separate territory, within which each of the respective parties was not to interfere with the business of the other in operating cotton gins, etc., the plaintiff sold the defendant a cotton ginning plant, the latter agreeing to remove the plant and not to again operate one there, the intent of the agreement was a division of territory, with the object to eliminate competition therein, and the agreement will not be enforced. Shute v. Shute, 176 N.C. 462, 97 S.E. 392 (1918).

Restrictions on Free Use of Land. — Although the courts will not tolerate unreasonable restraints upon trade, and frown upon restrictions upon the free use of land, there is no doubt of the validity, under ordinary circumstances, of a restriction imposed by a lessor, ancillary to a leasing of part of his property, upon the remainder of the property owned or controlled. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

It appears to be well settled that the seller or lessor of property (as distinguished from business or goodwill) may by a reasonably limited restrictive promise agree to refrain from (1) himself engaging in, or (2) from disposing of his property in such a way that others can engage in, a business which would impair the value of the property to the buyer for the purpose for which he intended to use it. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

The owner of a business, who also owns land nearby, may sell or lease such land to a buyer or tenant who promises not to use it for business purposes in competition with that of the seller or lessor. Here, the restriction is limited to the use of the land transferred. Or, the owner of a tract of land or business block may sell or lease a portion thereof to one intending to use it for a particular purpose, making to him an ancillary promise not to permit the remaining part of the tract or building to be used for a competitive business purpose. These agreements are usually sustained as being reasonable, even though the purpose is to prevent competition and no business goodwill is being transferred. Quadro Stations, Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970).

Sufficiency of Consideration for Contract in Restraint of Trade. — A contract

in restraint of trade, like any other contract, must be supported by a consideration, but, unless the contract be a fraud upon the party sought to be restrained or nudum pactum, courts ordinarily will not inquire into the adequacy of the consideration. It is sufficient that the contract shows on its face a legal and valuable consideration; but whether it is adequate or inadequate to the restraint imposed must be determined by the parties themselves upon their own view of all the circumstances attending the particular transaction. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Consideration for sale of goodwill and withdrawal from competition may be found in the general consideration for the sale of the business. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

A longer period of time in a covenant not to compete is justified where the area in which competition is prohibited is relatively small. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

The modern rule permitting the sale of goodwill recognizes that one who, by his skill and industry, builds up a business, acquires a property right in the goodwill of his patrons and that this property is not marketable unless the owner is at liberty to sell his right of competition to the full extent of the field from which he derives his profit and for a reasonable length of time. Where the contract is between individuals or between private corporations, which do not belong to the quasi-public class, there is no reason why the general rule that the seller should not be allowed to fix the time for the operation of the restriction so as to command the highest market price for the property he disposes of should apply. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Intention to Sell Goodwill. — Where a person sells a business and in connection therewith agrees not to engage in the same business in the same place, the obvious intention is to sell the goodwill of the business. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

A contract for a valid consideration not to engage in the manufacture and sale of firearms in general use would be allowed to cover a larger extent of territory than would a contract not to engage in the manufacture of timber or the ginning of cotton. Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968).

Exclusive Sale for Specified Period. — A contract made in good faith between a vendor and purchaser of a certain particular make or character of a manufactured product that restricts the former from selling articles of the same make or kind to other dealers within the town wherein the purchaser conducts his mercantile business, and which requires the expenditure of large sums of money and much time in advertising the goods and popularizing them on the local market, does not come within the intent and meaning of this Chapter; and in vendor's action for the purchase price the seller may recover damages as a counterclaim for breach of the seller's contract in that respect. Mar-Hof Co. v. Rosenbacker, 176 N.C. 330, 97 S.E. 169 (1918).

Agreement Contravening Section. — A single instrument whereby the owner of lands leased same to an oil company rent free, and the oil company subleased the property back to the owner rent free, upon agreement that only the petroleum products of the oil company should be sold at the filling station, was held void, since the only consideration was the promise of the oil company to sell its products to the owner and the promise of the owner to handle such products to the exclusion of similar merchandise of competitors, which agreement was in contravention of this section, and this result is not affected by a recital in the writing that the owner signed same as part of consideration for a deed to the property executed by a third person. Arey v. Lemons, 232 N.C. 531, 61 S.E.2d 596 (1950).

A contract whereby plaintiff and defendant jointly undertake to provide a coin-operated phonograph for the use of patrons in defendant's restaurant, the plaintiff agreeing to furnish and service the machine and the defendant agreeing to furnish the space and the cost of electricity, is not a contract for the sale of goods, wares or merchandise within the contemplation of the statutes against restraint of trade. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

An agreement that a retailer should handle a certain product upon condition that he should not sell like products of other manufacturers within the same price range is held prohibited by this section, and unenforceable in our courts, and does not fall within subdivision (b)(6), permitting, in the absence of an intent to stifle competition, a contract granting the seller an exclusive agency for a product within a certain territory. Florsheim Shoe Co. v. Leader Dep't Store, Inc., 212 N.C. 75, 193 S.E. 9 (1937).

Covenant Not to Sell Products Other than Those of Lessor. — Lessee alleged that lessor covenanted not to sell any petroleum products other than those of lessee within a radius of 2,000 feet of the demised premises or from the demised premises. It was held that there being no allegation that lessor agreed to purchase petroleum products from anyone, the provisions of subdivision (b)(2) of this section are not applicable. Such a covenant apparently runs afoul of no statute. Grubb Oil Co. v. Garner, 230 N.C. 499, 53 S.E.2d 441 (1949).

Contract to Sell at Label Price. — A contract of sale of merchandise for resale by the buyer, which stipulates that the buyer will not sell the merchandise except at label prices and will not sell or permit the sale of any other similar merchandise, is violative of this section. Standard Fashion Co. v. Grant, 165 N.C. 453, 81 S.E. 606 (1914), writ dismissed, 239 U.S. 654, 36 S. Ct. 164, 60 L. Ed. 487 (1915).

A contract for sale of cafe and goodwill for a period of five years does not affect the interest of the public or fall within the terms of subdivision (b)(6) of this section. Hill v. Davenport, 195 N.C. 271, 141 S.E. 752 (1928).

Discrimination Not Allowed. — Where a public service corporation has acquired the exclusive right to furnish hydroelectric power and light to municipalities, and to other public service corporations, for distribution to consumers, including subsidiary companies that it controls, it may not discriminate among its patrons under the same or substantially similar conditions as to the rate charged, or select its customers. North Carolina Pub. Serv. Co. v. Southern Power Co., 179 N.C. 18, 101 S.E. 593 (1919), rehearing dismissed, 179 N.C. 330, 102 S.E. 625 (1920).

Attempt to Drive Competitor out of Business. — An indictment charging that the employees of a rival company in the sale of lawful commodities had combined together to break up their competitor's business by systematically following its salesmen from house to house and place to place and to so abuse, vilify and harass them as to deter them in their lawful business and to break up their sales; that they falsely represented that their rival company was composed of a set of thieves and liars, endeavoring to cheat and defraud the people, etc., charges a conspiracy indictable at common law. State v. Dalton, 168 N.C. 204, 83 S.E. 693 (1914).

Grant of Municipal Franchise. — A private sale of public utilities by the city authorities to an electrical power plant with a grant of a municipal franchise does not create or tend towards a monopoly. Allen v. Town of Reidsville, 178 N.C. 513, 101 S.E. 267 (1919).

Ordinance Restricting Sale of Commodity. — A municipal ordinance prohibiting the sale of milk within the city without a permit is not invalid as tending to create a monopoly although the permit "may be suspended or revoked at any time for cause." State v. Kirkpatrick, 179 N.C. 747, 103 S.E. 65 (1920).

Contract in Violation of Section Unenforceable. — A contract made in violation of the terms of this section will not be enforced. Standard Fashion Co. v. Grant, 165 N.C. 453, 81 S.E. 606 (1914), writ dismissed, 239 U.S. 654, 36 S. Ct. 164, 60 L. Ed. 487 (1915); Shute v. Shute, 176 N.C. 462, 97 S.E. 392 (1918); Radio Electronics Co. v. Radio Corp. of America, 244 N.C. 114, 92 S.E.2d 664 (1956).

Threats to Retaliate unless Competition Withdrawn. — Threats by one ice company that it would sell ice in the town of a second ice company, if that company continued to supply ice to a rival of the first company are not prohibited by this section. Smith v. Morganton Ice Co., 159 N.C. 151, 74 S.E. 961 (1912).

The refusal by wholesalers of ice to sell to a retailer on the same terms as those offered to other retailers in the city is not a violation of this section, it not appearing that the parties were business competitors. Rice v. Asheville Ice Co., 204 N.C. 768, 169 S.E. 707 (1933).

The violation of this section is made criminal by § 75-6, and as ordinarily the violation of a criminal statute may not be enjoined, individuals who apprehend injury by such violation are afforded a remedy by indictment and prosecution under § 1-5. Carolina Motor Serv., Inc. v. Atlantic Coast Line R.R., 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

The provisions of the monopoly statutes apply to railroads just as they do to individuals and other corporations. Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Subdivision (b)(3) Constitutional. — Subdivision (b)(3) sufficiently defines the offense therein prohibited and is constitutional. State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

The purpose of subsection (b)(5) of this section is to prevent a seller with several distribution points from predatorily lowering his prices in one locality where he has competition, while maintaining his prices at another locality in order to continue to generate an acceptable overall profit margin, thereby destroying his competitor in the low priced locality. Such practices would be area discrimination in the primary line. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Subsection (b)(5) is aimed at predatory area discrimination in the primary line. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

It was not intended to outlaw price discrimination in the secondary line, and no reasonable construction of the statute produces that result. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

A contract establishing a price discrimination is not illegal per se. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Defense Based on Subsection (b)(5) Properly Sustained. — Where defendant who refused to honor a contract because it included discriminatory prices favoring plaintiff over other customers, had at best made out an inferential case of price discrimination in the sec-

ondary line, but had not shown the contract in question to be a predatory area discrimination in the primary line, his defense based on subsection (b)(5) of this section was properly sustained by the Court of Appeals. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

"Willful" Defined. — "Willful" means the wrongful doing of an act without justification or excuse. State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

Coal Dealers Held to Be Competent Witnesses. — Where in the prosecution for violation of subdivision (b)(3) of this section the State was allowed to introduce the testimony of coal dealers in the same city as to the cost of handling coal, the opinion testimony being based upon complicated and detailed facts relating to costs of buying, shipping, trucking, handling, shrinkage, labor, repairs, etc., the witnesses having had years of experience in operating their respective businesses in the city, it was held that the witnesses were experts and their opinion testimony was competent and was properly received in evidence. State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

Proper Instruction as to Injuring or Destroying Competitors. — In a prosecution for violating this section relating to monopolies, an instruction that a person violates this section if he lowers the price of the product in question for the purpose of injuring or destroying competitors, and then, after competition is removed, he sells at a higher price to the detriment of the public, was held without error. State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

Cited in Lewis v. Archbell, 199 N.C. 205, 154 S.E. 11 (1930); Brown v. Norfolk S.R.R., 208 N.C. 423, 181 S.E. 279 (1935); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

§ 75-6. Violation a misdemeanor; punishment.

Any corporation, either as agent or principal, violating any of the provisions of G.S.75-5 shall be guilty of a misdemeanor, and such corporation shall upon conviction be fined not less than one thousand dollars ($1,000) for each and every offense, and any person, whether acting for himself or as officer of any corporation or as agent of any corporation or persons violating any of the provisions of this Chapter, with the exception of G.S. 75-1.1 (the violation of which does not constitute a crime), shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 41, s. 5; C. S., s. 2564; 1969, c. 833.)

Cross References. — See note to § 75-5.

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

CASE NOTES

Applied in State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936).

Cited in Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

§ 75-7. Persons encouraging violation guilty.

Any person, being either within or without the State, who encourages or willfully allows or permits any agent or associates in business in this State, to violate any of the provisions of this Chapter, with the exception of G.S. 75-1.1 (the violation of which does not constitute a crime), shall be guilty of a misdemeanor, and upon conviction shall be punished as provided in G.S. 75-6. (1913, c. 41, s. 6; C. S., s. 2565; 1969, c. 833.)

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

CASE NOTES

Applied in State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

§ 75-8. Continuous violations separate offenses.

Where the things prohibited in this Chapter are continuous, then in such event, after the first violation of any of the provisions hereof, each week that the violation of such provision shall continue shall be a separate offense. (1913, c. 41, s. 7; C. S., s. 2566.)

CASE NOTES

Applied in Thomas v. Petro-Wash, Inc., 429 F. Supp. 808 (M.D.N.C. 1977).

Quoted in State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1937).

§ 75-9. Duty of Attorney General to investigate.

The Attorney General of the State of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations or persons doing business in this State, which are or may be embraced within the meaning of the statutes of this State defining and denouncing trusts and combinations against trade and commerce, or which he shall be of opinion are so embraced, and all other corporations or persons in North Carolina doing business in violation of law; and all other corporations of every character engaged in this State in the business of transporting property or passengers, or transmitting messages, and all other public service corporations of any kind or nature whatever which are doing business in the State for hire. Such investigation shall be with a view of ascertaining whether the law or any rule of the Utilities Commission or Commission of Banks [Commissioner of Banks] is being or has been violated by any such corporation, officers or agents or employees thereof, and if so, in what respect, with the purpose of acquiring such information as may be necessary to enable him to prosecute any such corporation, its agents, officers and employees for crime, or prosecute civil actions against them if he discovers they are liable and should be prosecuted. (1913, c. 41, s. 8; C. S., s. 2567; 1931, c. 243, s. 5; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1969, c. 833.)

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

CASE NOTES

Power of Attorney General to Investigate. — Although this section empowers the Attorney General to prosecute under applicable criminal and civil statutes, the power to investigate under this Chapter is not subject to the restrictions imposed upon criminal discovery under the Criminal Procedure Act, § 15A-908, or upon civil discovery under the Rules of Civil Procedure, § 1A-1, Rule 26(c). In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976).

§ 75-10. Power to compel examination.

In performing the duty required in G.S. 75-9, the Attorney General shall have power, at any and all times, to require the officers, agents or employees of any such corporation or business, and all other persons having knowledge with respect to the matters and affairs of such corporations or businesses, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations or businesses, or which are in any way connected with the business thereof; and the Attorney General is hereby given the right to administer oath to any person whom he may desire to examine. He shall also, if it may become necessary, have a right to apply to any justice or judge of the appellate or superior court divisions, after five days' notice of such application, for an order on any such person or corporation he may desire to examine to appear and subject himself or itself to such examination, and disobedience of such order shall constitute contempt, and shall be punishable as in other cases of disobedience of a proper order of such judge. (1913, c. 41, s. 9; C. S., s. 2568; 1969, c. 44, s. 56; c. 833.)

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

CASE NOTES

Stated in In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976).

§ 75-11. Person examined exempt from prosecution.

No natural person examined, as provided in G.S. 75-10, shall be subject to indictment, criminal prosecution, criminal punishment or criminal penalty by reason of or on account of anything disclosed by him upon examination, and full immunity from criminal prosecution and criminal punishment by reason of or on account of anything so disclosed is hereby extended to all natural persons so examined. The immunity herein granted shall not apply to civil actions instituted pursuant to this Chapter. (1913, c. 41, s. 9; C. S., s. 2569; 1969, c. 833.)

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

CASE NOTES

Cited in In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976).

§ 75-12. Refusal to furnish information; false swearing.

Any corporation or person unlawfully refusing or willfully neglecting to furnish the information required by this Chapter, when it is demanded as herein provided, shall be guilty of a misdemeanor and fined not less than one thousand dollars ($1,000): Provided, that if any corporation or person shall in writing notify the Attorney General that it objects to the time or place designated by him for the examination or inspection provided for in this Chapter, it shall be his duty to apply to a justice or judge of the appellate or superior court division, who shall fix an appropriate time and place for such examina-

tion or inspection, and such corporation or person shall, in such event, be guilty under this section only in the event of its failure, refusal or neglect to appear at the time and place so fixed by the judge and furnish the information required by this Chapter. False swearing by any person examined under the provisions of this Chapter shall constitute perjury, and the person guilty of it shall be punishable as in other cases of perjury. (1913, c. 41, s. 10; C. S., s. 2570; 1969, c. 44, s. 57; c. 833.)

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

CASE NOTES

Stated in In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976).

§ 75-13. Criminal prosecution; district attorneys to assist; expenses.

The Attorney General in carrying out the provisions of this Chapter shall have a right to send bills of indictment before any grand jury in any county in which it is alleged this Chapter has been violated or in any adjoining county, and may take charge of and prosecute all cases coming within the purview of this Chapter, and shall have the power to call to his assistance in the performance of any of these duties of his office which he may assign to them any of the district attorneys in the State, who shall, upon being required to do so by the Attorney General, send bills of indictment and assist him in the performance of the duties of his office. (1913, c. 41, s. 13; C. S., s. 2571; 1973, c. 47, s. 2.)

§ 75-14. Action to obtain mandatory order.

If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of this Chapter, and the venue shall be in any county as selected by the Attorney General. (1913, c. 41, s. 11; C. S., s. 2572; 1969, c. 833.)

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

CASE NOTES

Legislative Intent. — Even though individual remedies may exist, the statutes provide for injunctive relief at the instance of the State. To hold otherwise would cripple the legislative intent to provide an effective means of curbing illegitimate business schemes and protecting the consumers of the State. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

Quoted in Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978).

Stated in Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980).

Cited in Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978).

§ 75-15. Actions prosecuted by Attorney General.

It shall be the duty of the Attorney General, upon his ascertaining that the laws have been violated by any trust or public service corporation, so as to render it liable to prosecution in a civil action, to prosecute such action in the name of the State, or any officer or department thereof, as provided by law, or in the name of the State on relation of the Attorney General, and to prosecute all officers or agents or employees of such corporations, whenever in his opinion the interests of the public require it. (1913, c. 41, s. 12; C. S., s. 2573.)

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

CASE NOTES

Quoted in Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978).

§ 75-15.1. Restoration of property and cancellation of contract.

In any suit instituted by the Attorney General to enjoin a practice alleged to violate G.S. 75-1.1, the presiding judge may, upon a final determination of the cause, order the restoration of any moneys or property and the cancellation of any contract obtained by any defendant as a result of such violation. (1973, c. 614, s. 2.)

CASE NOTES

This section is a companion enforcement provision to § 75-1.1. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Applicability of Section to Debt Collection Activities. — Inherent in the remedy of this section is the intent to prohibit only unfair and deceptive practices affecting sales. If the legislature had intended to cover debt collection activities it would have provided for the rescission of contracts not only where the contract is obtained as a result of a violation, but also where a violation occurs which is unrelated to the contract's formation. State ex rel. Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895 (1977).

Stated in Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980).

Cited in Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978).

§ 75-15.2. Civil penalty.

In any suit instituted by the Attorney General, in which the defendant is found to have violated G.S. 75-1.1 and the acts or practices which constituted the violation were, when committed, specifically prohibited by a court order or knowingly violative of a statute, the court may, in its discretion, impose a civil penalty against the defendant of up to five thousand dollars ($5,000) for each violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant. Any penalty so

assessed shall be paid to the General Fund of the State of North Carolina. (1977, c. 747, s. 3.)

Legal Periodicals. — For comment on this section, see 56 N.C.L. Rev. 547 (1978).

CASE NOTES

Cited in Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

§ 75-16. Civil action by person injured; treble damages.

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (1913, c. 41, s. 14; C. S., s. 2574; 1969, c. 833; 1977, c. 707.)

Legal Periodicals. — For comment entitled "Consumer Protection and Unfair Competition — The 1969 Legislation," see 48 N.C.L. Rev. 896 (1970).

For comment entitled, "Attacking the 'Forfeiture as Liquidated Damages' Clause in North Carolina Installment Land Sales Contracts as an Equitable Mortgage, Penalty and Unfair and Deceptive Trade Practice," see 7 N.C. Cent. L.J. 370 (1976).

CASE NOTES

Legislative Intent. — It was the clear intention of the General Assembly in enacting § 75-1.1 and this section, among other things, to declare deceptive acts or practices in the conduct of any trade or commerce in North Carolina unlawful, to provide civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State and to enable a person injured by deceptive acts or practices to recover treble damages from a wrongdoer. Hardy v. Toler, 24 N.C. App. 625, 211 S.E.2d 809, modified on other grounds, 288 N.C. 303, 218 S.E.2d 342 (1975).

Section Not Intended as Penalty. — It would not be proper for the North Carolina Appeals Court to strain to infer that the General Assembly meant this section to be a penalty where, in the preceding statutory section, the General Assembly has expressly created a "penalty" denominated as such and reserved the authority to enforce the "penalty" to the State's chief law enforcement officer. The language of § 75-15.2 is sufficiently particular for the court to conclude that had the General Assembly intended its sister provision, § 75-16, also to be a "penalty," the General Assembly would have expressly provided for a second "penalty." Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

This section is punitive in nature. United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1979).

Civil Action for Damages and Injunctive Relief. — While conspiracies in restraint of trade, and undertakings to destroy or injure the business of a competitor, with the purpose of attempting to fix the price when competition is removed, are made unlawful, these provisions do not prevent one whose business as a common carrier has been injured and threatened by any of the acts thus denounced from pursuing a remedy by civil action for damages and seeking the interposition of equity, if necessary to restrain wrongful acts which threaten irreparable loss. Burke Transit Co. v. Queen City Coach Co., 228 N.C. 768, 47 S.E.2d 297 (1948).

Causal Relation between Violation and Injury Must Be Shown. — Section 75-5 condemns a contract of sale only when such sale is made "upon the condition" that the purchaser shall not deal in the goods or merchandise of a competitor of the seller, and in order for a party to recover damages for a breach of the statute

under the provisions of this section, he must show a violation of the statute and a causal relation between the violation and injury to his business. Lewis v. Archbell, 199 N.C. 205, 154 S.E. 11 (1930). See Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Who May Bring Action. — The contention that an action for the violation of this Chapter resulting in injury to a party's business can only be brought by the Attorney General is contrary to the provisions of this section. Bennett v. Southern Ry., 211 N.C. 474, 191 S.E. 240 (1937).

Plaintiff was not entitled to treble damages under section where he sought to rescind the sale of a car and to recover the sale price on the ground the year model of the car had been misrepresented by the seller. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Punitive damages may be awarded only where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights. Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975).

Breach of Warranties in Sale of House. — Breach of implied and express warranties alone in the sale of a house does not constitute a "violation of the provisions" of this Chapter. Hence, it is inappropriate to treble damages resulting solely from breach of warranties. Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 245 S.E.2d 801, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Statute of Limitations Prior to Enactment of § 75-16.2. — An action under this section to recover treble damages for a violation of the unfair trade practices statute, § 75-1.1, instituted prior to the enactment of the four-year statute of limitations of § 75-16.2 on June 12, 1969, is governed by the three-year limitation of § 1-52(2), not the one-year limitation of § 1-54(2) applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

Applied in Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980).

Quoted in Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978).

Stated in Ray v. United Family Life Ins. Co., 430 F. Supp. 1353 (W.D.N.C. 1977); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978).

Cited in Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961); Ramsey v. Camp, 254 N.C. 443, 119 S.E.2d 209 (1961); Parsons v. Bailey, 30 N.C. App. 497, 227 S.E.2d 166 (1976); Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 238 S.E.2d 193 (1977); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977); CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978); Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978); Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978); Harrington Mfg. Co. v. Powell Mfg. Co., 38 N.C. App. 393, 248 S.E.2d 739 (1978); Anderson v. Pamlico Chem. Co., 470 F. Supp. 12 (E.D.N.C. 1977); Burgess v. North Carolina Farm Bureau Mut. Ins. Co., 44 N.C. App. 441, 261 S.E.2d 234 (1980); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646 (1980).

§ 75-16.1. Attorney fee.

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to pay the claim which constitutes the basis of such suit; or

(2) The party instituting the action knew, or should have known, the action was frivolous and malicious. (1973, c. 614, s. 1.)

CASE NOTES

"Prevailing Party" Must Have Suffered Actual Injury. — In a private action to recover damages for a violation of § 75-1.1, the plaintiff, in order to be the "prevailing party" within the meaning of this section, must prove not only a violation of § 75-1.1 by the defendant, but also that plaintiff has suffered actual injury as a result of that violation. Mayton v. Hiatt's

Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860 (1980).

Applied in Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 245 S.E.2d 801 (1978); United Roasters, Inc. v. Colgate-Palmolive Co., 485 F. Supp. 1049 (E.D.N.C. 1979).

Cited in CF Indus., Inc. v. Transcontinental Gas Pipe Line Corp., 448 F. Supp. 475 (W.D.N.C. 1978); Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978); Burgess v. North Carolina Farm Bureau Mut. Ins. Co., 44 N.C. App. 441, 261 S.E.2d 134 (1980).

§ 75-16.2. Limitation of actions.

Any civil action brought under this Chapter to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues.

When any civil or criminal proceeding shall be commenced by the Attorney General or by any of the district attorneys of the State to prevent, restrain or punish a violation of Chapter 75, the running of the period of limitation with respect to every private right of action arising under Chapter 75 and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; provided that when the running of the period of limitation with respect to a cause of action arising under Chapter 75 shall be suspended hereunder, any action to enforce such cause of action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued, whichever is later. (1979, c. 169, s. 1.)

Editor's Note. — Session Laws 1979, c. 169, s. 2, provides: "This act is effective upon ratification [March 21, 1979] but shall not apply to any pending civil action."

CASE NOTES

Applicable Statute Prior to Enactment of Section. — An action under § 75-16 to recover treble damages for a violation of the unfair trade practices statute, § 75-1.1, instituted prior to the enactment of the four-year statute of limitations of this section on June 12, 1969, is governed by the three-year limitation of § 1-52(2), not the one-year limitation of § 1-54(2) applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

§ 75-17. Lender may not require borrower to deal with particular insurer.

No person, firm, or corporation engaged in lending money on the security of real or personal property, and no trustee, director, officer, agent, employee, affiliate, or associate, of any such person, firm, or corporation, shall either directly or indirectly require or impose as a condition precedent

(1) To financing the purchase of such property, or

(2) To lending money upon the security of a mortgage, deed of trust, or other security instrument, or

(3) For the renewal or extension of any such loan, mortgage, or deed of trust, or

(4) For the performance of any other act in connection therewith,

that such person, firm or corporation

a. For whom such purchase is to be financed, or

b. To whom the money is to be loaned, or

c. For whom such extension, renewal, or other act is to be granted, negotiate, procure, or otherwise obtain any policy of insurance or renewal, or extension thereof, covering such property, or a secu-

rity interest therein, by or through a particular insurance company, agent, broker, or other person so specified or otherwise designated in any manner by the lenders, or their agents or employees or affiliated or related companies. (1969, c. 1032, s. 1.)

§ 75-18. Lender may require nondiscriminatory approval of insurer.

Although the lender and other persons enumerated in G.S. 75-17 may not specify or designate as a condition precedent a particular insurance company or agent, those persons, firms, or corporations engaged in lending money may approve the insurer selected by the borrower on a reasonable, nondiscriminatory basis, related to the solvency of the company and the type and provisions of policy coverage. (1969, c. 1032, s. 2.)

§ 75-19. Violators subject to fine and injunction.

The superior court, on complaint by any person that G.S. 75-17 or 75-18 is being violated, may issue an injunction against such violation and may fine all persons, firms, corporations, and officers, directors, trustees, agents, employees, or affiliates of such up to two thousand dollars ($2,000) per person for such violation. In event of a disregard of such injunction or other court order, the superior court shall hold such parties in contempt and prescribe such further penalties as the court in its discretion shall so determine. (1969, c. 1032, s. 3.)

§§ 75-20 to 75-26: Reserved for future codification purposes.

§ 75-27. Unsolicited merchandise.

Unless otherwise agreed, where unsolicited goods are delivered to a person, he has a right to refuse to accept delivery of the goods and is not bound to return such goods to the sender. If such unsolicited goods are addressed to and intended for the recipient, they shall be deemed a gift to the recipient, who may use them or dispose of them in any manner without any obligation to the sender. (1969, c. 70, s. 1; 1977, c. 498.)

§ 75-28. Unauthorized disclosure of tax information; violation a misdemeanor.

Except in accordance with proper judicial order, or as otherwise provided by law, it shall be unlawful for any person, firm or corporation employed or engaged to prepare, or who or which prepares or undertakes to prepare, for any other person or taxpayer any tax form, report or return, to disclose, divulge or make known in any manner or use for any purpose or in any manner other than in the preparation of such form, report or return, without the express consent of the taxpayer or person for whom the form or return is prepared, the name or address of the taxpayer or such other person, the amount of income, income tax or other taxes, or any other information shown on or included in such form, report or return, or any information which may be or may have been furnished by the taxpayer or such other person to the preparer of such form, report or return or to the person, firm or corporation so employed or engaged.

Nothing in this section shall be construed to amend or modify the authority specified in G.S. 105-276(6) or any statute enacted in substitution therefor.

Nothing in this section shall be construed to prohibit the inspection of such forms, reports or returns required under Subchapter I of Chapter 105 of the General Statutes in accordance with the authority provided in G.S. 105-259, or the examination of any person, books, papers, records or other data in accordance with the authority provided in G.S. 105-258.

Any person, firm or corporation, or any officer, agent, clerk, employee, or former officer or employee, of any firm or corporation engaged or formerly engaged in the preparation of tax forms, reports or returns for others, whether acting for himself or as agent for such corporation, who or which shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court. (1971, c. 231.)

Editor's Note. — The reference in this section to § 105-276(6) is to a former section existing prior to the 1971 amendment of Chapter 105. See now § 105-291.

§ 75-29. Unfair and deceptive trade names; use of term "wholesale" in advertising, etc.

(a) No person, firm or corporation shall advertise the sale of its merchandise using the term "wholesale" with regard to its sale prices, except as such word may appear in the company or firm name, unless such advertised sale or sales is, or are, to a customer or customers having a certificate of resale issued pursuant to G.S. 105-164.28 and recorded as required by G.S. 105-164.25 or unless the wholesale price is established by an independent agency not engaged in the manufacture, distribution or sale of such merchandise.

No person, firm or corporation shall utilize in any commercial transaction a company or firm name which contains the word "wholesale" unless such person, firm or corporation is engaged principally in sales at wholesale as defined in G.S. 105-164.3. For the purposes of determining whether sales are made principally at wholesale or retail, all sales to employees of any such person, firm or corporation, all sales to organizations subject to refunds pursuant to G.S. 105-164.14, and all exempt sales pursuant to G.S. 105-164.13 shall be considered sales at wholesale. Sales of merchandise for delivery by the seller to the purchaser at a location other than the seller's place of business shall be considered sales at wholesale for the purposes of this section.

(b) The violation of any provision of this section shall be considered an unfair trade practice, as prohibited by G.S. 75-1.1.

(c) This section shall not apply to the sales of farm products, fertilizers, insecticides, pesticides or petroleum. (1973, c. 1392, ss. 1, 2.)

§ 75-30. Automatic dialing and recorded message players; restriction on use of.

(a) No person may make an unsolicited telephone call by the use of an automatic dialing and recorded message player unless:

(1) Such calling person is a charitable, civic, political or opinion polling organization or a radio station, television station or broadcast rating service conducting a public opinion poll required by law; and

(2) Such calling person clearly identifies the nature of the call and the name and address of the calling organization.

(b) As an exception to subsection (a) an unsolicited telephone call may be made by the use of an automatic dialing and recorded message player if the recorded message is preceded by an announcement made by a human operator who:

(1) States the nature and length in minutes of the recorded message; and
(2) Identifies the individual, business, group, or organization calling; and
(3) Asks the called party whether he is willing to listen to the recorded message; and
(4) Disconnects from the called party's line if the called party is unwilling to listen to the recorded message.

(c) For the purpose of this section an automatic dialing and recorded message player shall be defined as any automatic equipment which incorporates a storage capability of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called and the capability, working alone or in conjunction with other equipment, of disseminating prerecorded message to the telephone number called.

(d) For the purpose of this section, a telephone call shall be deemed to be unsolicited unless pursuant to a prior agreement between the parties the person called has agreed to accept such calls from the person calling.

(e) Violation of this section shall be a misdemeanor, punishable by a fine of one hundred dollars ($100.00), for each occurrence. (1979, c. 573.)

Editor's Note. — Session Laws 1979, c. 724, s. 2, makes this section effective July 1, 1979.

§ 75-31. Work-at-home solicitations.

No person, firm, association, or corporation shall advertise, represent, or imply that any person can earn money by stuffing envelopes, addressing envelopes, mailing circulars, clipping newspaper and magazine articles, or performing similar work, unless the person, firm, association or corporation making the advertisement or representation:

(1) Actually pays a wage, salary, set fee, or commission to others for performing the represented tasks; and
(2) At no time requires the person who will perform the represented tasks to purchase from or make a deposit to the solicitor on any instructional booklets, brochures, kits, programs or similar information materials, mailing lists, directories, memberships in cooperative associations, or other items or services. (1979, c. 724, s. 1.)

§ 75-32. Representation of winning a prize.

No person, firm or corporation engaged in commerce shall, in connection with the sale or lease or solicitation for the sale or lease of any goods, property, or service, represent that any other person, firm or corporation has won anything of value or is the winner of any contest, unless all of the following conditions are met:

(1) The recipient of the prize must have been selected by a method in which no more than ten percent (10%) of the names considered are selected as winners of any prize;
(2) The recipient of the prize must be given the prize without any obligation; and
(3) The prize must be delivered to the recipient at no expense to him, within 10 days of the representation.

The use of any language that has a tendency to lead a reasonable person to believe he has won a contest or anything of value, including but not limited to "congratulations," and "you are entitled to receive," shall be considered a representation of the type governed by this section. (1979, c. 879, s. 1.)

Editor's Note. — Session Laws 1979, c. 879, s. 2, makes this section effective Jan. 1, 1980.

§ 75-33. Representation of eligibility to win a prize.

No person, firm or corporation engaged in commerce shall in connection with the sale or lease or solicitation for sale or lease of any goods, property or service represent that any other person, firm or corporation may win or is eligible to win anything of value, unless all of the following information is clearly and prominently conveyed at the time of the representation:

(1) The actual retail value of each prize (the price at which substantial sales of the item which constitutes the prize were made in the area within the last 90 days, or if no substantial sales were made, the actual cost of the prize to the conductor of the contest);

(2) The actual number of each prize to be awarded;

(3) The odds of winning each prize. (1979, c. 879, s. 1.)

Editor's Note. — Session Laws 1979, c. 879, s. 2, makes this section effective Jan. 1, 1980.

§ 75-34. Representation of being specially selected.

No person, firm or corporation engaged in commerce shall represent that any other person, firm or corporation has been specially selected in connection with the sale or lease or solicitation for sale or lease of any goods, property, or service, unless all of the following conditions are met:

(1) The selection process is designed to reach a particular type or particular types of person, firm or corporation;

(2) The selection process uses a source other than telephone directories, city directories, tax listings, voter registration records, purchased mailing lists, or similar common sources of names;

(3) No more than ten percent (10%) of those considered are selected.

The use of any language that has a tendency to lead a reasonable person to believe he has been specially selected, including but not limited to "carefully selected" and "you have been chosen," shall be considered a representation of the type governed by this selection [section]. (1979, c. 879, s. 1.)

Editor's Note. — Session Laws 1979, c. 879, s. 2, makes this section effective Jan. 1, 1980.

§ 75-35. Simulation of checks and invoices.

No person engaged in commerce shall in any manner issue any writing which simulates or resembles: (i) a negotiable instrument; or (ii) an invoice, unless the intended recipient has actually contracted for goods, property, or services for which the issuer seeks proper payment. (1979, c. 879, s. 1.)

Editor's Note. — Session Laws 1979, c. 879, s. 2, makes this section effective Jan. 1, 1980.

§§ 75-36 to 75-49: Reserved for future codification purposes.

ARTICLE 2.

Prohibited Acts by Debt Collectors.

§ 75-50. Definitions.

The following words and terms as used in this Article shall be construed as follows:

(1) "Consumer" means any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes.

(2) "Debt" means any obligation owed or due or alleged to be owed or due from a consumer.

(3) "Debt collector" means any person engaging, directly or indirectly, in debt collection from a consumer except those persons subject to the provisions of Article 9, Chapter 66 of the General Statutes. (1977, c. 747, s. 4.)

Editor's Note. — Article 9, Chapter 66, of the General Statutes, referred to in subdivision (3) of this section, was rewritten by Session Laws 1979, c. 835, and has been recodified as Article 9C, § 66-49.24 et seq., of Chapter 66.

Legal Periodicals. — For comment on this article, see 56 N.C.L. Rev. 547 (1978).

§ 75-51. Threats and coercion.

No debt collector shall collect or attempt to collect any debt alleged to be due and owing from a consumer by means of any unfair threat, coercion, or attempt to coerce. Such unfair acts include, but are not limited to, the following:

(1) Using or threatening to use violence or any illegal means to cause harm to the person, reputation or property of any person.

(2) Falsely accusing or threatening to accuse any person of fraud or any crime, or of any conduct that would tend to cause disgrace, contempt or ridicule.

(3) Making or threatening to make false accusations to another person, including any credit reporting agency, that a consumer has not paid, or has willfully refused to pay a just debt.

(4) Threatening to sell or assign, or to refer to another for collection, the debt of the consumer with an attending representation that the result of such sale, assignment or reference would be that the consumer would lose any defense to the debt or would be subjected to harsh, vindictive, or abusive collection attempts.

(5) Representing that nonpayment of an alleged debt may result in the arrest of any person.

(6) Representing that nonpayment of an alleged debt may result in the seizure, garnishment, attachment, or sale of any property or wages unless such action is in fact contemplated by the debt collector and permitted by law.

(7) Threatening to take any action not in fact taken in the usual course of business, unless it can be shown that such threatened action was actually intended to be taken in the particular case in which the threat was made.

(8) Threatening to take any action not permitted by law. (1977, c. 747, s. 4.)

§ 75-52. Harassment.

No debt collector shall use any conduct, the natural consequence of which is to oppress, harass, or abuse any person in connection with the attempt to collect any debt. Such unfair acts include, but are not limited to, the following:

(1) Using profane or obscene language, or language that would ordinarily abuse the typical hearer or reader.

(2) Placing collect telephone calls or sending collect telegrams unless the caller fully identifies himself and the company he represents.

(3) Causing a telephone to ring or engaging any person in telephone conversation with such frequency as to be unreasonable or to constitute a harassment to the person under the circumstances or at times known to be times other than normal waking hours of the person.

(4) Placing telephone calls or attempting to communicate with any person, contrary to his instructions, at his place of employment, unless the debt collector does not have a telephone number where the consumer can be reached during the consumer's nonworking hours. (1977, c. 747, s. 4.)

§ 75-53. Unreasonable publication.

No debt collector shall unreasonably publicize information regarding a consumer's debt. Such unreasonable publication includes, but is not limited to, the following:

(1) Any communication with any person other than the debtor or his attorney, except:

a. With the written permission of the debtor or his attorney given after default;

b. To persons employed by the debt collector, to a credit reporting agency, to a person or business employed to collect the debt on behalf of the creditor, or to a person who makes a legitimate request for the information;

c. To the spouse (or one who stands in place of the spouse) of the debtor, or to the parent or guardian of the debtor if the debtor is a minor and lives in the same household with such parent;

d. For the sole purpose of locating the debtor, if no indication of indebtedness is made;

e. Through legal process.

(2) Using any form of communication which ordinarily would be seen or heard by any person other than the consumer that displays or conveys any information about the alleged debt other than the name, address and phone number of the debt collector except as otherwise provided in this Article.

(3) Disclosing any information relating to a consumer's debt by publishing or posting any list of consumers, except for credit reporting purposes and the publication and distribution of otherwise permissible "stop lists" to the point-of-sale locations where credit is extended, or by advertising for sale any claim to enforce payment thereof or in any other manner other than through legal process. (1977, c. 747, s. 4; 1979, c. 910.)

Effect of Amendments. — The 1979 amendment added "given after default" at the end of subdivision (1)a.

§ 75-54. Deceptive representation.

No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudulent, deceptive or misleading representation. Such representations include, but are not limited to, the following:

(1) Communicating with the consumer other than in the name (or unique pseudonym) of the debt collector and the person or business on whose behalf the debt collector is acting or to whom the debt is owed.

(2) Failing to disclose in all communications attempting to collect a debt that the purpose of such communication is to collect a debt.

(3) Falsely representing that the debt collector has in his possession information or something of value for the consumer.

(4) Falsely representing the character, extent, or amount of a debt against a consumer or of its status in any legal proceeding; falsely representing that the collector is in any way connected with any agency of the federal, State or local government; or falsely representing the creditor's rights or intentions.

(5) Using or distributing or selling any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by a court, an official, or any other legally constituted or authorized authority, or which creates a false impression about its source.

(6) Falsely representing that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges.

(7) Falsely representing the status or true nature of the services rendered by the debt collector or his business. (1977, c. 747, s. 4.)

§ 75-55. Unconscionable means.

No debt collector shall collect or attempt to collect any debt by use of any unconscionable means. Such means include, but are not limited to, the following:

(1) Seeking or obtaining any written statement or acknowledgment in any form containing an affirmation of any debt by a consumer who has been declared bankrupt, an acknowledgment of any debt barred by the statute of limitations, or a waiver of any legal rights of the debtor without disclosing the nature and consequences of such affirmation or waiver and the fact that the consumer is not legally obligated to make such affirmation or waiver.

(2) Collecting or attempting to collect from the consumer all or any part of the debt collector's fee or charge for services rendered, collecting or attempting to collect any interest or other charge, fee or expense incidental to the principal debt unless legally entitled to such fee or charge.

(3) Communicating with a consumer (other than a statement of account used in the normal course of business) whenever the debt collector has been notified by the consumer's attorney that he represents said consumer.

(4) Bringing suit against the debtor in a county other than that in which the debt was incurred or in which the debtor resides if the distances and amounts involved would make it impractical for the debtor to defend the claim. (1977, c. 747, s. 4.)

§ 75-56. Application.

The specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article. Notwithstanding the provisions of G.S. 75-15.2, 75-16, and 75-16.1, civil penalties in excess of one thousand dollars ($1,000) shall not be imposed, nor shall damages be trebled or attorney's fees assessed for any violation under this Article nor shall the provisions of this Article be construed to confer any right of private action not already available at common law or by means of other specific statutory authorization. (1977, c. 747, s. 4.)

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

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Article 2.

North Carolina Water Safety Committee.

75A-20. Creation of North Carolina Water Safety Committee.
75A-21. Terms and appointment of members.
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Article 1.

Boating Safety Act.

§ 75A-1. Declaration of policy.

It is the policy of this State to promote safety for persons and property in and connected with the use, operation, and equipment of vessels, and to promote uniformity of laws relating thereto. (1959, c. 1064, s. 1.)

CASE NOTES

Quoted in Grindstaff v. Watts, 254 N.C. 568, 119 S.E.2d 784 (1961).

Cited in Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973).

§ 75A-2. Definitions.

As used in this Chapter, unless the context clearly requires a different meaning:

(1) "Motorboat" means any vessel equipped with propulsion machinery of any type, whether or not such machinery is the principal source of propulsion: Provided, that "propulsion machinery" as used in this section shall not include an electric motor when used as the only means of mechanical propulsion of any vessel: Provided further, that the term "motorboat" shall not include a vessel which has a valid marine document issued by the Bureau of Customs of the United States government or any federal agency successor thereto.

(2) "Operate" means to navigate or otherwise use or occupy a motorboat or vessel, and shall be applicable to any motorboat or vessel that is afloat.

(3) "Owner" means a person, other than a lienholder, having the property in or title to a motorboat. The term includes a person entitled to the use or possession of a motorboat subject to an interest in another person, reserved or created by agreement and securing payment or performance of an obligation, but the term excludes a lessee under a lease not intended as security.

(4) "Person" means an individual, partnership, firm, corporation, association, or other entity.

(5) "Vessel" means every description of watercraft or structure, other than a seaplane on the water, used or capable of being used as a means of transportation or habitation on the water.

(6) "Waters of this State" means any waters within the territorial limits of this State, and the marginal sea adjacent to this State and the high seas when navigated as a part of a journey or ride to or from the shore of this State, but does not include private ponds as defined in G.S. 113-129. (1959, c. 1064, s. 2; 1965, c. 634, s. 1; 1969, c. 87; 1975, c. 340, s. 1.)

§ 75A-3. Wildlife Resources Commission to administer Chapter; Motorboat Committee; funds for administration.

(a) It shall be the duty and responsibility of the North Carolina Wildlife Resources Commission to enforce and administer the provisions of this Chapter.

(b) The chairman of the Wildlife Resources Commission shall designate from among the members of the Wildlife Resources Commission three members who shall serve as the Motorboat Committee of the Wildlife Resources Commission, and who shall, in their activities with the Commission, place special emphasis on the administration and enforcement of this Chapter.

(c) All expenses required for administration and enforcement of this Chapter shall be paid from the funds collected pursuant to the numbering provisions of this Chapter, provided however, that the Wildlife Resources Commission is hereby authorized, subject to the approval of the Advisory Budget Commission and the Governor and Council of State, to borrow funds from the Contingency and Emergency Fund in an amount not to exceed one hundred thousand dollars ($100,000), to be used for initiating the provisions of this Chapter and to be repaid from the funds collected pursuant to the numbering provisions of this Chapter in four equal installments, the first installment in the amount of twenty-five thousand dollars ($25,000) to be remitted on or before September 1, 1961, and a like sum to become due and payable on the first day of September

during each of the years 1962, 1963 and 1964. All moneys collected pursuant to the numbering provisions of this Chapter shall be deposited in the State treasury and credited to a special fund known as the Wildlife Resources Fund and accounted for as a separate part thereof. The said moneys shall be made available to the Wildlife Resources Commission, subject to the provisions of the Executive Budget Act and the provisions of the Personnel Act of the General Statutes of North Carolina, for the administration and enforcement of this Chapter as herein provided and for educational activities relating to boating safety and for acquisition of land and provision of facilities for access to waters of this State and for no other purpose. All moneys collected pursuant to the numbering provisions of this Chapter and moneys otherwise provided for in this Chapter shall be made available to carry out the intent and purposes as set forth herein in accordance with plans approved by the Wildlife Resources Commission and all such funds are hereby appropriated, reserved, set aside and made available until expended for the enforcement and administration of this Chapter; provided that the Wildlife Resources Commission is hereby authorized to adopt a plan or formula for the use of said moneys for employing and equipping such additional personnel as may be necessary for carrying out the provisions of this Chapter and for paying a proportionate share of the salaries, expense, and operational costs of existing personnel according to the time and effort expended by them in carrying out the provisions of this Chapter. Such plan or formula may be altered or amended from time to time by the Wildlife Resources Commission as existing conditions may warrant. No funds derived from the sale of hunting licenses or fishing licenses shall be expended or diverted for carrying out the provisions of this Chapter. (1959, c. 1064, s. 3; 1961, c. 644; 1963, c. 1003.)

State Government Reorganization. — The Wildlife Resources Commission was transferred to the Department of Natural and Economic Resources (now the Department of Natural Resources and Community Development) by former § 143A-118, enacted by Session Laws 1971, c. 864.

§ 75A-4. Identification numbers required.

Every motorboat on the waters of this State shall be numbered. No person shall operate or give permission for the operation of any motorboat on such waters unless the motorboat is numbered in accordance with this Chapter, or in accordance with applicable federal law, or in accordance with a federally approved numbering system of another state, and unless

(1) The certificate of number awarded to such motorboat is in full force and effect, and

(2) The identifying number set forth in the certificate of number is displayed on each side of the bow of such motorboat. (1959, c. 1064, s. 4.)

§ 75A-5. Application for numbers; fee; displaying; reciprocity; change of ownership; loss of certificate; presumption from possession of certificate; conformity with United States regulations; award of certificates; records; renewal of certificates; transfer of interest, abandonment, etc.; change of address; unauthorized numbers.

(a) The owner of each motorboat requiring numbering by this State shall file

an application for number with the Wildlife Resources Commission on forms approved by it. The application shall be signed by the owner of the motorboat, or his agent, and shall be accompanied by a fee of five dollars and fifty cents ($5.50) for a one-year period or by a fee of thirteen dollars ($13.00) for a three-year period. The applicant shall have the option of selecting a one-year numbering period or a three-year numbering period. Upon receipt of the application in approved form, the Commission shall have the same entered upon the records of its office and issue to the applicant a certificate of number stating the number awarded to the motorboat and the name and address of the owner, and a validation decal indicating the expiration date of the certificate of number. The owner shall paint on or attach to each side of the bow of the motorboat the identification number in such manner as may be prescribed by rules and regulations of the Commission in order that it may be clearly visible. The number shall be maintained in legible condition. The validation decal shall be displayed on the starboard bow of the motorboat immediately following the number. The certificate of number shall be pocket size and shall be available at all times for inspection on the motorboat for which issued, whenever such motorboat is in operation. Provided, however, any person charged with failing to so carry such certificate of number shall not be convicted if he produces in court a certificate of number theretofore issued to him and valid at the time of his arrest.

(b) The owner of any motorboat already covered by a number in full force and effect which has been awarded to it pursuant to then operative federal law or a federally approved numbering system of another state shall record the number prior to operating the motorboat on the waters of this State in excess of the 90-day reciprocity period provided for in G.S. 75A-7(1). Such recordation shall be in the manner and pursuant to the procedure required for the award of a number under subsection (a) of this section, except that no additional or substitute number shall be issued.

(c) Should the ownership of a motorboat change, a new application form with fee of two dollars ($2.00) shall be filed with the Wildlife Resources Commission and a new certificate bearing the same number shall be awarded in the manner as provided for in an original award of number. In case a certificate should become lost, a new certificate bearing the same number shall be issued upon payment of a fee of two dollars ($2.00). Possession of the certificate shall in cases involving prosecution for violation of any provision of this Chapter be prima facie evidence that the person whose name appears therein is the owner of the boat referred to therein.

(d) In the event that an agency of the United States government shall have in force an over-all system of identification numbering for motorboats within the United States, the numbering system employed pursuant to this Chapter by the Wildlife Resources Commission shall be in conformity therewith.

(e) The Wildlife Resources Commission may award any certificate of number directly or may authorize any person to act as agent for the awarding thereof. In the event that a person accepts such authorization, he may be assigned a block of numbers and certificates therefor which upon award, in conformity with this Chapter and with any rules and regulations of the Commission, shall be valid as if awarded directly by the Commission. As compensation for his services any such agent shall be allowed to retain for his own use fifty cents (50¢). It is a misdemeanor punishable in the discretion of the court for any such agent to charge or accept any additional fee, remuneration, or other thing of value for such services.

(f) All records of the Wildlife Resources Commission made or kept pursuant to this section shall be public records.

(g) Each certificate of number awarded pursuant to this Chapter, unless sooner terminated or discontinued in accordance with the provisions of this

Chapter, shall continue in full force and effect to and including the last day of the same month during which the same was awarded after the lapse of one year in the case of a one-year certificate or three years in the case of a three-year certificate. In addition to the year of expiration, the validation decal required by subsection (a) of this section shall indicate the last month during which the certificate is valid. No person shall willfully remove a validation decal from any vessel during the continuance of its validity or alter, counterfeit, or otherwise tamper with a validation decal attached to any vessel for the purpose of changing or obscuring the indicated date of expiration of the certificate of number of such vessel.

(h) Each certificate of number awarded pursuant to this Chapter must be renewed on or before the first day of the month next succeeding that during which the same expires; otherwise, such certificate shall lapse and be void until such time as it may thereafter be renewed. Application for renewal shall be submitted on a form approved by the Wildlife Resources Commission and shall be accompanied by a fee of five dollars and fifty cents ($5.50) for a one-year period or by a fee of thirteen dollars ($13.00) for a three-year period; provided, there shall be no fee required for renewal of certificates of number which have been previously issued to commercial fishing boats as defined in G.S. 75A-5.1, upon compliance with all of the requirements of that section.

(i) The owner shall furnish the Wildlife Resources Commission notice of the transfer of all or any part of his interest other than the creation of a security interest in a motorboat numbered in this State pursuant to subsections (a) and (b) of this section or of the destruction or abandonment of such motorboat, within 15 days thereof. Such transfer, destruction, or abandonment shall terminate the certificate of number for such motorboat except that, in the case of a transfer of a part interest which does not affect the owner's right to operate such motorboat, such transfer shall not terminate the certificate of number.

(j) Any holder of a certificate of number shall notify the Wildlife Resources Commission within 15 days if his address no longer conforms to the address appearing on the certificate, and shall, as a part of such notification, furnish the Commission his new address. The Commission may provide in its rules and regulations for the surrender of the certificate bearing the former address and its replacement with a certificate bearing the new address or for the alteration of an outstanding certificate to show the new address of the holder.

(k) No number other than the number awarded to a motorboat or granted reciprocity pursuant to this Chapter shall be painted, attached, or otherwise displayed on either side of the bow of such motorboat, except the validation decal required by subsection (a) of this section.

(l) When certificates of number are to be issued by agents as provided by subsection (e) of this section, the Wildlife Resources Commission is authorized by regulation to establish the qualifications of such agents, including, but not limited to, their financial responsibility, the locations and types of business operated by them and their facilities for safekeeping of unused certificates of number, validation decals, and the monetary proceeds of certificates which have been issued; to prescribe the duties of such agents, including, but not limited to, the methods of issuing certificates of number and validation decals, the evidence of ownership of vessels to be numbered by applicants for number, the times and methods of making periodic and final reports of certificates and decals issued and remaining unissued and remittances of public moneys and unissued certificates and decals; to establish methods and procedures of ensuring accountability of such agents for the proceeds of certificates and decals issued and for certificates and decals remaining unissued; to require individual or blanket bonds of such agents in amounts sufficient to protect the State against loss of public moneys and unissued certificates and decals, the premiums for such bonds to be paid by the agents; to permit such agents to issue both original certificates of number and validation decals and renewals

thereof or to limit such agents, or any of them, to the issuance of the originals only; to authorize some or all of such agents to issue temporary certificates of number for use during a limited time pending delivery of regular certificates of number and validation decals; to establish methods and procedures, including submission of the amounts and kinds of evidence which the Commission may deem sufficient, whereby any such agent may be relieved of accountability for the value of unissued certificates and validation decals, or of the monetary proceeds of those which have been issued, which have been lost or destroyed as the result of any occurrence which is beyond the control of such agent; and to prescribe such other reasonable requirements and conditions as the Commission may, in its discretion, deem necessary or desirable to expedite and control the issuance of certificates of number by such agents. In accordance with such regulations, the executive director is authorized to prepare and distribute all forms necessary or convenient for application for and the appointment and bonding of such agents and for receipts, reports and remittances by such agents; to select and appoint such agents in areas most convenient to the boating public and to limit the number of such agents in any locality; to require prompt and accurate reporting and remission of public moneys and unissued certificates and decals by such agents, and to require periodic or special audits of their accounts; to revoke or terminate any such agency for failure to make timely reports and remittances or to comply with any administrative directive or regulation of the Commission, or when he has reason to believe that State money or property is in jeopardy; and to require immediate surrender of all agency accounts, forms, certificates, decals and State moneys in the event of such revocation or termination of any such agency. The Administrative Procedure Act as contained in Chapter 150A of the General Statutes shall not apply in any case of revocation or termination of any agency to issue certificates of boat number and validation decals. Any violation of the regulations authorized by this subsection shall be a misdemeanor punishable in the discretion of the court. If any check or draft of any agent for the issuance of certificates of boat number shall be returned by the banking facility upon which the same is drawn for lack of funds, such agent shall be liable to the Wildlife Resources Commission for a penalty of five percent (5%) of the amount of such check or draft, but in no event shall such penalty be less than five dollars ($5.00) or more than two hundred dollars ($200.00). (1959, c. 1064, s. 5; 1961, c. 469, s. 1; 1963, c. 470; 1975, c. 483, ss. 1, 2; 1977, c. 566; 1979, c. 761, ss. 1-7.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "five dollars and fifty cents ($5.50)" for "three dollars ($3.00)" and "thirteen dollars ($13.00)" for "seven dollars and fifty cents ($7.50)" in the second sentence of subsection (a), substituted "two dollars ($2.00)" for "one dollar ($1.00)" in two places in subsection (c), added the last two sentences of subsection (e), rewrote subsections (g) and (h), added "except the validation decal required by subsection (a) of this section" at the end of subsection (k), and added subsection (l).

Session Laws 1979, c. 761, s. 9, provides: "This act shall become effective on July 1, 1979, provided that nothing in this act shall have the effect of extending the date of termination of any certificate of boat number which has been issued prior to the effective date of this act."

CASE NOTES

A "certificate of number" required by this section is not a "certificate of title" to be compared with that required by § 20-50 for vehicles intended to be operated on the highways. Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604 (1972).

New Certificate Issued upon Change of Ownership. — Upon the change of ownership of a motorboat, subsection (c) authorizes the issuance of a new "certificate of number" to the transferee upon proper application. The application for transfer of the number, among other

things, requires the seller's signature. Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604, cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972).

§ 75A-5.1. Commercial fishing boats; renewal of number.

(a) The owner or operator of any commercial fishing boat which is currently licensed for the use of commercial fishing gear under the provisions of G.S. 113-152, shall be entitled to renewal of the certificate of number of such boat when such owner has complied with all of the conditions of this section.

(b) For the purpose of this section, commercial fishing boats are defined as motorboats which are used primarily for commercial fishing operations, from which operations the owners and/or operators thereof derived more than one half of their gross incomes during the preceding calendar year.

(c) In order to be entitled to renewal of certificate of number under the provisions of this section, the owner of the boat shall submit, and the Wildlife Resources Commission shall require:

(1) The regular application for renewal of the certificate of number of such boat, as provided by G.S. 75A-5;

(2) A statement, on a form to be supplied by the Commission, and signed by the applicant, that the boat for which the application for renewal is made is a commercial fishing boat as herein defined; and

(3) A receipt, signed by an authorized agent of the Department of Natural Resources and Community Development, and bearing the number awarded to the boat under the provisions of this Chapter, showing that the commercial fishing boat license tax imposed by G.S. 113-152 has been paid for such boat for the period during which the application for renewal of the certificate of number is submitted.

(d) Any person who shall willfully give false information upon the application or the statement required by the preceding paragraph, or who shall falsify any tax receipt thereby required, shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine or imprisonment, or both, in the discretion of the court. (1961, c. 469, s. 2; 1965, c. 957, s. 8; 1973, c. 1262, s. 86; 1977, c. 771, s. 4.)

§ 75A-6. Classification and required lights and equipment; rules and regulations.

(a) Motorboats subject to the provisions of this Chapter shall be divided into four classes as follows:

(1) Class A. Less than 16 feet in length.

(2) Class 1. Sixteen feet or over and less than 26 feet in length.

(3) Class 2. Twenty-six feet or over and less than 40 feet in length.

(4) Class 3. Forty feet or over.

(b) Every motorboat in all weathers from sunset to sunrise shall carry and exhibit the following lights when under way, and during such times no other lights which may be mistaken for those prescribed shall be exhibited:

(1) Class A shall carry a white light to show all around the horizon. Class 1 shall carry a combined lantern in the fore part of the vessel and lower than the white light aft, showing green to starboard and red to port, so fixed as to throw light from right ahead to two points abaft the beam of their respective sides.

(2) Every motorboat of Classes 2 and 3 shall carry the following lights:

a. A bright white light in the fore part of the vessel as near the stem as practicable, so constructed as to show an unbroken light over an arc of the horizon of 20 points of the compass so fixed as to throw the light 10 points on each side of the vessel; namely, from right ahead to two points abaft the beam on either side.

b. A bright white light aft to show all around the horizon and higher than the white light forward.

c. On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam of the starboard side. On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side. The said side lights shall be fitted with inboard screens of sufficient height so set as to prevent these lights from being seen across the bow.

(3) Motorboats of Classes A and 1 when propelled by sail alone shall carry the combined lantern, but not the white light aft prescribed by this section. Motorboats of Classes 2 and 3 when so propelled, shall carry the colored side lights, suitably screened, but not the white lights prescribed by this section. Motorboats of all classes, when so propelled, shall carry, ready at hand, a lantern or flashlight showing a white light which shall be exhibited in sufficient time to avert collision.

(4) Every white light prescribed by this section shall be of such character as to be visible at a distance of at least two miles. Every colored light prescribed by this section shall be of such character as to be visible at a distance of at least one mile. The word "visible" in this subdivision, when applied to lights, shall mean visible on a dark night with clear atmosphere.

(5) When propelled by sail and machinery any motorboat shall carry the lights required by this section for a motorboat propelled by machinery only.

(c) Any vessel may carry and exhibit the lights required by the Federal Regulations for Preventing Collisions at Sea, 1948, Federal Act of October 11, 1951, (33 USC 143-147d) as amended, in lieu of the lights required by subsection (b) of this section.

(d) Every motorboat of Classes 1, 2, or 3 shall be provided with an efficient whistle or other sound-producing mechanical appliance.

(e) Every motorboat of Classes 2 or 3 shall be provided with an efficient bell.

(f) Every motorboat shall carry at least one life preserver, or life belt, or ring buoy, or other device of the sort prescribed by the regulations of the Wildlife Resources Commission for each person on board, so placed as to be readily accessible: Provided, that every motorboat carrying passengers for hire shall carry so placed as to be readily accessible at least one life preserver of the sort prescribed by the regulations of the Commission for each person on board.

(g) Every motorboat shall be provided with such number, size, and type of fire extinguishers, capable of promptly and effectually extinguishing burning gasoline, as may be prescribed by the regulations of the Wildlife Resources Commission, which fire extinguishers shall be at all times kept in condition for immediate and effective use and shall be so placed as to be readily accessible.

(h) The provisions of subsections (d), (e), and (g) of this section shall not apply to motorboats while competing in any race conducted pursuant to G.S. 75A-14 or, if such boats be designed and intended solely for racing, while engaged in such navigation as is incidental to the tuning up of the boats and engines for the race.

(i) Every motorboat shall have the carburetor or carburetors of every engine therein (except outboard motors) using gasoline as fuel, equipped with such efficient flame arrestor, backfire trap, or other similar device as may be prescribed by the regulations of the Wildlife Resources Commission.

(j) Every such motorboat and every such vessel, except open boats, using as fuel any liquid of a volatile nature, shall be provided with such means as may

be prescribed by the regulations of the Wildlife Resources Commission properly and efficiently ventilating the bilges of the engine and fuel tank compartments so as to remove any explosive or inflammable gases.

(k) The Wildlife Resources Commission is hereby authorized to make rules and regulations modifying the equipment requirements contained in this section to the extent necessary to keep these requirements in conformity with the provisions of the federal navigation laws or with the navigation rules promulgated by the United States coast guard.

(l) No person shall operate or give permission for the operation of a vessel which is not equipped as required by this section or modification thereof.

(m) In the event that any of the regulations of subsections (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), and (l) of this section are in conflict with the equipment regulations of the Federal Boat Safety Act of 1971 and the federal regulations adopted pursuant thereto, the Wildlife Resources Commission is hereby granted the authority to adopt such regulations as are necessary to conform with the Federal Boat Safety Act of 1971 and the federal regulations adopted pursuant thereto.

(n) All boats propelled by machinery of 10 hp or less, which are operated on the public waters of this State, shall carry at least one life preserver, or life belt, or ring buoy, or other device of the sort prescribed by the regulations of the Wildlife Resources Commission for each person on board, and from one-half hour after sunset to one-half hour before sunrise shall carry a white light in the stern or shall have on board a hand flashlight in good working condition, which light shall be ready at hand and shall be temporarily displayed in sufficient time to prevent collision.

(o) The Department of Human Resources is hereby authorized and directed to prepare design standards that will be used as a guide in approving sewage treatment devices and holding tanks for marine toilets installed in boats operating on the inland fishing waters of the State as designated by the Wildlife Resources Commission and the inland lake waters of the State.

No vessel operating on the inland fishing waters of the State as designated by the Wildlife Resources Commission and the inland lake waters of this State that is equipped with a marine toilet shall be registered by the Wildlife Resources Commission unless such vessel is provided with a sewage treatment device or holding tank approved by the Commission for Health Services.

All vessels operating on the inland fishing waters of the State as designated by the Wildlife Resources Commission and the inland lake waters of the State that are equipped with a marine toilet shall be required to provide a sewage treatment device or holding tank approved by the Commission for Health Services.

The protectors of the Wildlife Resources Commission shall inspect vessels on the inland fishing waters of the State as designated by the Wildlife Resources Commission and the inland lake waters to determine if approved treatment devices or holding tanks are properly installed and if they are operating in a satisfactory manner.

Any boat or vessel equipped with a sewage treatment device or holding tank operated on the inland fishing waters of the State as designated by the Wildlife Resources Commission and the inland lake waters of North Carolina which does not meet the design standards and approval of the Commission for Health Services prior to January 1, 1966, may continue to use such device or tank until January 1, 1969.

A vessel registered, documented or otherwise licensed in another state and equipped with a marine toilet not prohibited in such state may be operated on the inland fishing waters of the State as designated by the Wildlife Resources Commission, without regard to the provisions of this subsection while making an interstate trip. (1959, c. 1064, s. 6; 1963, c. 396; 1965, c. 634, s. 2; 1967, cc. 230, 1075; 1971, c. 296, ss. 1, 2; 1973, c. 476, s. 128; 1975, c. 340, s. 2; c. 483, s. 3.)

CASE NOTES

Cited in Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

§ 75A-7. Exemption from numbering requirements.

A motorboat shall not be required to be numbered under this Chapter if it is:

(1) A motorboat which is required to be awarded a number pursuant to federal law or a federally approved numbering system of another state, and for which a number has been so awarded: Provided, that any such boat shall not have been within this State for a period in excess of 90 consecutive days.

(2) A motorboat from a country other than the United States temporarily using the waters of this State.

(3) A motorboat whose owner is the United States, a state or a subdivision thereof.

(4) A ship's lifeboat. (1959, c. 1064, s. 7.)

§ 75A-8. Boat liveries.

It shall be unlawful for the owner of a boat livery to rent a motorboat to any person unless the provisions of this Chapter have been complied with. It shall be the duty of owners of boat liveries to equip all motorboats rented as required by this Chapter. (1959, c. 1064, s. 8; 1975, c. 340, s. 3.)

§ 75A-9. Muffling devices.

The exhaust of every internal combustion engine used on any motorboat shall be effectively muffled by equipment so constructed and used to muffle the noise of the exhaust in a reasonable manner. The use of cutouts is prohibited, except for motorboats competing in a regatta or boat race approved as provided in G.S. 75A-14, and for such motorboats while on trial runs, during a period not to exceed 48 hours immediately preceding such regatta or race and for such motorboats while competing in official trials for speed records during a period not to exceed 48 hours immediately following such regatta or race. (1959, c. 1064, s. 9.)

§ 75A-9.1. Muffling devices — Motorboats.

Every internal combustion engine with an open-air exhaust which is used on any motorboat and which has a capacity of operating at more than 4000 revolutions per minute shall have effective muffling equipment installed on each exhaust manifold stack except for motorboats competing in a regatta or boat race approved as provided in G.S. 75A-14, and for such motorboats while on trial runs, during a period not to exceed 48 hours immediately preceding such regatta or race and for such motorboats while competing in official trials for speed records during a period not to exceed 48 hours immediately following such regatta or race. This Article shall not apply to licensed commercial fishing boats. (1977, c. 737, s. 1.)

§ 75A-10. Operating boat or manipulating water skis, etc., in reckless manner; operating, etc., while intoxicated, etc.; depositing or discharging litter, etc.

(a) No person shall operate any motorboat or vessel, or manipulate any water skis, surfboard, or similar device in a reckless or negligent manner so as to endanger the life, limb, or property of any person.

(b) No person shall operate any motorboat or vessel, or manipulate any water skis, surfboard, or similar device while intoxicated or under the influence of any narcotic drug, barbiturate, or marijuana.

(c) No person shall place, throw, deposit, or discharge or cause to be placed, thrown, deposited, or discharged into the inland lake waters of this State, any litter, raw sewage, bottles, cans, papers, or other liquid or solid materials which render the waters unsightly, noxious, or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment and safety of the water for recreational purposes.

Violation of this provision shall be a misdemeanor and subject to penalty as provided in G.S. 75A-18(a). (1959, c. 1064, s. 10; 1965, c. 634, s. 3.)

CASE NOTES

Stated in Grindstaff v. Watts, 254 N.C. 568, 119 S.E.2d 784 (1961).

Cited in In re Howser's Petition, 227 F. Supp. 81 (W.D.N.C. 1964); Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

§ 75A-10.1. Family purpose doctrine applicable.

The family purpose doctrine, as applicable in this State to tort cases arising from the operation of motor vehicles, shall apply to tort cases arising from the operation of motorboats and vessels as those terms are defined in this Chapter. (1971, c. 450, s. 1.)

Legal Periodicals. — For a note discussing the extension of the family purpose doctrine to motorcycles and private property, see 14 Wake Forest L. Rev. 699 (1978).

CASE NOTES

Cited in Williams v. Wachovia Bank & Trust Co., 292 N.C. 416, 233 S.E.2d 589 (1977).

§ 75A-10.2. Proof of ownership of motorboat.

(a) In all actions to recover damages for injury to the person or to property or for the death of a person, arising out of an accident or collision involving motorboats or vessels as said terms are described in G.S. 75A-2, proof of ownership of such motorboat or vessel at the time of such accident or collision shall be prima facie evidence that said motorboat or vessel was being operated and used with the authority, consent and knowledge of the owner in the very transaction out of which said injury or cause of action arose.

(b) Proof of the certificate of number stating the number awarded to the motorboat or vessel in the name of any person, firm or corporation as required by this Chapter, or proof of the licensing, registration, or documentation of said motorboat or vessel as required by other state or federal law in the name of any

person, firm or corporation, shall for the purpose of any such action, be prima facie evidence of ownership and that said motorboat or vessel was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment. (1971, c. 652, s. 1.)

§ 75A-11. Duty of operator involved in collision, accident or other casualty.

(a) It shall be the duty of the operator of a vessel involved in a collision, accident, or other casualty, so far as he can do so without serious danger to his own vessel, crew, and passengers (if any), to render persons affected by the collision, accident, or other casualty such assistance as may be practicable and as may be necessary in order to save them from or minimize any danger caused by the collision, accident, or other casualty, and also to give his name, address and identification of his vessel in writing to any person injured and to the owner of any property damaged in the collision, accident, or other casualty.

(b) In the case of collision, accident, or other casualty involving a vessel, the operator thereof, if the collision, accident, or other casualty results in death or injury to a person or damage to property in excess of one hundred dollars ($100.00), shall, within 10 days, file with the Wildlife Resources Commission a full description of the collision, accident, or other casualty, including such information as said agency may, by regulation, require. Such report shall not be admissible as evidence. (1959, c. 1064, s. 11.)

CASE NOTES

Cited in In re Howser's Petition, 227 F. Supp. 81 (W.D.N.C. 1964).

§ 75A-12. Furnishing information to agency of United States.

In accordance with any request duly made by an authorized official or agency of the United States, any information compiled or otherwise available to the Wildlife Resources Commission pursuant to G.S. 75A-11(b) shall be transmitted to said official or agency of the United States. (1959, c. 1064, s. 12.)

§ 75A-13. Water skis, surfboards, etc.

(a) No person shall operate a vessel on any water of this State for towing a person or persons on water skis, or a surfboard, or similar device unless there is in such a vessel a person, in addition to the operator, in a position to observe the progress of the person or persons being towed or unless the skiers wear a life preserver or unless the boat is equipped with a rear view mirror.

(b) No person shall operate a vessel on any water of this State towing a person or persons on water skis, a surfboard, or similar device, nor shall any person engage in water skiing, surfboarding, or similar activity at any time between the hours from one hour after sunset to one hour before sunrise.

(c) The provisions of subsections (a) and (b) of this section do not apply to a performer engaged in a professional exhibition or a person or persons engaged in an activity authorized under G.S. 75A-14.

(d) No person shall operate or manipulate any vessel, tow rope, or other device by which the direction or location of water skis, a surfboard, or similar

device may be affected or controlled in such a way as to cause the water skis, surfboard, or similar device, or any person thereon to collide with any object or person. (1959, c. 1064, s. 13.)

§ 75A-13.1. Skin and scuba divers.

(a) No person shall engage in skin diving or scuba diving in the waters of this State which are open to boating, or assist in such diving, without displaying a diver's flag from a mast, buoy, or other structure at the place of diving; and no person shall display such flag except when diving operations are under way or in preparation.

(b) The diver's flag shall be square, not less than 12 inches on a side, and shall be of red background with a diagonal white stripe, of a width equal to one fifth of the flag's height, running from the upper corner adjacent to the mast downward to the opposite outside corner.

(c) No operator of a vessel under way in the waters of this State shall permit such vessel to approach closer than 50 feet to any structure from which a diver's flag is then being displayed, except where such flag is so positioned as to constitute an unreasonable obstruction to navigation; and no person shall engage in skin diving or scuba diving or display a diver's flag in any locality at which the same will unreasonably obstruct vessels from making legitimate navigational use of the water. (1969, c. 97, s. 1.)

§ 75A-14. Regattas, races, marine parades, tournaments or exhibitions.

(a) The Wildlife Resources Commission may authorize the holding of regattas, motorboat or other boat races, marine parades, tournaments, or exhibitions on any waters of this State. It shall adopt and may, from time to time, amend regulations concerning the safety of motorboats and other vessels and persons thereon, either observers or participants. Whenever a regatta, motorboat, or other boat race, marine parade, tournament, or exhibition is proposed to be held, the person in charge thereof shall, at least fifteen days prior thereto, file an application with the Wildlife Resources Commission for permission to hold such regatta, motorboat, or other boat race, marine parade, tournament, or exhibition. The application shall set forth the date, time and location where it is proposed to hold such regatta, motorboat, or other boat race, marine parade, tournament, or exhibition, and it shall not be conducted without authorization of the Wildlife Resources Commission in writing. Provided, that camps for boys or girls shall not be required to obtain such authorization for regattas or boat races where no motor power is used.

(b) The provisions of this section shall not exempt any person from compliance with applicable federal law or regulation, but nothing contained herein shall be construed to require the securing of a State permit pursuant to this section if a permit therefor has been obtained from an authorized agency of the United States. (1959, c. 1064, s. 14; 1965, c. 437.)

§ 75A-15. Regulations on water safety; adoption of the Uniform Waterway Marking System.

(a) Upon petition to it in accordance with subsection (b) of this section, the Wildlife Resources Commission is empowered to make special regulations, for the local water in question, as to:

(1) Operation of vessels, including restrictions concerning speed zones, and type of activity conducted.

(2) Promotion of boating and water safety generally by occupants of vessels, swimmers, fishermen, and others using the water.

(3) Placement and maintenance of navigation aids and markers, in conformity with governing provisions of law.

Prior to making any special regulations, the Commission shall investigate the water recreation and safety needs of the local water in question in accordance with any standards that may have been developed by the North Carolina Water Safety Committee. In making such investigation, the Commission in its discretion may hold public hearings on the regulations proposed and the general needs of the local water in question. After such investigation and application of standards, the Commission may in its discretion pass the special regulations requested, pass them in an amended form, or refuse to pass them. After passage, the Commission may amend or repeal the special regulations after first holding a public hearing.

(b) The agencies listed in this subsection may, but only after public notice, make formal application to the Wildlife Resources Commission for special regulations on local waters as to the matters listed in subsection (a) of this section. The agencies and waters in question are:

(1) Any subdivision of this State, with reference to waters within its territorial limits.

(2) The North Carolina Water Safety Committee, with reference to local areas of water defined by it which are found to be heavily used for water recreation purposes by persons from other areas of the State and as to which there is not coordinated local interest in regulation.

The Wildlife Resources Commission is authorized and empowered to adopt regulations as provided by Chapter 150A, Administrative Procedure Act, prohibiting entry of vessels into public swimming areas and establishing speed zones at public boat launching ramps, marinas, or boat service areas and on other congested water areas where there are demonstrated water safety hazards. Enforcement of such special regulations shall be dependent upon placement and maintenance of regulatory markers in accordance with the Uniform State Waterway Marking System by such agency or agencies as may be designated by the Wildlife Resources Commission.

(c) The Uniform State Waterway Marking System as approved by the Advisory Panel of State Officials to the Merchant Marine Council, United States Coast Guard, in October 1961 is hereby adopted for use on the waters of North Carolina. The Wildlife Resources Commission is authorized to pass regulations implementing the marking system and may:

(1) Modify provisions as necessary to meet the special water recreational and safety needs of this State, provided that such modifications do not depart in any essential manner from the uniform standards being adopted in other states.

(2) Modify provisions as necessary to conform with amendments to the marking system that may be proposed for adoption by the states.

(3) Enact supplementary standards regarding design, construction, placement, and maintenance of markers.

(4) Enact clarifying regulations as to matters not covered with precision in the report of the Advisory Panel of State Officials.

(5) Enact implementing regulations as to matters left to State discretion in the report of the Advisory Panel of State Officials.

(6) Enact regulations forbidding or restricting the placement of markers either throughout the State or in certain classes or areas of waters without prior permission having been obtained from the Commission or some agency or official designated by the Commission.

It is unlawful to place or maintain any marker of the sort covered by the marking system in the waters of North Carolina that does not conform to or is in violation of the marking system and the implementing regulations of the Commission.

(d) Special regulations enacted under the authority of subsections (a) and (b) of this section shall supersede all local regulations in conflict or incompatible with such special regulations. As used in this subsection, "local regulations" shall include provisions relating to boating, water safety, or other recreational use of local waters in special local, or private acts, in ordinances or regulations of local governing bodies, or in ordinances or regulations of local water authorities. Except as may be authorized in subsections (a) and (b) of this section, no local regulations may be made respecting the Uniform Waterway Marking System and its implementation or respecting supplemental safety equipment on vessels. (1959, c. 1064, s. 15; 1965, c. 394; 1969, c. 1093, s. 4; 1977, c. 424.)

§ 75A-16: Repealed by Session Laws 1979, c. 830, s. 9, effective July 1, 1980.

Cross References. — For game laws generally effective July 1, 1980, and Aug. 1, 1980, see §§ 113-127 to 113-316. And see note catchlined "Revision of Subchapter," immediately preceding Article 12 of Chapter 113.

Editor's Note. — Session Laws 1979, c. 830, s. 17, provides, in part: "The provisions of this act generally take effect July 1, 1980. Those provisions that specifically apply to annual licenses which expire on July 31 of each year take effect on August 1, 1980. Persons exercising rights under annual licenses renewable each January 1 on the effective date of this act, however, may continue to utilize those licenses until their expiration subject to the provisions of this act relating to restrictions upon and suspension, revocation, and termination of licenses. The North Carolina Wildlife Resources Commission may administratively provide for the continued use or the orderly replacement, or both, of permanent licenses and permits outstanding upon the effective date of this act."

Session Laws 1979, c. 830, s. 2, provides: "The repeal of Article 6 and Subchapters IIA and III and of parts of Subchapter IV of Chapter 113 of the General Statutes and of all special, local, and private acts and ordinances regulating the conservation of wildlife resources is made subject to such temporary retention of local acts and former provisions of Chapter 113 of the General Statutes as may be specified in Subchapter IV. The repeal of acts which themselves repeal former acts is not intended to revive the former acts."

For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

§ 75A-17. Enforcement of Chapter.

(a) Every wildlife protector and every other law-enforcement officer of this State and its subdivisions shall have the authority to enforce the provisions of this Chapter and in the exercise thereof shall have authority to stop any vessel subject to this Chapter; and, after having identified himself in his official capacity, shall have authority to board and inspect any vessel subject to this Chapter.

(b) In order to secure broader enforcement of the provisions of this Chapter, the Wildlife Resources Commission is authorized to enter into an agreement with the Department of Natural Resources and Community Development whereby the enforcement personnel of the Department shall assume responsibility for enforcing the provisions of this Chapter in the territory and area normally policed by such enforcement personnel and whereby the Wildlife Resources Commission shall contribute a share of the expense of such personnel according to a ratio of time and effort expended by them in enforcing the provisions of this Chapter, when such ratio has been agreed upon by both of the contracting agencies. Such agreement may be modified from time to time as conditions may warrant. (1959, c. 1064, s. 17; 1965, c. 957, s. 9; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4.)

CASE NOTES

Subsection (a) of this section contains no requirement of reasonableness and no effort to balance legitimate state interest against the boat owner's right to be secure under the Fourth Amendment against unreasonable searches and seizures. Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973).

Taken literally, this section extends an inspection authority that is absolutely unlimited as to time and place and convenience of occupants. Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973).

But Warrantless Search May Impose Unconstitutional Burden. — The power of a state to inspect boats for reasons of health and safety is not denied. However, possible emergencies aside, warrantless searches against the owner's will of a boat on a land-locked lake, which can be repeated by that inspector or any other inspector who chooses to board the boat, are an oppressive, unreasonable and unconstitutional burden not justified by considerations of sanitation and safety. Klutz v. Beam, 374 F. Supp. 1129 (W.D.N.C. 1973).

§ 75A-18. Penalties.

(a) Any person who violates any provision of G.S. 75A-4, 75A-5, 75A-5.1, 75A-6, 75A-8, 75A-9, 75A-10(c), 75A-11, 75A-13, 75A-14, and 75A-15 or who violates any provision of any rule or regulation adopted under authority of this Chapter shall be guilty of a misdemeanor and shall be subject to a fine not to exceed fifty dollars ($50.00) for each such violation. The limitation prescribed by the preceding sentence shall not apply in any case where a more severe penalty may be prescribed in any of said sections.

(b) Any person who violates any provision of G.S. 75A-10(a), (b) shall be guilty of a misdemeanor and shall be subject to a fine of not to exceed five hundred dollars ($500.00) or imprisonment for not to exceed six months, or both, for each violation.

(c) Any person who violates any provision of G.S. 75A-13.1 shall be guilty of a misdemeanor and upon conviction thereof shall be fined no more than twenty-five dollars ($25.00). (1959, c. 1064, s. 18; 1965, c. 634, s. 3; c. 793; 1969, c. 97, s. 2; 1979, c. 761, s. 8.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added the second sentence of subsection (a).

Session Laws 1979, c. 761, s. 9, provides: "This act shall become effective on July 1, 1979, provided that nothing in this act shall have the effect of extending the date of termination of any certificate of boat number which has been issued prior to the effective date of this act."

§ 75A-19. Operation of watercraft by manufacturers, dealers, etc.

Notwithstanding any other provisions of this Chapter, the Wildlife Resources Commission may promulgate such rules and regulations regarding the operation of watercraft by manufacturers, distributors, dealers, and demonstrators as the Commission may deem necessary and proper. (1959, c. 1064, s. 18½.)

ARTICLE 2.

North Carolina Water Safety Committee.

§ 75A-20. Creation of North Carolina Water Safety Committee.

There is hereby created the North Carolina Water Safety Committee to function as a continuing advisory and coordinative body with respect to the activities of the various public and private agencies, organizations, corporations, and individuals with responsibilities or interests relevant to the maintenance of an effective program of water safety in North Carolina. (1969, c. 1093, s. 3.)

Cross References. — As to the North Carolina Water Safety Council, see §§ 143B-314 through 143B-316.

State Government Reorganization. — The North Carolina Water Safety Committee was transferred to the Department of Natural and Economic Resources (now the Department of Natural Resources and Community Development) by former § 143A-125, enacted by Session Laws 1971, c. 864.

§ 75A-21. Terms and appointment of members.

(a) Members of the Committee shall be appointed by the Governor so as to represent various viewpoints and interests respecting water safety that exist within the State. The membership of the Committee shall be not less than 25 nor more than 50.

(b) Regular terms of members other than those designated by the Governor to serve on the executive committee shall be for periods of three years. In making initial appointments, the Governor shall appoint approximately one third of the members for one-year terms, another third for two-year terms, and the balance for three-year terms so as to achieve an overlapping of terms. In subsequent years as increases or decreases in the number of members of the Committee may occur the Governor shall appoint or reappoint members for such periods of less than three years as may be necessary to preserve the system of overlapping terms. Members representing the agencies listed in subsection (e) of this section and designated by the Governor to serve on the executive committee of the Committee shall serve at the pleasure of the Governor.

(c) Except as to representatives of the agencies listed in subsection (e) of this section, the Governor may decline to fill any vacancy that may occur on the Committee. As used in this subsection, "vacancy" includes termination of membership caused by expiration of a term as well as that caused by resignation, death, inability to serve, or termination of the appointment by the Governor.

(d) The Governor may terminate the appointment of any member serving for a specific term for cause. Cause for termination shall include the member's ceasing to hold the position or to be affiliated with the organization or agency by reason of which he was appointed to the Committee. The Governor in his discretion, however, taking into account the balance of representation of interest on the Committee and factors pertaining to its total size, may permit such member to continue to serve on the Committee by reason of the individual contributions he may make. Where a member of the executive committee serving at the pleasure of the Governor has been retained on the Committee despite his ceasing to represent one of the agencies listed in subsection (e) of this section, he shall lose his membership on the executive committee.

(e) In making his appointments the Governor shall provide for continuing membership on the Committee by at least one professional representative from each of the following agencies of the State:

(1) The Department of Natural Resources and Community Development.
(2) The Department of Public Instruction.
(3) The Department of Natural Resources and Community Development.
(4) The Department of Natural Resources and Community Development.
(5) The North Carolina Wildlife Resources Commission.
(6) The Department of Human Resources. (1969, c. 1093, s. 3; c. 1145, s. 1; 1973, c. 476, s. 128; c. 1262, ss. 23, 51, 86; 1977, c. 771, s. 4.)

§ 75A-22. Executive committee.

(a) Except as indicated in subsection (b) of this section, the executive committee of the Committee shall have full power to act on behalf of the Committee with regard to external affairs in the interim period between meetings of the Committee. The executive committee shall consist of the professional representatives from the agencies list in G.S. 75A-21(e) plus six other members of the Committee selected by the Governor. Where there is more than one member from any of the listed agencies appointed to the Committee, the Governor shall designate which one is to serve on the executive committee.

(b) The Committee may not restrict the authorization to the executive committee to act on its behalf in any class of external affairs or repudiate any action taken in its behalf except upon the vote of a majority of the full membership of the Committee. (1969, c. 1093, s. 3.)

§ 75A-23. Chairman.

The Governor shall designate one of the agency members of the executive committee to serve both as chairman of the Committee and the executive committee. The chairman shall serve as such at the pleasure of the Governor. (1969, c. 1093, s. 3.)

§ 75A-24. Organization and meetings.

(a) To the extent not in conflict with specific provisions of this Article, the Committee may organize itself as it sees fit, specifically including selection and duties of other officers than the chairman, fixing dates and procedures for calling regular meetings, selection and tenure of chairmen and members of subcommittees, and the extent to which authority to act on internal matters may be delegated to the chairman or the executive committee.

(b) Regular meetings of the Committee shall be held at least twice each year. Special meetings may be held upon the call of:

(1) The chairman,
(2) Three members of the executive committee, or
(3) One third of the full membership of the Committee.

(c) Meetings of the executive committee shall be held upon the call of the chairman or upon the call of three of its members. To constitute a quorum of members attending a meeting of the Committee, there must be present at least eight members of the executive committee and one third of the balance of the members of the Committee. Eight members shall constitute a quorum for meetings of the executive committee, except that the votes of at least seven members shall be required to carry any matter in which the executive committee is acting on behalf of the Committee in regard to external affairs. (1969, c. 1093, s. 3.)

§ 75A-25. Administrative and staff support.

Administrative and staff support for the Committee shall be provided by such State agency or agencies as may be designated by the Governor. (1969, c. 1093, s. 3.)

§ 75A-26. Local water safety committees.

(a) In order that responsible State and local officials may consult with an advisory body as to the needs and desires of the public in matters of water recreation and safety in various local waters, local authorities may sponsor local water safety committees. When a local government or two or more local governments acting jointly determine that the interests of the public would be served by sponsorship of a local water safety committee, such local government or governments may sponsor a committee. As used in this section, the noun "sponsor" shall include a sponsoring local government or a sponsoring group of local governments acting jointly.

(b) Members of a local committee shall be selected by the sponsor to represent various viewpoints and interests respecting water recreation and safety in the locality concerned. The membership of the committee shall be not less than 15 nor more than 35, and members shall serve at the pleasure of the sponsor. Except where the charter granted by the sponsor may make specific provision, the members of a local committee shall select their officers, determine the need for subcommittees (if any), provide for times and places of regular meetings, and otherwise order the internal organization and administration of the committee. Special meetings may be held:

(1) Upon the call of such officers or members of the local committee as may be specified in the charter from the sponsor or the bylaws enacted by the committee.

(2) Upon the call of three members of the governing body or bodies of the sponsor.

(3) Upon the call of the chairman of the North Carolina Water Safety Committee.

(c) Where the sponsor finds that an existing organization or committee is sufficiently broadly based to represent the various community interests, it may sponsor (and at any time withdraw sponsorship of) the activities of such organization or committee relating to water recreation and safety in lieu of creating a separate local committee. In the event an existing organization or committee is sponsored, the membership restrictions of subsection (b) do not apply. The phrase "local committee" as used in this section shall include such sponsored existing organizations and committees as well as separate committees.

(d) Except as indicated below, members of a local committee shall serve without compensation from the sponsor. Public officers and employees who are acting within the scope and course of their employment, however, may receive such travel and subsistence allowance as authorized by law when attending meetings, whether as members or observers, or otherwise assisting or participating in the affairs of a local committee. Within the bounds set by governing provisions of the law generally, a sponsor may also provide administrative and staff services to a local committee and may underwrite or finance its projects which are carried out to the benefit of water recreation and safety in the area concerned.

(e) At the time of sponsorship, or withdrawal of sponsorship, of a local committee, the sponsor shall notify the following persons of the action taken:

(1) The chairman of the North Carolina Water Safety Committee.

(2) The Executive Director of the North Carolina Wildlife Resources Commission.

(f) All meetings of separately created local committees shall be open to the public. Where an existing organization or committee has received sponsorship, all its meetings devoted to carrying out the advisory functions of a local committee shall be open to the public.

(g) Members of a local committee are under an obligation:

(1) To keep themselves informed as to problems of water recreation and safety in their area.

(2) To study such problems concerning water recreation and safety as may be referred to them by their sponsor or by the chairman of the North Carolina Water Safety Committee.

(3) To make reports from time to time, either on their own motion or in response to a request for a study, on problems of water recreation and safety, and with suggestions for remedies where such are indicated and feasible. Such reports may be made to the sponsor, the chairman of the North Carolina Water Safety Committee, the Executive Director of the North Carolina Wildlife Resources Commission, or any other public or private person, agency, firm, corporation, or organization with the power to effect improvements in the level of water recreation and safety available to the public.

(4) To take part in and, where necessary, to help coordinate programs of public education in the field of water safety. (1969, c. 1093, s. 3.)

Chapter 75B.

Discrimination in Business.

Sec.
75B-1. Definitions.
75B-2. Discrimination in business prohibited.
75B-3. Actions not prohibited.
75B-4. Enforcement.
75B-5. Remedies cumulative.
75B-6. Contracts void.
75B-7. Chapter not exclusive.

§ 75B-1. Definitions.

The following words and phrases as used in this Chapter shall have the following meaning unless the context clearly requires otherwise:

(1) "Business," the manufacture, processing, sale, purchase, licensing, distribution, provision, or advertising of goods or services, or extension of credit, or issuance of letters of credit, or any other aspect of business;

(2) "Foreign government," all governments and political subdivisions and the instrumentalities thereof, excepting the government, political subdivisions, and instrumentalities of the United States and the states, commonwealths, territories and possessions of the United States, and the District of Columbia;

(3) "Foreign person," any person whose principal place of residence, business or domicile is outside the United States, or any person controlled directly or indirectly by such person or persons; provided, however, that no person shall be deemed a foreign person if after reasonable inquiry and due diligence it cannot be determined that any such person has a principal place of residence, business, or domicile outside the United States or is controlled by such person;

(4) "Foreign trade relationships," the dealing with or in any foreign country of any person, or being listed on a boycott list or compilation of unacceptable persons maintained by a foreign government, foreign person, or international organization;

(5) "International organization," any association or organization, with the exception of labor associations, or organizations of which more than a majority of the membership consists of foreign persons or foreign governments; and

(6) "Persons," one or more of the following or their agents, employees, servants, representatives, directors, officers, partners, members, managers, superintendents, and legal representatives: individuals, corporations, partnerships, joint ventures, associations, labor organizations, educational institutions, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, fiduciaries, and all other entities recognized at law by this State. (1977, c. 916, s. 1.)

Cross References. — For statute of limitation for an action under this Chapter, see § 1-52(14).

Legal Periodicals. — For a survey of 1977 law on trade regulation, see 56 N.C.L. Rev. 934 (1978).

§ 75B-2. Discrimination in business prohibited.

It shall be unlawful for any person doing business in the State or for the State of North Carolina:

(1) To enter into any agreement, contract, arrangement, combination, or understanding with any foreign government, foreign person, or

international organization, which requires such person or the State to refuse, fail, or cease to do business in the State with any other person who is domiciled or has a usual place of business in the State, based upon such other person's race, color, creed, religion, sex, national origin or foreign trade relationships;

(2) To execute in the State any contract with any foreign government, foreign person, or international organization which requires such person or the State to refuse, fail or cease to do business with another person who is domiciled or has a usual place of business in the State, based upon such other person's race, color, creed, religion, sex, national origin, or foreign trade relationships;

(3) To refuse, fail or cease to do business in the State with any other person who is domiciled or has a usual place of business in the State or with the State when such refusal, failure, or cessation results directly or indirectly from an agreement, contract, arrangement, combination, or understanding between the person who refuses, fails or ceases to do business and any foreign government, foreign person, or international organization, and is based upon such other person's race, color, creed, religion, sex, national origin or foreign trade relationships;

(4) To discharge or to fail, refuse or cease to hire, promote or appoint in the State any other person who is domiciled in the State to any position of employment or employment responsibility when such refusal, failure or cessation results from an agreement, contract, arrangement, combination, or understanding with any foreign government, foreign person, or international organization and is based upon such other person's race, color, creed, religion, sex, national origin, or foreign trade relationships;

(5) To willfully and knowingly aid or abet any other person to engage in conduct which is prohibited by this Chapter. (1977, c. 916, s. 1.)

§ 75B-3. Actions not prohibited.

It shall not be unlawful under this Chapter:

(1) To engage in conduct required by or expressly authorized by acts of the United States Congress, a United States treaty, a United States regulation, or a United States executive order;

(2) To enter into any agreement with an international organization entirely composed of member governments or their contracting representatives which requires that a preference or priority be given to the citizens or products of one or more of such member governments;

(3) To enter into any agreement with respect to the insuring, handling, or shipping of goods, or choice of carrier while in international transit. (1977, c. 916, s. 1.)

§ 75B-4. Enforcement.

The Attorney General may institute a civil action to prevent or restrain violations of G.S. 75B-2.

A person injured by a violation of G.S. 75B-2 may maintain an action for damages or for an injunction or both against any person who has committed the violation.

In a proceeding under this section, the court shall determine whether a violation has been committed and enter any judgment or decree necessary to remove the effects of any violation it finds and to prevent continuation or renewal of the violation in the future.

If an application for an injunction is granted, after due notice to all parties, a hearing thereon, and as a disposition on the merits of such application, the complainant may be awarded costs and reasonable attorney's fees.

In an action for damages, if there is a willful violation of G.S. 75B-2 the person injured may be awarded up to three times the amount of actual damages which results from the violation, with costs and reasonable attorney's fees. (1977, c. 916, s. 1.)

§ 75B-5. Remedies cumulative.

The remedies provided in this Chapter are cumulative. (1977, c. 916, s. 1.)

§ 75B-6. Contracts void.

Any provision of any contract or other document or other agreement which violates G.S. 75B-2 or which, if complied with by the person intended to be bound by the provision, would cause a violation of G.S. 75B-2 shall be null and void as being against the public policy of the State. (1977, c. 916, s. 1.)

§ 75B-7. Chapter not exclusive.

This Chapter shall not be deemed to supersede, restrict or otherwise limit the continuing applicability of the antitrust or anti-discrimination laws of the State. (1977, c. 916, s. 1.)

Chapter 75C.

Motion Picture Fair Competition Act.

Sec.
75C-1. Declaration of policy.
75C-2. Definitions.
75C-3. Blind bidding prohibited.
75C-4. Bidding procedures.
75C-5. Enforcement.

§ 75C-1. Declaration of policy.

It is the policy of this State to establish fair and open procedures for the bidding and negotiation of motion pictures within the State in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the State; promote fair and effective competition in that business; and benefit the movie-going public by holding down admission prices to motion picture theatres, expanding the choice of motion pictures available to the public, and preventing exposure of the public to objectionable or unsuitable motion pictures by insuring that exhibitors have the opportunity to view a picture before committing themselves to exhibiting it. (1979, c. 463, s. 1.)

Editor's Note. — Session Laws 1979, c. 463, s. 3, makes this Chapter effective July 1, 1979. Session Laws 1979, c. 463, s. 2, contains a severability clause.

§ 75C-2. Definitions.

When used in this Chapter, and for the purposes of this Chapter:

(1) The term "bid" means a written or oral offer or proposal by an exhibitor to a distributor, in response to an invitation to bid for the right to exhibit a motion picture, stating the terms under which the exhibitor will agree to exhibit a motion picture.

(2) The term "blind bidding" means the bidding for, negotiating for, or offering or agreeing to terms for the licensing or exhibition of, a motion picture if such first run motion picture has not been trade screened within the State before any such event has occurred.

(3) The term "distributor" means any person engaged in the business of distributing or supplying motion pictures to exhibitors by rental or licensing.

(4) The term "exhibit" or "exhibition" means showing a motion picture to the public for a charge.

(5) The term "exhibitor" means any person engaged in the business of operating one or more theatres.

(6) The term "invitation to bid" means a written or oral solicitation or invitation by a distributor to one or more exhibitors to bid or negotiate for the right to exhibit a first run motion picture.

(7) The term "license agreement" means any contract, agreement, understanding or condition between a distributor and an exhibitor relating to the licensing or exhibition of a motion picture by the exhibitor.

(8) The term "person" includes one or more individuals, partnerships, associations, societies, trusts, or corporations.

(9) The term "run" means the continuous exhibition of a motion picture in a defined geographic area for a specified period of time. A "first run" is the first exhibition of a picture in the designated area, a "second run" is the second exhibition and "subsequent runs" are subsequent exhibitions after the second run.

(10) The term "theatre" means any establishment in which motion pictures are exhibited to the public regularly for a charge.

(11) The term "trade screening" means the showing of a motion picture by a distributor within the State which is open to any exhibitor interested in exhibiting the motion picture. (1979, c. 463, s. 1.)

§ 75C-3. Blind bidding prohibited.

(a) Blind bidding for a first run motion picture is hereby prohibited within the State. No bids shall be returnable, no negotiations for the exhibition or licensing of a first run motion picture shall take place, and no license agreement or any of its terms shall be agreed to for the first run exhibition of any motion picture within the State before the motion picture has been trade screened within the State.

(b) A distributor shall include in each invitation to bid for the first run exhibition of any motion picture within the State the date, time and place of the trade screening of the motion picture within the State.

(c) A distributor shall provide reasonable and uniform notice to exhibitors within the State of all trade screenings within the State of motion pictures he is distributing. Such notice may be provided by mail or by publication in a trade magazine or other publication having general circulation among exhibitors within the State.

(d) No exhibitor may bid, negotiate, or offer terms for the licensing or exhibition of a motion picture that has been trade screened in accordance with the provisions of G.S. 75C-3 herein, unless said exhibitor or his agent has attended the trade screening.

The provisions of this subdivision (d) are subject to waiver by the distributor of a motion picture upon notice of such waiver to an exhibitor prior to the trade screening.

(e) Any purported waiver of the requirements of subdivisions (a) through (c) of this section shall be void and unenforceable. (1979, c. 463, s. 1.)

§ 75C-4. Bidding procedures.

When bids are solicited from exhibitors for the licensing of a first run motion picture within the State, then:

(a) The invitation to bid shall specify (i) the number and length of runs for which the bid is being solicited, whether it is a first, second or subsequent run, and the geographic area for each run; (ii) the names of all exhibitors who are being individually solicited; (iii) the date and hour the invitation to bid expires; and (iv) the time and location, including the address, where the bids will be opened, which shall be within the State. The invitation to bid may contain additional terms or conditions not inconsistent with the provisions of this Chapter.

(b) All bids shall be submitted in writing and shall be opened at the same time and in the presence of exhibitors, or their agents, who submitted bids and who are present at such time. Bids may be opened at the scheduled time notwithstanding the absence of exhibitors entitled to appear at such time.

(c) After being opened, bids shall be subject to examination by exhibitors, or their agents, who submitted bids. Within seven business days after a bid is accepted, the distributor shall notify in writing each exhibitor who submitted a bid of the terms of the accepted bid and the name of the winning bidder.

(d) Once bids are solicited and no bids are received or all bids are withdrawn, the distributor shall license the picture by re-bids or negotiation; provided that nothing in this Chapter shall be interpreted to require any distributor to accept any bid. (1979, c. 463, s. 1.)

§ 75C-5. Enforcement.

Any person who suffers loss or pecuniary damages resulting from a violation of the provisions of this Chapter shall be entitled to bring an individual action to recover damages and reasonable attorney fees. The provisions of this Chapter may be enforced by injunction or any other available equitable or legal remedy. Class actions are not available under this Chapter. (1979, c. 463, s. 1.)

Chapter 76.

Navigation.

Article 1.

Cape Fear River.

Sec.

76-1. Board of commissioners of navigation and pilotage.
76-2. Rules to regulate pilotage service.
76-3. Examination and licensing of pilots.
76-4. Appointment and regulation of pilots' apprentices.
76-5. Classes of licenses issued.
76-6. Renewal of license; license fee.
76-7. Expenses of the board.
76-8. Pilots to give bond.
76-9. Permission to run as pilots on steamers; other ports.
76-10. Cancellation of licenses.
76-11. Jurisdiction over disputes as to pilotage.
76-12. Retirement of pilots from active service.
76-13. When employment compulsory.
76-14. Rates of pilotage.
76-15. Vessels not liable for pilotage.
76-16. First pilot to speak vessel to get fees.
76-17. Vessels entering for harborage exempt.
76-18. [Repealed.]
76-19. Port wardens of Wilmington; election; oath.
76-20. Port wardens of Wilmington; duties; fees.
76-21. Repairing boats in street docks at Wilmington forbidden.
76-22. Obstructing docks by flats and barges at Wilmington forbidden.
76-23. Obstructing harbor master of Wilmington forbidden.
76-24. Encumbering docks at Wilmington forbidden.

Article 2.

Beaufort Harbor.

76-25 to 76-34. [Repealed.]

Article 3.

Bogue Inlet.

76-35, 76-36. [Repealed.]

Article 4.

Hatteras and Ocracoke.

76-37 to 76-39. [Repealed.]

Article 5.

General Provisions.

Sec.

76-40. Navigable waters; certain practices regulated.
76-41. Obstructing waters of Currituck Sound.
76-42. Lumbermen to remove obstructions in Albemarle Sound.
76-43. Anchorage in range of lighthouses.
76-44. Vessels on inland waterways exempt from pilot laws; proviso as to steam vessels.
76-45. Bond of pilot.
76-46. Pilots to have spyglasses.
76-47. Acting as pilot without license.
76-48. Penalty on pilot neglecting to go to vessel having signal set.
76-49. Pilots may be removed.
76-50. Pilots refused, entitled to pay.
76-51. Pay of pilots when detained by vessel.
76-52. Rates of pilotage annexed to commission.
76-53. Harbor masters; how appointed.
76-54. Commissioners of navigation may hold another office.
76-55. Commissioners of navigation to designate place for trash.
76-56. Harbor master; how appointed where no board of navigation.
76-57. Rafts to exercise care in passing buoys, etc., penalty.
76-58. Interfering with buoys, beacons, and day marks.

Article 6.

Morehead City Navigation and Pilotage Commission.

76-59. Board of commissioners of navigation and pilotage.
76-60. Rules to regulate pilotage service.
76-61. Examination and licensing of pilots.
76-62. Appointment and regulation of pilots' apprentices.
76-62.1. Renewal of license; license fee.
76-63. Expenses of the board.
76-64. Pilots to give bond.
76-65. Permission to run as pilots on steamers; other ports.
76-66. Cancellation of licenses.
76-67. Jurisdiction over disputes as to pilotage.
76-68. Retirement of pilots from active service.
76-69. When employment compulsory; rates of pilotage.
76-70. Pay for detention of pilots.
76-71. Vessels not liable for pilotage.
76-72. First pilot to speak vessel to get fees.
76-73. Vessels entering for harborage exempt.

State Government Reorganization. — All navigation and pilotage commissions established by this Chapter were transferred to the Department of Commerce by a Type I transfer by Session Laws 1977, c. 198, s. 6, as amended by Session Laws 1977, c. 802, s. 50.46, effective July 1, 1977.

Article 1.

Cape Fear River.

§ 76-1. Board of commissioners of navigation and pilotage.

A board of commissioners of navigation and pilotage for the Cape Fear River and Bar, to consist of five members, at least four of whom shall be residents of New Hanover County, and none of whom shall be licensed pilots, is hereby created. The members of the board shall be appointed by the Governor and their terms of office shall begin on the fifteenth day of April of the year in which they are appointed and continue for four years and until their successors shall be appointed and qualified. They shall be and are hereby declared to be commissioners for a special purpose, within the purview of Sec. 7, Article XIV, of the Constitution of North Carolina. It shall be the duty of the Governor to appoint, on or before the fifth day of April, 1921, and on or before the fifth day of April of every fourth year thereafter, the members of said board of commissioners. A majority of the board shall constitute a quorum and may act in all cases. The board shall have power to fill vacancies in its membership as they occur during their term, to appoint a clerk to record in a book, rules, orders and proceedings of the board, and the board shall have authority in all matters that may concern the navigation of waters from seven miles above Negrohead Point downwards, and out of the bar and inlets. (1921, c. 79, s. 1; C. S., s. 6943(a); 1975, c. 23, s. 2.)

Cross References. — As to transfer of the board of commissioners of navigation and pilotage for the Cape Fear River to the Department of Commerce, see § 143B-451.

Editor's Note. — The reference to Sec. 7, Article XIV, of the Constitution of North Carolina above is to Art. XIV, § 7, Const. 1868, which existed prior to the revision of the Constitution by Session Laws 1969, c. 1258. For present provisions as to dual office holding, see N. C. Const., Art. VI, § 9.

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

State Government Reorganization. — The Board of Commissioners of Navigation and Pilotage was transferred to the Department of Transportation and Highway Safety (now the Department of Transportation) by former § 143A-103, enacted by Session Laws 1971, c. 864.

CASE NOTES

Editor's Note. — The cases cited below were decided under former § 6943 of the Consolidated Statutes, which contained substantially the same provisions.

Constitutionality. — This Article is constitutional as it is an exercise of the State's right to regulate pilotage, and should be construed liberally as a part of the maritime law. It does not create a monopoly or grant special privileges, but only regulates for the protection of the public. St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908); St. George v. Hanson, 239 N.C. 259, 78 S.E.2d 885 (1954).

Cruising Grounds for Pilot Boats. — The legislature may confer upon a local board of commissioners of navigation and pilotage authority to mark out cruising grounds for pilot boats. Morse v. Heide, 152 N.C. 625, 68 S.E. 173 (1910).

Time of Appointment of Commissioners. — The time of making the appointment of commissioners is merely directory, and if appointment is made after the fifth day of April, but before the fifteenth day of April, it is valid. St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908).

§ 76-2. Rules to regulate pilotage service.

The board shall from time to time make and establish such rules and regulations respecting the qualifications, arrangements, and station of pilots as to them shall seem most advisable, and shall impose such reasonable fines, forfeitures and penalties as may be prescribed for the purpose of enforcing the execution of such rules and regulations. The board shall also have power and authority to prescribe, reduce, and limit the number of pilots necessary to maintain an efficient pilotage service for the Cape Fear River and Bar, as in its discretion may be necessary: Provided, that the present number of 11 pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability, or death. When, in the opinion of a majority of the board, the best interests of the port of Wilmington, the State of North Carolina, and the pilotage service shall require it, the board shall have power and authority to organize all pilots licensed by it into a mutual association, under such reasonable rules and regulations as the board may prescribe; any licensed pilot refusing to become a member of such association shall be subject to suspension, or to have his license revoked, at the discretion of the board. (1921, c. 79, s. 2; C. S., s. 6943(b); 1927, c. 158, s. 1.)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

CASE NOTES

Reasonable Regulations. — A rule and regulation of the board to the effect that pilots shall not cruise beyond certain territory and that no pilot, except under certain unusual circumstances, shall be entitled to his fee for such services if they be tendered beyond the cruising ground they had laid off is valid and reasonable. Morse v. Heide, 152 N.C. 625, 68 S.E. 173 (1910).

Limiting Number of Pilots. — The limiting of the number of pilots is a valid exercise of the police power, and is not such a grant of special privileges to certain persons as is provided against by the Constitution. St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908).

Providing for the qualifications of pilots is a valid exercise of the police power. St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908).

Court's Interference with Discretion of Board. — The determination of the qualifications, arrangements and stations of

pilots, and as to whether one or more of the 11 pilots actively engaged in service on March 7, 1927, shall be reduced for cause involves judgment on the part of the licensing board, and generally calls for an examination of evidence and the passing upon questions of fact. Where such is the case, a court will not interfere with the board's judgment or discretion, unless it is arbitrarily exercised, and will not attempt by mandamus to compel it to decide in a particular way. St. George v. Hanson, 239 N.C. 259, 78 S.E.2d 885 (1954).

Mandamus to Reinstate License. — Where plaintiff sought the reinstatement of his pilot's license under this section, and the parties waived jury trial and agreed that the court might find the facts, it was held that there being no finding or request for finding that plaintiff's license was revoked or his application for reinstatement refused on the ground that there was a sufficient number of pilots for the commerce on the river, or that the license was revoked or reinstatement refused without cause, mandamus will not lie to compel the issuance of license, since in such instance the writ would control the exercise of judgment by the licensing board. St. George v. Hanson, 239 N.C. 259, 78 S.E.2d 885 (1954).

§ 76-3. Examination and licensing of pilots.

The board, or a majority of them, may from time to time examine, or cause to be examined, such persons as may offer themselves to be pilots for the Cape Fear River and Bar, and shall give to such as are approved commissions under their hands and the seal of the board, to act as pilots for the river and bar; and the number of pilots so commissioned, not exceeding 15 at any one time, shall be left to the discretion of the board, but the limitation as to number herein shall not deprive the board of the power to issue license to any person who is a duly licensed pilot at the time of the passage of this Article. (1921, c. 79, s. 3; C. S., s. 6943(c); 1927, c. 158, s. 2.)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

CASE NOTES

Providing for examinations is a valid exercise of the police power. St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908).

§ 76-4. Appointment and regulation of pilots' apprentices.

The board, when it deems necessary for the best interests of the port, is hereby authorized to appoint in its discretion apprentices, and to make and enforce reasonable rules and regulations relating to apprentices. No apprentice shall be required to serve for a longer period than three years in order to obtain a license to pilot vessels of a draught of not exceeding 25 feet, and one year thereafter for a license to pilot vessels of a draught of more than 25 feet. No one shall be entered as an apprentice who is of the age of more than 25 years. (1921, c. 79, s. 4; C. S., s. 6943(d); 1927, c. 158, s. 3; 1967, c. 940, s. 1.)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such

agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 76-5. Classes of licenses issued.

The board shall have authority to issue two classes of licenses as follows:

(1) A license to pilot vessels whose draught of water does not exceed 25 feet, to such applicants above the age of 21 years who have served as apprentices for such length of time as is required by the rules and regulations of the board to entitle such applicant to such license;

(2) An unlimited or full license to those who have served at least one year under a license of the first class: Provided, that the board shall have power to appoint pilots without reference to apprenticeship record as in its judgment the service may require. (1921, c. 79, s. 5; C. S., s. 6943(e); 1927, c. 158, s. 4; 1967, c. 940, s. 2.)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 76-6. Renewal of license; license fee.

All licenses shall be renewed annually upon payment of a fee of five dollars ($5.00): Provided, the holder of such license shall have, during the year preceding the date for such renewal, complied with the provisions of this Article and the reasonable rules and regulations prescribed by the board under authority hereof. (1921, c. 79, s. 6; C. S., s. 6943(f).)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 76-7. Expenses of the board.

Each pilot, or the association of pilots, when organized as in this Article provided, shall pay over to the board under such reasonable rules as the board shall prescribe two percent (2%) of each and every pilotage fee received, for the purpose of providing funds to defray the necessary expenses of the board. In the event that the total of the sums so paid over in any one year shall exceed the expenses of the board, the excess, upon being duly ascertained, shall be paid over to the fund for the benefit of widows and orphans of the deceased pilots, as said fund is now constituted and provided for by law. (1921, c. 79, s. 7; C. S., s. 6943(g).)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also

repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 76-8. Pilots to give bond.

Every person before being commissioned as a pilot shall give bond for the faithful performance of his duties, with two or more sureties, payable to the State of North Carolina in the sum of five hundred dollars ($500.00); the board may, from time to time, and as often as it may deem necessary, enlarge the penalty of the bond, or require new or additional bonds to be given in a sum or sums not to exceed in all, one thousand dollars ($1,000). Every bond taken of a pilot shall be filed with and preserved by the board, in trust for every person, firm, or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm, or corporation, so injured may severally bring suit for the damage by each one sustained. (1921, c. 79, s. 8; C. S., s. 6943(h).)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 76-9. Permission to run as pilots on steamers; other ports.

The board shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers running between the port of Wilmington and other ports of the United States, under such rules and regulations as the board shall prescribe. (1921, c. 79, s. 9; C. S., s. 6943(i).)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 76-10. Cancellation of licenses.

The board shall have the power to call in and cancel the license of any pilot who has refused or neglected, except in case of sickness, his duty as a pilot for a period of six months in succession, and any pilot who has been absent from the State for a longer period than six months in succession shall, upon his return, surrender his license to the board, or the board may declare the same void, except when such absence has been under permission from the board as provided in G.S. 76-9. (1921, c. 79, s. 10; C. S., s. 6943(j).)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 76-11. Jurisdiction over disputes as to pilotage.

Each member of the board shall have the power and authority to hear and determine any matter of dispute between any pilot and any master of a vessel, or between pilots themselves respecting the pilotage of any vessel, and any member of the board may issue a warrant against any pilot for the recovery of any demand which one pilot may have against another, relative to pilotage, and for the recovery of any forfeiture or penalty provided by law, relating to pilotage on Cape Fear River and Bar, or provided by any bylaw or rule or regulation enacted by the board by virtue of any such law, which warrant the sheriff in New Hanover or Brunswick Counties shall execute together with any other process authorized by this Article. On any warrant issued as herein provided, any one of the commissioners may give judgment for any sum not exceeding five hundred dollars ($500.00), and may issue execution thereon, in like manner as is provided for the issuing of execution on judgments rendered by magistrates, which writ of execution shall be executed agreeably to the law regulating levy and sale under executions issuing from the General Court of Justice. Any member of the board shall have authority to issue summons for witnesses and to administer oaths, and hearings before any member of the board on any matters as provided in this section shall conform as nearly as possible to procedure provided by law in courts of magistrates. From any judgment rendered by any member of the board, either party shall have the right of appeal to the district court of New Hanover or Brunswick Counties, in the same manner as appeals from judgments of magistrates. (1921, c. 79, s. 11; C. S., s. 6943(k); 1973, c. 108, s. 26.)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

CASE NOTES

Determining Disputes between Pilots and Masters. — For dictum questioning the validity of the provisions of this section allowing members of the board to hear and determine disputes between pilots and masters of vessels, etc., see St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908).

§ 76-12. Retirement of pilots from active service.

The board shall have and is hereby given authority in its discretion, and under such reasonable rules and regulations as it may prescribe, to retire from active service any pilot who shall become physically or mentally unfit to perform his duties as pilot, and to provide for such pilot or pilots so retired such

compensation as the board shall deem proper: Provided, however, that no pilot shall be retired, except with his consent, for physical or mental disability, unless and until such pilot shall have first been examined by the public health officers or county physicians of New Hanover or Brunswick Counties, and such public health officers or physicians shall have certified, either separately or jointly, to the board the fact of such physical or mental disability. (1921, c. 79, s. 12; C. S., s. 6943(l).)

Repeal of Section. — This section is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 76-13. When employment compulsory.

Every foreign vessel and every United States vessel sailing under register, over 60 gross tons, shall take a state-licensed pilot from sea to Southport, and from Southport to sea; the employment of pilots from Southport to Wilmington and from Wilmington to Southport is optional, but any foreign vessel and United States flag vessel under register taking a pilot from Southport to Wilmington or from Wilmington to Southport shall employ a state-licensed pilot. (1921, c. 79, s. 13; C. S., s. 6943(m); 1927, c. 158, s. 5; 1959, c. 1042; 1971, c. 558, s. 1; c. 861, s. 1.)

CASE NOTES

A barge of over 60 gross tons having a United States licensed pilot on board is subject to pilotage, tender and refusal under this section upon entering North Carolina waters. Craig v. Gulf Barge & Towing Co., 201 N.C. 250, 159 S.E. 424 (1931).

§ 76-14. Rates of pilotage.

(a) Pilotage charges for vessels, inbound or outbound, shall be based upon the gross tonnage and draft of each vessel in the following general classifications:

(1) Less than 2,000 gross tons . . . . . $12.00 per draft ft. (one way)

(2) 2,000 gross tons or more but less than 11,000 . . . . . $13.50 per draft ft. (one way)

(3) 11,000 gross tons or more but less than 20,000 . . . . . $15.00 per draft ft. (one way)

(4) 20,000 gross tons or more but less than 29,000 . . . . . $16.50 per draft ft. (one way)

(5) 29,000 gross tons or more . . . . . $18.00 per draft ft. (one way)

In addition to the regular charges on draft stated above, vessels shall be charged one and two-tenths cents (1.2¢) per maximum gross ton ($12.00 per M; or fraction thereof).

(b) The charge for a fraction of a draft foot shall be computed from the next half-foot.

(c) There shall be a minimum of 15 draft feet for each vessel in determining pilotage charges.

(d) The measurement described herein shall be in United States feet and inches and registered gross tons and shall be furnished to the pilot by the master of the vessel or her agent for the purposes of computing pilotage fees.

(e) The charge for towing vessels with a tow shall be the total gross tonnage of all vessels in the tow and the draft will be that of the deepest vessel. The charge for towing vessels with a tow requiring two pilots (one on the towing vessel and one on the vessel in tow) shall be the regular pilotage charge for each vessel.

(f) The board of commissioners of navigation and pilotage for the Cape Fear River and Bar shall be the sole arbitrators of any question arising concerning any pilotage charges.

(g) Pilotage charges for shifting of vessels shall be as follows:

(1) Less than five miles	$ 50.00
(2) Five miles or more but less than 10	$ 75.00
(3) Ten miles or more but less than 15	$100.00
(4) Fifteen miles and over	$125.00

A vessel shifting "dead" (without power) will be charged double the regular shifting fee.

(h) The charge for detention of a pilot on board because of weather conditions preventing the pilot from being removed shall be fifty dollars ($50.00) per day, plus quarters equal to a deck officer, plus first-class transportation cost for a return trip to Wilmington.

(i) All vessels calling at any Cape Fear River port which require pilotage will pay full pilotage charges regardless of the reason for the call. (1921, c. 79, ss. 13, 14; C. S., ss. 6943(m), (n); 1927, c. 158, s. 5; 1959, c. 1042; 1971, c. 558, s. 2; c. 861, s. 2; 1975, c. 198; 1977, c. 700, ss. 1, 2.)

CASE NOTES

Pilot Entitled to Pilotage. — The first pilot speaking a vessel shall be entitled to the pilotage fees over the bar to Southport and out to sea again, provided said pilot shall be ready and willing to serve as a pilot, etc. St. George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908), decided under § 76-13 as it existed prior to the 1971 amendments.

§ 76-15. Vessels not liable for pilotage.

Any vessel coming into Southport from sea without the assistance of a pilot, the wind and weather being such that such assistance or service could have been reasonably given, shall not be liable for pilotage inward from sea, and shall be at liberty to depart without payment of any pilotage, unless the services of a pilot be secured. (1921, c. 79, s. 15; C. S., s. 6943(o).)

CASE NOTES

Validity. — This section is valid, when construed with the other sections, being an incentive to render pilots vigilant. St George v. Hardie, 147 N.C. 88, 60 S.E. 920 (1908).

§ 76-16. First pilot to speak vessel to get fees.

The first pilot speaking a vessel from a regularly numbered and licensed boat of this board shall be entitled to the pilotage fees over the bar to Southport, and out to sea again: Provided, said pilot shall be ready and willing to serve as pilot when the vessel is ready to depart, due notice having been given by the master or agent to said pilot. (1921, c. 79, s. 16; C. S., s. 6943(p).)

§ 76-17. Vessels entering for harborage exempt.

Any vessel coming in from sea for harbor shall not be required to take a pilot either from sea inward or back to sea. (1921, c. 79, s. 17; C. S., s. 6943(q).)

§ 76-18: Repealed by Session Laws 1975, c. 23, s. 3.

Editor's Note. — Session Laws 1975, c. 23, s. 1, effective May 5, 1975, provides: "The position and office of harbor master for the port of Wilmington is hereby abolished."

§ 76-19. Port wardens of Wilmington; election; oath.

There shall be three competent persons at the port of Wilmington, to be known as port wardens. The persons so elected shall at once take and subscribe before the clerk of the Superior Court of New Hanover County the following oath:

I, A. B., do solemnly and sincerely swear that I will faithfully, honestly, and impartially execute and discharge the duty of port warden for the port of Wilmington, by duly appraising and estimating the damage sustained on any vessel or goods arriving in or stranded within the bounds of said port, and will make a true and fair estimate and report of and regarding the seaworthiness of any vessel by me surveyed. (1889, c. 437; 1905, c. 321; Rev., s. 4959; C. S., s. 6961.)

§ 76-20. Port wardens of Wilmington; duties; fees.

The port wardens of Wilmington shall, on request made by the master, owner, freighter, or supercargo of any vessel arriving in said port, or stranded within the bounds thereof, survey and make report of her situation and condition, and the causes thereof, and whether she should be repaired or condemned; inspect the conditions of vessels which may arrive in distress or may have suffered by gales of wind or otherwise at sea; the situation and condition of goods, wares, and merchandise which may arrive in said vessels or may have received damage at sea, and report thereon and the probable causes thereof; inspect the storage of cargoes of vessels arriving as aforesaid, or having received damage as aforesaid, before the same shall be discharged, except where vessels may be stranded, in which cases their cargoes may be inspected after the same are removed, and report thereon, whether faulty or not, in which report shall be stated the probable cause of the damage; make surveys of goods, wares, and merchandise, and the cargoes of vessels damaged as aforesaid, and make and report estimates of the amount of the damage sustained as aforesaid; and make and report, if required, surveys of vessels outward-bound, and report whether they are seaworthy or not, and fit for the voyage intended. All goods which shall be sold by reason of their having received damage as aforesaid, and shall have been surveyed or inspected by the said port wardens, shall be sold under their inspection and direction; and the said port wardens shall respectively receive for their services: for a survey at the Town of Wilmington, the sum of ten dollars ($10.00); for a survey at the Flats, the sum of twelve dollars

($12.00); and for a survey at Fort Johnson, the sum of fifteen dollars ($15.00), to be paid by the party at whose request the same is made, and recovered before any court of competent jurisdiction. (1889, c. 437, ss. 2, 3; Rev., s. 4960; C. S., s. 6962.)

§ 76-21. Repairing boats in street docks at Wilmington forbidden.

If any person shall, for the purpose of repair, put any flat, steamboat, or other craft, in any of the street docks of the City of Wilmington, or shall, for the purpose of repair, ground any such flat, steamboat, or other craft in any of the public docks of such city on the east side of the Cape Fear River between Church Street dock and Red Cross Street dock, he shall be guilty of a misdemeanor, and shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. (1903, c. 662, s. 2; Rev., s. 3554; C. S., s. 6963.)

§ 76-22. Obstructing docks by flats and barges at Wilmington forbidden.

The owner of any rafts, flats, vessels, or other craft lying alongside any wharf or wharves or before the entrance of any public dock, his or their agents or servants, shall, upon notice from the harbor master, immediately remove the same, and upon his or their refusal so to do, it shall be the duty of the harbor master, and he is hereby authorized and directed, after notice as aforesaid to the owner or owners thereof, their agents or servants, forthwith to cause all such rafts, flats, vessels, or other craft to be removed at the cost and expense of such owner or owners or their agent or agents, and the owners shall be guilty of a misdemeanor. (1903, c. 662, s. 3; Rev., s. 3549; C. S., s. 6964.)

Editor's Note. — The position and office of harbor master for the port of Wilmington, referred to in this section, was abolished by Session Laws 1975, c. 23, s. 1.

§ 76-23. Obstructing harbor master of Wilmington forbidden.

If any person shall hinder, delay, obstruct, or in any manner willfully interfere with the harbor master of Wilmington in the discharge of his duty he shall be guilty of a misdemeanor, and be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. (1903, c. 662, s. 8; Rev., s. 3552; C. S., s. 6965.)

Editors' Note. — The position and office of harbor master for the port of Wilmington, referred to in this section, was abolished by Session Laws 1975, c. 23, s. 1.

§ 76-24. Encumbering docks at Wilmington forbidden.

If any person shall encumber any of the public docks of the City of Wilmington with logs, hulks, flats, or barges, trash or garbage, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined ten dollars ($10.00); and if the encumbrance be not removed immediately upon notice from the harbor master, he shall be fined ten dollars ($10.00) for each and every day thereafter such nuisance shall remain. (1903, c. 662, s. 9; Rev., s. 3547; C. S., s. 6966.)

Editor's Note. — The position and office of harbor master for the port of Wilmington, referred to in this section, was abolished by Session Laws 1975, c. 23, s. 1.

Article 2.

Beaufort Harbor.

§§ 76-25 to 76-34: Repealed by Session Laws 1975, c. 716, s. 4.

Article 3.

Bogue Inlet.

§§ 76-35, 76-36: Repealed by Session Laws 1975, c. 716, s. 4.

Article 4.

Hatteras and Ocracoke.

§§ 76-37 to 76-39: Repealed by Session Laws 1975, c. 716, s. 4.

Article 5.

General Provisions.

§ 76-40. Navigable waters; certain practices regulated.

(a) It shall be unlawful for any person, firm or corporation to place, deposit, leave or cause to be placed, deposited or left, either temporarily or permanently, any trash, refuse, rubbish, garbage, debris, rubble, scrapped vehicle or equipment or other similar waste material in or upon any body of navigable water in this State; "waste material" shall not include spoil materials lawfully dug or dredged from navigable waters and deposited in spoil areas designated by the Department of Natural Resources and Community Development; violation of this section shall constitute a misdemeanor, punishable by a fine of up to five hundred dollars ($500.00) or imprisonment for up to six months, or both, in the discretion of the court.

(b) No person, firm or corporation shall erect upon the floor of, or in or upon, any body of navigable water in this State, any sign or other structure, without having first secured a permit to do so from the appropriate federal agencies (which would include a permit from the State of North Carolina) or from the Department of Administration, or from the agency designated by the Department to issue such permit. Provided, however, this subsection shall not apply to commercial fishing nets, fish offal, ramps, boathouses, piers or duck blinds placed in navigable waters. Any person, firm or corporation erecting such sign or other structure without a proper permit or not in accordance with the specification of such permit shall be guilty of a misdemeanor and upon conviction shall be fined up to five hundred dollars ($500.00) or imprisoned for up to six months, or both, in the discretion of the court. The State may immediately proceed to remove or cause to be removed such unlawful sign or structure after five days' notice to the owner or erector thereof and the cost of such removal by the State shall be payable by the person, firm or corporation who

erected or owns the unlawful sign or other structure and the State may bring suit to recover the costs of the removal thereof.

(c) Whenever any structure lawfully erected upon the floor of, or in or upon, any body of navigable water in this State, is abandoned, such structure shall be removed by the owner thereof and the area cleaned up within 30 days of such abandonment; failure to comply with this section shall constitute a misdemeanor and upon conviction the owner of the abandoned structure shall be fined up to five hundred dollars ($500.00) or imprisoned for not over six months, or both, in the discretion of the court. The State may, after 10 days' notice to the owner or erector thereof, remove the abandoned structure and have the area cleaned up and the cost of such removal and cleaning up by the State shall be payable by the owner or erector of the abandoned structure and the State may bring suit to recover the costs thereof.

(d) For purposes of this section, the term "navigable waters" shall not include any waters within the boundaries of any reservoir, pond or impoundment used in connection with the generation of electricity, or of any reservoir project owned or operated by the United States.

(e) The provisions of this section, in the coastal waters of this State, shall be enforced by the Department of Natural Resources and Community Development. In the inland waters of the State, the provisions of this section shall be enforced by the Wildlife Resources Commission. The Department of Natural Resources and Community Development and the Wildlife Resources Commission shall cooperate with the Department of Water and Air Resources [Environmental Management Commission] in the enforcement of this section. (1784, c. 206, s. 11; 1811, c. 839; 1833, c. 146; R. S., c. 88, ss. 23, 24, 45; 1842, c. 65, s. 4; 1846, c. 60, s. 3; R. C., c. 85, ss. 40, 41; Code, ss. 3537, 3538; Rev., s. 3560; C. S., s. 6891; 1969, c. 792; 1973, c. 1262, s. 86; 1977, c. 771, s. 4.)

Editor's Note. — Pursuant to Session Laws 1973, c. 1262, s. 23, "Environmental Management Commission" has been inserted in brackets following "Department of Water and Air Resources" near the end of the second sentence of subsection (e).

CASE NOTES

Cited in State v. Eason, 114 N.C. 787, 19 S.E. 88 (1894).

§ 76-41. Obstructing waters of Currituck Sound.

It shall be unlawful for any person to obstruct navigation in the waters of Currituck Sound and tributaries, and all persons, corporations, companies, or clubs, who have heretofore placed or caused to be placed any hedging across the mouth of a bay, creek, strait, or lead of water in Currituck Sound or tributaries, made of iron, wire, or wood or other material, for the purpose of preventing the free passage of boats or vessels of any size or class, or to stop the public use of such bay, creek, strait, or lead of water, are required to forthwith remove the same. Any person, corporation, or club violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars ($50.00) nor less than ten dollars ($10.00), or imprisoned not more than 30 days, at the discretion of the court. (1897, c. 277; Rev., s. 3553; C. S., s. 6982.)

§ 76-42. Lumbermen to remove obstructions in Albemarle Sound.

If any lumberman shall fail to remove all obstructions placed by him in the waters of Albemarle Sound and its tributaries, as soon as practicable, after they have ceased to use them for the purpose for which they were placed in said waters, from all places where the water is not less than two feet deep, and also from all landing places on both sides, for the space of 60 feet from the shore outward, he shall be guilty of a misdemeanor, and fined not less than one dollar ($1.00) nor more than fifty dollars ($50.00), at the discretion of the court. (1880, c. 37, ss. 1, 2; Code, s. 3303; Rev., s. 3551; C. S., s. 6983.)

§ 76-43. Anchorage in range of lighthouses.

If the master of any vessel shall anchor on the range line of any range of lights established by the United States Lighthouse Board, unless such anchorage is unavoidable, he shall be guilty of a misdemeanor, and punished by a fine not to exceed fifty dollars ($50.00). (1883, c. 165, s. 2; Code, s. 3086; Rev., s. 3550; C. S., s. 6984.)

§ 76-44. Vessels on inland waterways exempt from pilot laws; proviso as to steam vessels.

All vessels, barges, schooners, or other craft passing through the inland waterway of this State, when bound to a port or ports in this or any other state, be and the same are hereby exempt from the operations of the pilot laws of North Carolina and are not compelled to take a state-licensed pilot: Provided, that steam vessels not having a United States licensed pilot for the waters navigated on board shall be subject to the State pilot laws. (1917, c. 33, s. 2; C. S., s. 6985.)

CASE NOTES

Under the Federal La v. — Vessels passing through the inland waterways of the State are exempt from the pilot laws by the State statutes, subject to the proviso of this section; and, under the federal statutes, whether a vessel has a gross tonnage of more than 15 tons should be determined by the method prescribed by the federal statutes requiring a pilot; and in an action for damages alleged to have been caused by defendant's negligence in a collision, it is reversible error for the trial judge to direct an affirmative answer to the issue of contributory negligence in navigating without a pilot upon plaintiff's assertion that his vessel would carry 30 tons. Harris v. Slater, 187 N.C. 163, 121 S.E. 437 (1924).

§ 76-45. Bond of pilot.

Every person, before he obtains a commission or a branch to be a pilot, shall give bond with two sufficient sureties payable to the State of North Carolina, in the sum of five hundred dollars ($500.00), with condition for the due and faithful discharge of his duties, and the duties of his apprentices; and the body appointing such pilot may, from time to time, and as often as they may deem it necessary, enlarge the penalty of the bond, or require new and additional bonds to be given; and every bond taken of a pilot shall be filed with, and preserved by, the said body appointing such pilot in trust for every person that shall be injured by the neglect or misconduct of such pilot, or his apprentices; who may severally bring suit thereon for the damage by each one sustained. (1784, c. 207, s. 3; R. C., c. 85, s. 6; Code, s. 3487; Rev., s. 307; C. S., s. 6986.)

§ 76-46. Pilots to have spyglasses.

Every pilot, within such convenient time as the commissioners may direct, who has control over the waters within which he acts, shall furnish himself with a good telescope or spyglass, under the penalty of fifty dollars ($50.00), to be paid to the commissioners. (1790, c. 320, s. 3; R. C., c. 85, s. 27; Code, s. 3517; Rev., s. 4973; C. S., s. 6987.)

§ 76-47. Acting as pilot without license.

If any person shall act as a pilot, who is not qualified and licensed in the manner prescribed in this Chapter, he shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars ($50.00) and not less than twenty-five dollars ($25.00), or imprisoned not more than 30 days at the discretion of the court: Provided, that should there be no licensed pilot in attendance, any person may conduct into port any vessel in danger from stress of weather or in a leaky condition. (1783, c. 194, s. 3; 1784, c. 208, s. 4; R. C., c. 85, s. 29; Code, s. 3519; Rev., s. 4974; C. S., s. 6988; 1933, c. 325.)

§ 76-48. Penalty on pilot neglecting to go to vessel having signal set.

When any pilot shall see any vessel on the coast, having a signal for a pilot, or shall hear a gun of distress fired off the coast, and shall neglect or refuse to go to the assistance of such vessel, such pilot shall forfeit and pay one hundred dollars ($100.00), to be recovered in the name of the State, one half to the use of the informer and the other half to the master of the vessel, unless such pilot is then actually in charge of another vessel. (1783, c. 194, s. 6; 1784, c. 207, s. 10; 1790, c. 320, s. 2; R. C., c. 85, s. 31; Code, s. 3521; Rev., s. 4975; C. S., s. 6989.)

§ 76-49. Pilots may be removed.

Unless otherwise provided in the first Article of this Chapter for the Cape Fear River, whenever any pilot appointed, as authorized in this Chapter, shall, on trial, be found incompetent, or shall be guilty of improper conduct by intoxication or otherwise, or of any misbehavior in his office, or shall absent himself from the State for a period of six months, the pilot so offending may be removed from his office by the board of commissioners under whose authority he is acting, by a notice to him in writing; and if after such removal he shall attempt to take charge of any vessel, he shall forfeit and pay two hundred dollars ($200.00) for the use of said board. And it shall be the duty of the board to put up a written notice of the removal, in the public places within the port, or publish it in some convenient newspaper. But no pilot for the navigation of Hatteras Inlet shall be required to surrender or forfeit his branch by reason of absence from the State for a period of less than six months. (1784, c. 207, s. 4; 1800, c. 565; 1819, c. 1025, s. 4; R. S., c. 88, ss. 7, 31, 35; R. C., c. 85, s. 28; 1869-70, c. 235, s. 7; 1876-7, c. 22; 1881, c. 261, ss. 1, 2; Code, ss. 3490, 3518; Rev., s. 4976; C. S., s. 6990.)

CASE NOTES

Entitled to Fees until Removed. — A duly licensed pilot may recover charges for his services, and while his failure to have his boat registered and numbered will cause a forfeiture of his license, the lawful pilotage charges for the service of such boat are recoverable by him until the commissioners of navigation and pilotage have acted thereon and revoked his license. Davis v. Heide & Co., 161 N.C. 476, 77 S.E. 691 (1913).

§ 76-50. Pilots refused, entitled to pay.

If a branch pilot shall go off to any vessel bound in, and offer to pilot her over the bar, the master or commander of such vessel, if he refuses to take such pilot, shall pay to such pilot, if not previously furnished with one, the same sum as is allowed by law for conducting such vessel in, to be recovered in the district court: Provided, that the first pilot, and no other, who shall speak such vessel so bound in shall be entitled to the pay provided for in this section. (R. C., c. 85, s. 32; 1871-2, c. 117; Code, s. 3522; Rev., s. 4978; C. S., s. 6991; 1973, c. 108, s. 30.)

§ 76-51. Pay of pilots when detained by vessel.

Every master of a vessel who shall detain a pilot at the time appointed, so that he cannot proceed to sea, though wind and weather should permit, shall pay to such pilot three dollars ($3.00) per day during the time of his actual detention. (1858-9, c. 23, s. 7; Code, s. 3495; Rev., s. 4979; C. S., s. 6992.)

§ 76-52. Rates of pilotage annexed to commission.

The commissioners of navigation for the several ports of this State shall annex to the branch or commission, by them given to each pilot, a copy of the fees to which such pilot is entitled. (1784, c. 208, s. 4; 1796, c. 470, s. 5; R. C., c. 85, ss. 9, 38; Code, ss. 3497, 3536; Rev., s. 4980; C. S., s. 6993.)

§ 76-53. Harbor masters; how appointed.

The several boards of commissioners of navigation may appoint a harbor master for their respective ports. They shall appoint a clerk to keep books, in which shall be recorded all their proceedings. (R. C., c. 85, s. 35; Code, s. 3525; Rev., s. 4981; C. S., s. 6994.)

§ 76-54. Commissioners of navigation may hold another office.

A commissioner of navigation and pilotage shall be deemed a commissioner for a special purpose within the meaning of Sec. 7 of Article XIV of the Constitution of North Carolina, so as not to be prohibited from holding at the same time with his commissionership another office under the national or State governments. (Ex. Sess., 1913, c. 76; C. S., s. 6995.)

Editor's Note. — The reference to Sec. 7 of Article XIV of the Constitution of North Carolina above is to Art. XIV, § 7, Const. 1868, which existed prior to the revision of the Constitution by Session Laws 1969, c. 1258. For present provisions as to dual office holding, see N.C. Const., Art. VI, § 9.

§ 76-55. Commissioners of navigation to designate place for trash.

The several boards of commissioners established by this Chapter may, subject to such regulations as the United States may make, designate the places whereat, within the waters under their several and respective control, may be cast and thrown ballast, trash, stone, and like matter. (1833, c. 146, ss. 1, 2, 3; R. S., c. 88, ss. 23, 24, 45; 1846, c. 60, s. 3; R. C., c. 85, s. 40; Code, s. 3537; Rev., s. 4982; C. S., s. 6996.)

CASE NOTES

Cited in State v. Eason, 114 N.C. 787, 19 S.E. 88 (1894).

§ 76-56. Harbor master; how appointed where no board of navigation.

Where no board of navigation exists the governing body of any incorporated town, situated on any navigable watercourse, shall have power to appoint a harbor master for the port, who shall have the same power and authority in their respective ports as the harbor master of Wilmington is by this Chapter given for that port, and shall receive like fees and no others.

The board of county commissioners of any county is authorized to appoint a harbor master for any unincorporated community situated on any navigable watercourses in their respective counties. Harbor masters appointed hereunder shall have the same power and authority and shall receive the same fees as set forth in G.S. 76-18. (Rev., s. 4983; C. S., s. 6997; 1953, c. 445.)

Editor's Note. — The position and office of harbor master for the port of Wilmington, referred to in this section, was abolished by Session Laws 1975, c. 23, s. 1.

Section 76-18, referred to in this section, was repealed by Session Laws 1975, c. 23, s. 3.

§ 76-57. Rafts to exercise care in passing buoys, etc., penalty.

If any person having charge of any raft passing any buoy, beacon, or day mark, shall not exercise due diligence in keeping clear of it, or, if unavoidably fouling it, shall not exercise due diligence in clearing it, without dragging from its position such buoy, beacon, or day mark, he shall be guilty of a misdemeanor, and punished by fine not to exceed fifty dollars ($50.00). (1883, c. 165, s. 3; Code, s. 3087; Rev., s. 3545; C. S., s. 6998.)

§ 76-58. Interfering with buoys, beacons, and day marks.

If any person shall moor any kind of vessel, or any raft or any part of a raft, to any buoy, beacon, or day mark placed in the waters of North Carolina by the authority of the United States Lighthouse Board, or shall in any manner hang on with any vessel or raft, or part of a raft, to any such buoy, beacon, or day mark, or shall willfully remove, damage, or destroy any such buoy, beacon, or day mark, or shall cut down, remove, damage, or destroy any beacon erected on land in this State by the authority of the said United States Lighthouse Board, or through unavoidable accident run down, drag from its position, or in any way injure any buoy, beacon, or day mark, as aforesaid, and shall fail to give notice as soon as practicable of having done so, to the lighthouse inspector of the district in which said buoy, beacon, or day mark may be located, or to the collector of the port, or, if in charge of a pilot, to the collector of the port from which he comes, he shall for every such offense be guilty of a misdemeanor and shall be punished by a fine not to exceed two hundred dollars ($200.00), or imprisoned not to exceed three months, or both, at the discretion of the court. (1858-9, c. 58, ss. 2, 3; 1883, c. 165, s. 1; Code, s. 3085; Rev., s. 3546; C. S., s. 6999.)

ARTICLE 6.

Morehead City Navigation and Pilotage Commission.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 76-59. Board of commissioners of navigation and pilotage.

A board of commissioners of navigation and pilotage for Old Topsail Inlet and Beaufort Bar to consist of three members, none of whom shall be licensed pilots, is hereby created. The members of the board shall be appointed by the Morehead City port commission, and their terms of office shall begin on the fifteenth day of July of the year in which they are appointed and continue for four years and until their successors shall be appointed and qualified. They shall be and are hereby declared to be commissioners for a special purpose, within the purview of Sec. 7, Article XIV of the Constitution of North Carolina. It shall be the duty of the Morehead City port commission to appoint on or before the first day of July, 1947, and on or before the first day of July every fourth year thereafter, the members of said board of commissioners. A majority of the board shall constitute a quorum and may act in all cases. The board shall have power to fill vacancies in its membership as they occur during their term, to appoint a clerk to record in a book, rules, orders and proceedings of the board, and the board shall have authority in all matters that may concern the navigation of waters from the Beaufort Sea Buoy to Morehead City, and out of the bar and inlet including Beaufort Harbor. (1947, c. 748; 1975, c. 716, s. 4.)

Cross references. — As to transfer of the board of commissioners of navigation and pilotage for Old Topsail Inlet and Beaufort Bar to the Department of Commerce, see § 143B-451.

Editor's Note. — The reference to Sec. 7, Article XIV of the Constitution of North Carolina is to Art. XIV, § 7, Const. 1868, which existed prior to the revision of the Constitution by Session Laws 1969, c. 1258. For present provisions as to dual office holding, see N.C. Const., Art. VI, § 9.

Session Laws 1951, c. 776, s. 2, transfers to the State Ports Authority all powers and functions of the Morehead City port commission.

§ 76-60. Rules to regulate pilotage service.

The board shall from time to time make and establish such rules and regulations respecting the qualifications, arrangements, and station of pilots as to them shall seem most advisable, and shall impose such reasonable fines, forfeitures and penalties as may be prescribed for the purpose of enforcing the execution of such rules and regulations. The board shall also have power and authority to prescribe, reduce and limit the number of pilots necessary to

maintain an efficient pilotage service for Old Topsail Inlet and Beaufort Bar, as in its discretion may be necessary: Provided, that the present number of two pilots now actively engaged in the service shall not be reduced except for cause or by resignation, disability, or death. The board shall have power and authority to organize all pilots licensed by it into a mutual association, under such reasonable rules and regulations as the board may prescribe; any licensed pilot refusing to become a member of such association shall be subject to suspension, or to have his license revoked, at the discretion of the board. (1947, c. 748.)

§ 76-61. Examination and licensing of pilots.

The board, or a majority of them, may from time to time examine, or cause to be examined, such persons as may offer themselves to be pilots for Old Topsail Inlet and Beaufort Bar, and shall give to such as are approved commissions under their hands and the seal of the board, to act as pilots for Old Topsail Inlet and Beaufort Bar; and the number of pilots so commissioned, shall be left to the discretion of the board. (1947, c. 748; 1953, c. 436, s. 1.)

§ 76-62. Appointment and regulation of pilots' apprentices.

The board is hereby authorized to appoint in its discretion apprentices, and to make and enforce reasonable rules and regulations relating to apprentices. No apprentice shall be required to serve for a longer period than three years in order to obtain a license to pilot vessels of a draught of not exceeding 15 feet, and one year thereafter for a license to pilot vessels of any draught. No one shall be entered as an apprentice who is under the age of 21 years. (1947, c. 748; 1953, c. 436, s. 2.)

§ 76-62.1. Renewal of license; license fee.

All licenses shall be renewed annually upon payment of a fee of five dollars ($5.00); provided, the holder of such license shall have during the year preceding the date of such renewal, complied with the provisions of this Article and the reasonable rules and regulations prescribed by the board under authority hereof. (1947, c. 748.)

§ 76-63. Expenses of the board.

Each pilot, or the association of pilots, when organized as in this Article provided, shall pay over to the board under such reasonable rules as the board shall prescribe two percent (2%) of each and every pilotage fee received, for the purpose of providing funds to defray the necessary expenses of the board. (1947, c. 748.)

§ 76-64. Pilots to give bond.

Every person before being commissioned as a pilot shall give bond for the faithful performance of his duties, with two or more personal sureties or a bond in some surety company licensed to do business in North Carolina payable to the State of North Carolina in the sum of five hundred dollars ($500.00); the board may, from time to time, and as often as it may deem necessary, enlarge the penalty of the bond, or require new or additional bonds to be given in a sum or sums not to exceed in all, one thousand dollars ($1,000). Every bond taken of a pilot shall be filed with and preserved by the board in trust for every person, firm, or corporation, who shall be injured by the neglect or misconduct of such pilots, and any person, firm, or corporation so injured may severally bring suit for the damage by each one sustained. (1947, c. 748.)

§ 76-65. Permission to run as pilots on steamers; other ports.

The board shall have power to grant permission in writing to any pilot in good standing and authorized to pilot vessels, to run regularly as pilots on steamers running between Old Topsail Inlet and Beaufort Bar, and the port of Morehead City, and other ports of the United States, under such rules and regulations as the board shall prescribe. (1947, c. 748.)

§ 76-66. Cancellation of licenses.

The board shall have the power to call in and cancel the license of any pilot who has refused or neglected, except in case of sickness, his duty as a pilot. Any pilot who has been absent from the State for a longer period than six months in succession shall, upon his return, surrender his license to the board, or the board may declare the same void, except when such absence has been under permission from the board as provided above. (1947, c. 748.)

§ 76-67. Jurisdiction over disputes as to pilotage.

Each member of the board shall have power and authority to hear and determine any matter of dispute between any pilot and any master of a vessel, or between pilots themselves respecting the pilotage of any vessel, and any member of the board may issue a warrant against any pilot for the recovery of any demand which one pilot may have against another, relative to pilotage, and for the recovery of any forfeiture or penalty provided by law, relating to pilotage in Old Topsail Inlet and Beaufort Bar, or provided by any bylaw or rule or regulation enacted by the board by virtue of any such law, which warrant the sheriff in Carteret County shall execute together with any other process authorized by this Article. On any warrant issued as herein provided, any one of the commissioners may give judgment for any sum not exceeding five hundred dollars ($500.00), and may issue execution thereon, in like manner as is provided for the issuing of execution on judgments rendered by magistrates, which writ of execution shall be executed agreeably to the law regulating the levy and sale under executions issuing from the General Court of Justice. Any member of the board shall have authority to issue summons for witnesses and to administer oaths, and hearings before any member of the board on any matters as provided in this section shall conform as nearly as possible to procedure provided by law in courts of magistrates. From any judgment rendered by any member of the board, either party shall have the right of appeal to the District Court of Carteret County, in the same manner as appeals from judgments of magistrates. (1947, c. 748; 1973, c. 108, s. 31.)

§ 76-68. Retirement of pilots from active service.

The board shall have and is hereby given authority in its discretion, and under such reasonable rules and regulations as it may prescribe, to retire from active service any pilot who shall become physically or mentally unfit to perform his duties as pilot, and to provide for such pilot or pilots so retired such compensation as the board shall deem proper: Provided, however, that no pilot shall be retired, for physical or mental disability, unless and until such pilot shall have first been examined by the public health officer or county physician of Carteret County, and such public health officer or physician shall have certified, either separately or jointly, to the board the fact of such physical or mental disability. (1947, c. 748.)

§ 76-69. When employment compulsory; rates of pilotage.

All vessels, coastwise or foreign, over 60 gross tons, shall on and after the first day of August, 1947, take a State licensed pilot from Beaufort Sea Buoy to Morehead City and from Morehead City to sea, and the rates of pilotage shall be such as may be prescribed from time to time by the board of commissioners.

Vessels calling at the port solely for the purpose of obtaining bunkers shall pay one half of the fees prescribed by the said board. (1947, c. 748.)

§ 76-70. Pay for detention of pilots.

Every master of a vessel who shall detain a pilot at the time appointed so that he cannot proceed to sea, though wind and weather permit, shall pay such pilot ten dollars ($10.00) per day during the time of his actual detention, the pilot shall have due notice from the master or agent of said vessel. (1947, c. 748.)

§ 76-71. Vessels not liable for pilotage.

Any vessel coming into Morehead City from sea without assistance of a pilot, the wind and weather being such that such assistance or service could not have been reasonably given, shall not be liable for pilotage inward from sea, and shall be at liberty to depart without payment of any pilotage, unless the service of a pilot be secured. (1947, c. 748.)

§ 76-72. First pilot to speak vessel to get fees.

The first licensed pilot speaking a vessel from a regularly numbered pilot boat of this board shall be entitled to the pilotage fees over Old Topsail Inlet and Beaufort Bar to Morehead City, and out to sea again. Provided, said pilot shall be ready and willing to serve as pilot when the vessel is ready to depart, due notice having been given by the master or agent to said pilot. (1947, c. 748.)

§ 76-73. Vessels entering for harborage exempt.

Any vessel coming in from sea for harbor shall not be required to take a pilot either from sea inward or back to sea. (1947, c. 748.)

Chapter 77.

Rivers, Creeks, and Coastal Waters.

Article 1.

Commissioners for Opening and Clearing Streams.

Sec.

77-1. County commissioners to appoint commissioners.
77-2. Flats and appurtenances procured.
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Article 3.

Lands Adjoining Coastal Waters.

77-20. Seaward boundary of coastal lands.

Article 1.

Commissioners for Opening and Clearing Streams.

§ 77-1. County commissioners to appoint commissioners.

Where any inland river or stream runs through the county, or is a line of their county, the boards of commissioners of the several counties may appoint commissioners to view such river or stream, and make out a scale of the expense of labor with which the opening and clearing thereof will be attended; and if the same is deemed within the ability of the county, and to be expedient, they may appoint and authorize the commissioners to proceed in the most expeditious manner in opening and clearing the same. (Code, s. 3706; 1887, c. 370; Rev., s. 5297; C. S., s. 7363.)

Cross References. — As to building bridges, see § 136-72 et seq.

§ 77-2. Flats and appurtenances procured.

The board of county commissioners appointing the commissioners may direct them to purchase or hire a flat with a windlass and the appurtenances necessary to remove loose rock and other things, which may by such means be more easily removed, and allow the same to be paid for out of the county funds. (1785, c. 242, s. 2; R. C., c. 100, s. 3; Code, s. 3708; Rev., s. 5299; C. S., s. 7365.)

§ 77-3. Laid off in districts; passage for fish.

The board of county commissioners may appoint commissioners to examine and lay off the rivers and creeks in their county; and where the stream is a boundary between two counties, may lay off the same on their side; in doing so they shall allow three fourths for the owners of the streams for erecting slopes, dams and stands; and one-fourth part, including the deepest part, they shall leave open for the passage of fish, marking and designating the same in the best manner they can; and if mills are built across such stream, and slopes

may be necessary, the commissioners shall lay off such slopes, and determine the length of time they shall be kept open; and such commissioners shall return to their respective boards of county commissioners a plan of such slopes, dams, and other parts of streams viewed and surveyed. (1787, c. 272, s. 1; R. C., c. 100, s. 5; Code, s. 3710; Rev., s. 5301; C. S., s. 7367.)

Cross References. — See note to § 77-4. As to erecting artificial islands or lumps in public waters, see § 14-133. As to injuries to dams and water channels of mills and factories, see § 14-142. As to obstructing passage of fish in streams, see §§ 113-251 and 113-252.

CASE NOTES

Cited in Gwaltney v. Scottish Carolina Timber & Land Co., 111 N.C. 547, 16 S.E. 692 (1892); Hutton v. Webb, 124 N.C. 749, 33 S.E. 169 (1899).

§ 77-4. Gates and slopes on milldams.

The commissioners appointed by the board of county commissioners to examine and lay off the rivers and creeks within the county, or where the stream is a boundary between counties, shall have power to lay off gates, with slopes attached thereto, upon any milldam built across such stream, of such dimensions and construction as shall be sufficient for the convenient passage of floating logs and other timber, in cases where it may be deemed necessary by the said board of county commissioners; and they shall return to the board of county commissioners appointing them a plan of such gates, slopes, and dams in writing. (1858-9, c. 26, s. 1; Code, s. 3712; Rev., s. 5302; C. S., s. 7368.)

CASE NOTES

Only Applicable to Floatable Streams. — It would seem that the statute was passed entirely with reference to floatable streams because without condemnation the commissioners would have no right to enter upon and clean out beds of streams which were not natural highways. Commissioners of Burke County v. Catawba Lumber Co., 116 N.C. 731, 21 S.E. 941 (1895).

Dams Built under Permit. — Authority over streams, conferred upon county commissioners while it stands and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy by injunction. Therefore, a defendant will not be restrained from erecting a dam across a stream, when he is proceeding under the permit and direction of the commissioners. McLaughlin v. Hope Mfg. Co., 103 N.C. 100, 9 S.E. 307 (1889).

Cited in Gwaltney v. Scottish Carolina Timber & Land Co., 111 N.C. 547, 16 S.E. 692 (1892).

§ 77-5. Owner to maintain gate and slope.

Upon the confirmation of the report made by the commissioners, and notice thereof given to the owner or keeper of said mill, it shall be his duty forthwith to construct, and thereafter to keep and maintain, at his expense, such gate and slope, for the use of persons floating logs and other timber as aforesaid, so long as said dam shall be kept up, or until otherwise ordered by the board of county commissioners. (1858-9, c. 26, s. 2; Code, s. 3713; Rev., s. 5303; C. S., s. 7369.)

§ 77-6. Gates and slopes discontinued.

The commissioners appointed as aforesaid, at any time that they may deem such gate and slope no longer necessary, may report the fact to their respective boards of county commissioners, and said boards of county commissioners may order the same to be discontinued. (1858-9, c. 26, s. 3; Code, s. 3714; Rev., s. 5304; C. S., s. 7370.)

§ 77-7. Failure of owner of dam to keep gates, etc.

If any owner or keeper of a mill, whose dam is across any stream, shall fail to build a gate and slope therein, or thereafter to keep and maintain the same as required by commissioners to lay off rivers and creeks, he shall be guilty of a misdemeanor. (1858-9, c. 26, s. 4; Code, s. 3715; Rev., s. 3383; C. S., s. 7371.)

CASE NOTES

Cited in Letterman v. English Mica Co., 249 N.C. 769, 107 S.E.2d 753 (1959).

§ 77-8. Repairing breaks.

Wherever any stream of water which is used to propel machinery shall be by freshet or otherwise diverted from its usual channel so as to impair its power as used by any person, such person shall have power to repair the banks of such stream at the place where the break occurs, so as to cause the stream to return to its former channel. (1879, c. 53, s. 1; Code, s. 3716; Rev., s. 5305; C. S., s. 7372.)

§ 77-9. Entry upon lands of another to make repairs.

In case the break occurs on the lands of a different person from the one utilizing the stream, the person utilizing the stream shall have power to enter upon the lands of such other person to repair the same, and in case such person objects, the clerk of the superior court of the county in which the break occurs shall, upon application of the party utilizing the stream, appoint three disinterested freeholders, neither of whom shall be related to either party, who after being duly sworn shall lay off a road, if necessary, by which said person may pass over the lands of such other person to the break and repair said break from time to time as often as may be necessary, so as to cause the stream to return to its original channel, and assess any damage which may thereby be occasioned: Provided, the party upon whose land the work is proposed to be done shall have five days' notice in writing served on him or left at his place of residence: Provided further, that it shall be the duty of said commissioners to assess the damage of anyone on whose land the road shall be laid off to be paid by the applicant for said road: Provided, also, that either party shall have the right of appeal to the superior court. (1879, c. 53, s. 2; Code, s. 3717; Rev., s. 5306; C. S., s. 7373.)

§ 77-10. Draws in bridges.

Whenever the navigation of any river or creek which, in the strict construction of law, might not be considered a navigable stream, shall be obstructed by any bridge across said stream, except those under the supervision and control of the Board of Transportation, it shall be lawful for any person

owning any boat plying on said stream to make a draw in such bridge sufficient for the passage of such boat; and the party owning such boat shall construct and maintain such draw at his own expense, and shall use the same in such manner as to delay travel as little as possible. (1879, c. 279, ss. 1, 2; Code, s. 3719; Rev., s. 5307; C. S., s. 7374; 1965, c. 493; 1973, c. 507, s. 5.)

CASE NOTES

Cited in Staton v. Wimberly, 122 N.C. 107, 29 S.E. 63 (1898).

§ 77-11. Public landings.

The board of county commissioners may establish public landings on any navigable stream or watercourse in the county upon petition in writing. Unless it shall appear to the board that the person owning the lands sought to be used for a public landing shall have had 20 days' notice of the intention to file such petition, the same shall be filed in the office of the clerk of the board until the succeeding meeting of the board, and notice thereof shall be posted during the same period at the courthouse door. At said meeting of the board, the allegations of the petition shall be heard, and if sufficient reason be shown, the board shall order the establishment of the public landing.

The board is authorized to enter upon any land and locate a public landing after service of notice on the landowner that a landing is to be established under the authority of this section. If the board and landowner cannot agree on the damages, if any, the board shall, on the expiration of 60 days from the completion of the landing, cause to be summoned three disinterested freeholders of the county, who shall go upon the land and assess the damages and benefits according to the general law. All damages assessed shall be a county charge. In assessing damages, the jury shall take into consideration any special benefits accruing to the landowner, and if such benefits exceed the damages, the amount of such excess of benefits shall be assessed against the landowner and constitute a lien on the land adjoining the landing, and shall be collected in the same manner as county taxes. The board shall order how the costs shall be paid.

No suit shall be instituted by a landowner for damages for the location of the landing earlier than 60 days, nor later than six months, after the completion of the landing. Either party may appeal to the superior court for the assessment of damages and benefits, where the matter shall be heard de novo by the court and jury. No cost shall be awarded against the county upon appeals when the recovery awarded on appeal is not more favorable to the appellant than the award of the referees. All places heretofore established as public landings shall remain such. (1784, c. 206, s. 4; 1789, c. 303; 1790, c. 331, s. 3; 1793, c. 386; 1813, c. 862, s. 1; 1822, c. 1139, s. 2; R. C., c. 60, s. 1; c. 101, ss. 2, 4; 1869, c. 20, s. 8, subsec. 29; 1872-3, c. 189, s. 3; 1879, c. 82, s. 9; Code, ss. 2038, 2040, 2982; Rev., ss. 2684, 2685, 5308; 1917, c. 284, s. 33; 1919, c. 68; C. S., ss. 3667, 3762, 3763, 7375.)

ARTICLE 2.

Obstructions in Streams.

§ 77-12. Obstructing passage of boats.

If any person shall obstruct the free passage of boats along any river or creek, by felling trees, or by any other means whatever, he shall be guilty of a misdemeanor. (1796, c. 460, s. 2; R. C., c. 100, s. 6; Code, s. 3711; Rev., s. 3561; C. S., s. 7376.)

Cross References. — See note to § 77-13.

CASE NOTES

Cited in Hutton v. Webb, 124 N.C. 749, 33 S.E. 169 (1899).

§ 77-13. Obstructing streams a misdemeanor.

If any person shall willfully fell any tree, or willfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed, or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars ($50.00), or imprisoned not to exceed 30 days. Nothing in this section shall prevent the erection of fish dams or hedges which do not extend across more than two thirds of the width of any stream where erected, but if extending over more than two thirds of the width of any stream, the said penalties shall attach. This section may be enforced by specially commissioned forest law-enforcement officers of the Department of Natural Resources and Community Development. In any county with a population in excess of 325,000, this section may also be enforced by the county engineer. (1872-3, c. 107, ss. 1, 2; Code, s. 1123; Rev., s. 3559; C. S., s. 7377; 1975, c. 509; 1977, c. 771, s. 4; 1979, c. 493, s. 1.)

Effect of Amendments. — The 1979 amendment added the last sentence.

Session Laws 1979, c. 493, s. 2, contains a severability clause.

CASE NOTES

Compared with Common-Law Offense. — At common law it was an offense to obstruct any navigable stream, but by this section, unless the act is willful and not for the purpose of utilizing the water as a motive power the offense is not indictable. State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888); State v. Baum, 128 N.C. 600, 38 S.E. 900 (1901).

"Motive Power" Defined. — Water used in "sluicing" is not used as a "motive power" within the meaning of this section. The section has obvious reference to the use of the energies of water dammed, as a moving force, and not to the operation of the current in motion. State v. Duplin Canal Co., 91 N.C. 637 (1884).

"Or" Construed to Read "And". — The word "and" between the words "retarded" and "whereby" formerly read "or," and the court in State v. Pool, 74 N.C. 402 (1876), held that the word "or" should read "and."

Section Applicable to Navigable Streams. — If a creek is not navigable an obstruction cannot "impede, delay, or prevent" navigation, and so there is no violation of the statute by cutting trees so as to obstruct a nonnavigable stream. State v. Pool, 74 N.C. 402 (1876).

Section Applicable Though Stream Is Private Property. — The bed of a lake or watercourse may be private property, but if the

waters are navigable in their natural state the public has an easement of navigation in them, which easement the owner of the soil cannot obstruct. State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888).

Indictment. — The indictment under this section must charge that the obstruction was not "for the purpose of utilizing." Such a charge is not necessary in an indictment for obstructing waters, at common law. State v. Narrows Island Club, 100 N.C. 477, 5 S.E. 411 (1888).

Railroad Bridges. — A railroad bridge built over a navigable stream if obstructing passage of vessels is a nuisance, and tearing a portion of it down so that vessels may pass is not indictable. State v. Parrott, 71 N.C. 311 (1874).

Action for Damages. — In an action wherein actual damages were claimed, with punitive damages, for damming a navigable stream, made a misdemeanor by this section, it was held that to recover punitive damages it was insufficient to show merely that the stream was obstructed to plaintiff's damage, it being necessary to prove, in such cases, malice, fraud, wanton or willful disregard of the plaintiff's rights, or other circumstances of recklessness or aggravation. Warren v. Coharie Lumber Co., 154 N.C. 34, 69 S.E. 685 (1910).

Cited in Gwaltney v. Scottish Carolina Timber & Land Co., 111 N.C. 547, 16 S.E. 692 (1892).

§ 77-14. Obstructions in streams and drainage ditches.

If any person, firm or corporation shall fell any tree or put any slabs, stumpage, sawdust, shavings, lime, refuse or any other substances in any creek, stream, river or natural or artificial drainage ravine or ditch, or in any other outlet which serves to remove water from any land whatsoever whereby the natural and normal drainage of said land is impeded, delayed or prevented, the person, firm or corporation so offending shall be guilty of a misdemeanor and upon conviction thereof shall be fined up to five hundred dollars ($500.00) or imprisoned for up to six months, or both, in the discretion of the court: Provided, however, nothing herein shall prevent the construction of any dam or weir not otherwise prohibited by any valid local or State statute or regulation. This section may be enforced by specially commissioned forest law-enforcement officers of the Department of Natural Resources and Community Development. In any county with a population in excess of 325,000, this section may also be enforced by the county engineer. (1953, c. 1242; 1957, c. 524; 1959, cc. 160, 1125; 1961, c. 507; 1969, c. 790, s. 1; 1975, c. 509; 1977, c. 771, s. 4; 1979, c. 493, s. 1.)

Effect of Amendments. — The 1979 amendment added the last sentence.

Session Laws 1979, c. 493, s. 2, contains a severability clause.

§§ 77-15 to 77-19: Reserved for future codification purposes.

Article 3.

Lands Adjoining Coastal Waters.

§ 77-20. Seaward boundary of coastal lands.

(a) The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark. Provided, that this section shall not apply where title below the mean high water mark is or has been specifically granted by the State.

(b) Notwithstanding any other provision of law, no agency shall issue any rule or regulation which adopts as the seaward boundary of privately owned property any line other than the mean high water mark. The mean high water

mark also shall be used as the seaward boundary for determining the area of any property when such determination is necessary to the application of any rule or regulation issued by any agency.

(c) For purposes of this Article, "agency" means any part, branch, division, or instrumentality of the State; any county, municipality, or special district; or any commission, committee, council, or board established by the State, or by any county or municipality. (1979, c. 618, s. 2.)

Chapter 78.

Securities Law.

§§ 78-1 to 78-25: Repealed by Session Laws 1973, c. 1380.

Cross References. — See the Editor's note following the analysis to Chapter 78A.

Chapter 78A.

North Carolina Securities Act.

Article 1.

Title and Definitions.

Sec.
78A-1. Title.
78A-2. Definitions.
78A-3 to 78A-7. [Reserved.]

Article 2.

Fraudulent and Other Prohibited Practices.

78A-8. Sales and purchases.
78A-9. Misleading filings.
78A-10. Unlawful representations concerning registration or exemption.
78A-11 to 78A-15. [Reserved.]

Article 3.

Exemptions.

78A-16. Exempt securities.
78A-17. Exempt transactions.
78A-18. Denial and revocation of exemptions.
78A-19 to 78A-23. [Reserved.]

Article 4.

Registration of Securities.

78A-24. Registration requirement.
78A-25. Registration by notification.
78A-26. Registration by coordination.
78A-27. Registration by qualification.
78A-28. Provisions applicable to registration generally.
78A-29. Denial, suspension, and revocation of registration.
78A-30. Application to exchange securities.
78A-31 to 78A-35. [Reserved.]

Article 5.

Registration of Dealers and Salesmen.

Sec.
78A-36. Registration requirement.
78A-37. Registration procedure.
78A-38. Post-registration provisions.
78A-39. Denial, revocation, suspension, cancellation, and withdrawal of registration.
78A-40 to 78A-44. [Reserved.]

Article 6.

Administration and Review.

78A-45. Administration of Chapter.
78A-46. Investigations and subpoenas.
78A-47. Injunctions.
78A-48. Judicial review of orders.
78A-49. Rules, forms, orders, and hearings.
78A-50. Administrative files and opinions.
78A-51 to 78A-55. [Reserved.]

Article 7.

Civil Liabilities and Criminal Penalties.

78A-56. Civil liabilities.
78A-57. Criminal penalties.
78A-58 to 78A-62. [Reserved.]

Article 8.

Miscellaneous Provisions.

78A-63. Scope of the Chapter; service of process.
78A-64. Statutory policy.
78A-65. Repeal and saving provisions.

Editor's Note. — Session Laws 1973, c. 1380, repealed former Chapter 78, Securities Law, and enacted present Chapter 78A in its place. Where appropriate, the historical citations to the sections of repealed Chapter 78 have been added to similar sections in new Chapter 78A.

The cases cited under the various sections below were decided under corresponding sections of former Chapter 78.

Article 1.

Title and Definitions.

§ 78A-1. Title.

This Chapter shall be known and may be cited as the North Carolina Securities Act. (1925, c. 190, s. 1; 1927, c. 149, s. 1; 1943, c. 104, s. 1; 1973, c. 1380.)

Legal Periodicals. — For an article discussing the history of blue sky laws, summarizing the various statutes, and discussing the North Carolina cases, see 3 N.C.L. Rev. 150.

For comment on limited offerings, the federal securities code and increased burdens on the North Carolina Securities Act, see 15 Wake Forest L. Rev. 506 (1979).

CASE NOTES

Chapter Is within Police Power. — The regulation of the sale of securities for the protection of the public is within the police power of the State. State v. Allen, 216 N.C. 621, 5 S.E.2d 844 (1939).

Application of Chapter. — This Chapter applies where money is invested in stock, securities, profit-sharing agreements, etc., with the purpose of securing an income from the employment of the money, and a contract whereby the owner of a copyright system gives the exclusive right to another to operate the system in certain counties, and in return is to receive a percentage of the gross receipts from the operation of the system, with further provision for a division of net profit from sales or contracts written by either party, does not contemplate the placing of money in a way to secure an income from its employment, but the earning of a portion of the gross receipts in return for individual services, and the agreement is not a profit-sharing scheme or investment contract within the intent and meaning of the statute. State v. Heath, 199 N.C. 135, 153 S.E. 855 (1930).

Constitutionality. — It is within the police power of the State to pass a statute for the protection of its citizens against the sale to them of worthless shares of stock in speculative companies in the exercise of a power in the State reserved from that grant to the federal government, and such a statute does not contravene either the State or federal Constitution. State ex rel. Smith v. Fidelity & Deposit Co., 191 N.C. 643, 132 S.E. 792 (1926), error dismissed, 275 U.S. 505, 48 S. Ct. 156, 72 L. Ed. 396 (1927).

The purpose of "Blue Sky Laws" is to protect the general public from "wildcat" organizers, promoters and their agents, whether foreign or domestic, preying upon an unsuspecting and confiding public by selling "blue sky stock," without obtaining license and giving bond. State ex rel. Smith v. Fidelity & Deposit Co., 191 N.C. 643, 132 S.E. 792 (1926), error dismissed, 275 U.S. 505, 48 S. Ct. 156, 72 L. Ed. 396 (1927).

The object of the "Blue Sky Laws" is not only to keep worthless stock off the market but to make actual values and par values correspond. Thus, if the par value of a share of stock is $100.00, the part of the assets of the corporation represented by a share of stock must be worth $100.00. 1 N.C.L. Rev. 27.

§ 78A-2. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Administrator" means the official designated in G.S. 78A-45(a).

(2) "Dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Dealer" does not include:

a. A salesman,

b. A bank, savings institution, or trust company,

c. A person who has no place of business in this State if
   1. He effects transactions in this State exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other dealers, or (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or
   2. In the case of a person registered as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934 and in one or more states, during any period of 12 consecutive months he does not effect more than 15 purchases or sales in this State in any manner with persons other than those specified in clause 1, whether or not the dealer or any of the purchasers or sellers is then present in this State, or

d. An issuer if
   1. The security is exempted under subdivisions (1), (2), (3), (10), (11), (13), or (14) of G.S. 78A-16, or the transaction is exempted under G.S. 78A-17, and such exemption has not been denied or revoked under G.S. 78A-18, or
   2. The security is registered under this Chapter and it is offered and sold through a registered dealer, or
   3. All of the following conditions are met: (i) No commission or other remuneration is paid or given directly or indirectly for soliciting any prospective purchaser in this State, and (ii) the total amount of the offering, and the total number of purchasers, both within and without this State, does not exceed five hundred thousand dollars ($500,000) and 100, respectively.

(3) "Fraud," "deceit," and "defraud" are not limited to common-law deceit.

(4) "Guaranteed" means guaranteed as to payment of principal, interest, or dividends.

(5) "Issuer" means any person who issues or proposes to issue any security, except that
   a. With respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or persons performing similar functions or of the fixed, restricted-management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued; and
   b. With respect to certificates of interest or participation in oil, gas, or mining titles or leases or in payments out of production under such titles or leases, there is not considered to be any "issuer."

(6) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

(7) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

(8) a. "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.

b. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

c. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value.

d. A purported gift of assessable stock is considered to involve an offer and sale.

e. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

f. The terms defined in this subdivision and the term "purchase" as used in this Chapter do not include

1. Any bona fide loan, pledge, or other transaction creating a bona fide security interest;

2. Any stock split and any security dividend, whether the corporation distributing the dividend is the issuer of the security or not, if nothing of value is given by security holders for the dividend other than the surrender of a right to a cash or property dividend when each security holder may elect to take the dividend in cash or property or in securities;

3. Any transaction incident to a class vote by security holders, pursuant to the certificate of incorporation or the applicable corporation statute, on a merger, consolidation, reclassification of securities, or sale of corporate assets in consideration of the issuance of securities of another corporation; or

4. Any transaction incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims or property interests, or partly in such exchange and partly for cash.

(9) "Salesman" means any individual other than a dealer who represents a dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Salesman" does not include an individual who represents an issuer in (i) effecting transactions in a security exempted by subdivisions (1), (2), (3), (10), (11), (13), or (14) of G.S. 78A-16, (ii) effecting transactions exempted by G.S. 78A-17, or (iii) effecting transactions meeting the requirements of G.S. 78A-2(2)d3, or (iv) effecting transactions with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this State. A partner, officer, or director of a dealer or issuer, or a person occupying a similar status or performing similar functions, is a salesman only if he otherwise comes within this definition.

(10) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility Holding Company Act of 1935," "Investment Company Act of 1940," and "Internal Revenue Code" mean the federal statutes of those names as amended before or after April 1, 1975.

(11) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract including without limitation any investment contract taking the form

of a whiskey warehouse receipt or other investment of money in whiskey or malt beverages; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay (i) a fixed sum of money either in a lump sum or periodically for life or for some other specified period, or (ii) benefits or payments or value which vary so as to reflect investment results of any segregated portfolio of investments or of a designated separate account or accounts in which amounts received or retained in connection with any of such contracts have been placed if the delivering or issuing insurance company has currently satisfied the Commissioner of Insurance that it is in compliance with G.S. 58-79.2.

(12) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico. (1925, c. 190, s. 2; 1927, c. 149, s. 2; 1933, c. 432; 1943, c. 104, ss. 2, 3; 1955, c. 436, s. 1; 1973, c. 1380.)

CASE NOTES

The legislature has shown no intent to include both principal and agent transactions within the word "sale." Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

Meaning of "Sale". — See Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

Value of Property Does Not Affect Definition as a Security. — In a prosecution for violation of the Capital Issues Law the fact that the property sold is of little value is irrelevant to the question of whether the property is a security as defined by the statute. State v. Allen, 216 N.C. 621, 5 S.E.2d 844 (1939).

§§ 78A-3 to 78A-7: Reserved for future codification purposes.

Article 2.

Fraudulent and Other Prohibited Practices.

§ 78A-8. Sales and purchases.

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading or,

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. (1973, c. 1380.)

CASE NOTES

Cited in Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978).

§ 78A-9. Misleading filings.

It is unlawful for any person to make or cause to be made, in any document filed with the Administrator or in any proceeding under this Chapter, any statement which is, at the time and in the light of the circumstances under which it is made false or misleading in any material respect. (1973, c. 1380.)

§ 78A-10. Unlawful representations concerning registration or exemption.

(a) Neither (i) the fact that an application for registration under Article 5 or a registration statement under Article 4 has been filed nor (ii) the fact that a person or security is effectively registered constitutes a finding by the Administrator that any document filed under this Chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a security or a transaction means that the Administrator has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, security, or transaction.

(b) It is unlawful to make, or cause to be made, to any prospective purchaser, customer, or client any representation inconsistent with subsection (a). (1973, c. 1380.)

§§ 78A-11 to 78A-15: Reserved for future codification purposes.

Article 3.

Exemptions.

§ 78A-16. Exempt securities.

The following securities are exempted from G.S. 78A-24 and 78A-49(d):

(1) Any security (including a revenue obligation) issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing; or any certificate of deposit for any of the foregoing;

(2) Any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

(3) Any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States, or any bank, savings institution, or trust company organized and supervised under the laws of any state;

(4) Any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association organized under the laws of any state and authorized to do business in this State;

(5) Any security issued by and representing an interest in or a debt of, or guaranteed by, any insurance company organized under the laws of any state and authorized to do business in this State; but this exemption does not apply to an annuity contract, investment contract, or similar security under which the promised payments are not fixed in dollars but are substantially dependent upon the investment results of a segregated fund or account invested in securities unless the issuing or delivering company has satisfied the Commissioner of Insurance that it is in compliance with G.S. 58-79.2;

(6) Any security issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under the laws of this State;

(7) Any security issued or guaranteed by any railroad, other common carrier, public utility, or holding company which is (i) subject to the jurisdiction of the Interstate Commerce Commission; (ii) a registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act; (iii) regulated in respect of its rates and charges by a governmental authority of the United States or any state; or (iv) regulated in respect of the issuance or guarantee of the security by a governmental authority of the United States, any state, Canada, or any Canadian province;

(8) Any security listed or approved for listing upon notice of issuance on the New York Stock Exchange, the American Stock Exchange, the Midwest Stock Exchange or on any other national securities exchange registered under the Securities Exchange Act of 1934 and designated by rule of the Administrator; any other security of the same issuer which is of senior or substantially equal rank; any security called for by subscription rights or warrants so listed or approved; or any warrant or right to purchase or subscribe to any of the foregoing;

(9) Any security issued by any person organized under the laws of this State or having its principal office in this State and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association;

(10) Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited, or any guarantee of such paper or of any such renewal;

(11) Any investment contract and any stock option plan qualified under Subchapter D of Chapter One of Subtitle A of the Internal Revenue Code, or other comparable provision enacted in lieu thereof, and issued in connection with an employees' stock purchase, stock option, savings, pension, profit-sharing, or similar benefit plan;

(12) Any bond or note secured by lien on vessels shown by policies of marine insurance taken out in responsible companies to be of value, after deducting any and all other indebtedness secured by prior lien, of not less than one hundred twenty-five percent (125%) of the par amount of such bonds or notes;

(13) Any capital stock issued by a professional corporation organized pursuant to the provisions of the Professional Corporation Act, Chapter 55B;

(14) Any security issued by (i) any mutual association or agricultural marketing association organized or domesticated and existing under Subchapter IV or Subchapter V, respectively, of Chapter 54 of the General Statutes of North Carolina; or (ii) any electric or telephone

membership corporation organized or domesticated and existing under Chapter 117 of the General Statutes of North Carolina. (1925, c. 190, s. 3; 1927, c. 149, s. 3; 1931, c. 243, s. 5; 1955, c. 436, s. 2; 1967, c. 1233, s. 1; 1973, c. 1380.)

CASE NOTES

Questions of Fact. — The questions of whether debentures of a finance company sold to individuals in this State in a given case are exempted securities and of whether such sales were transactions exempted from the operation and of whether the debentures sold to individuals in this State in a given case were of a class that should have been registered before being offered for sale or sold within this State are questions of fact. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

Questions of Law. — The questions of what securities are exempted securities and of what transactions are exempted from the operation of the Securities Law, and of what securities cannot be offered for sale or sold unless registered are questions of law. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

§ 78A-17. Exempt transactions.

The following transactions are exempted from G.S. 78A-24 and 78A-49(d):

(1) Any isolated nonissuer transaction, whether effected through a dealer or not;

(2) Any nonissuer distribution other than by a controlling person of an outstanding security if

a. A recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within 18 months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, or

b. A registered dealer files with the Administrator such information relating to the issuer as the Administrator may by rule or order require, or

c. The security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security;

(3) Any nonissuer transaction effected by or through a registered dealer pursuant to an unsolicited order or offer to buy; but the Administrator may by rule require that the customer acknowledge upon a specified form that the sale was unsolicited, and that a signed copy of each such form be preserved by the dealer for a specified period;

(4) Any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(5) Any transaction in a bond or other evidence of indebtedness secured by a lien or security interest in real or personal property, or by an agreement for the sale of real estate or chattels, if the entire security interest or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;

(6) Any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(7) Any transaction executed by a person holding a bona fide security interest without any purpose of evading this Chapter;

(8) Any offer or sale to a corporation, bank, savings institution, trust company, insurance company, investment company as defined in the

Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity;

(9) a. Any transaction pursuant to an offer directed by the offeror to not more than 25 persons (other than those designated in subdivision (8)) in this State during any period of 12 consecutive months, whether or not the offeror or any of the offerees is then present in this State, if the seller reasonably believes that all the buyers in this State are purchasing for investment; provided, however, the Administrator may by rule or order as to any security or transaction, withdraw or further condition this exemption; or

b. Any transaction that is exempted from the provisions of section 5 of the Securities Act of 1933 by virtue of any rule, or rules, promulgated, either before or after April 1, 1975, by the Securities and Exchange Commission under section 4(2) of such act;

(10) Any offer or sale of preorganization certificates or subscriptions if (i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber, (ii) the total amount of the offering, and the total number of purchasers, both within and without this State, does not exceed five hundred thousand dollars ($500,000) and 100, respectively, (iii) no certificate or subscription is binding on the subscriber for more than six months after the date of execution of the first certificate or subscription; provided, however, that if a registration statement relating to the securities to be issued is filed under G.S. 78A-27 within such six-month period certificates or subscriptions may continue to be binding on the subscribers until 10 days after such registration statement becomes effective or until effectiveness is denied, and (iv) no payment is made by any subscriber;

(11) Any transaction pursuant to an offer to existing security holders of the issuer, including persons who at the time of the transaction are holders of convertible securities, nontransferable warrants, or transferable warrants exercisable within not more than 90 days of their issuance, if (i) no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this State, or (ii) the issuer first files a notice specifying the terms of the offer and the Administrator does not by order disallow the exemption within the next 10 full business days;

(12) Any offer (but not a sale) of a security for which registration statements have been filed under both this Chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending under either act;

(13) Any offer or sale by a domestic corporation of its own securities if (i) the corporation was organized for the purpose of promoting community, agricultural or industrial development of the area in which the principal office is located, (ii) the offer or sale has been approved by resolution of the county commissioners of the county in which its principal office is located, and, if located in a municipality or within two miles of the boundaries thereof, by resolution of the governing body of such municipality, and (iii) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective buyer in this State;

(14) Any offer, sale or issuance of securities pursuant to an investment contract or stock option plan which is exempt under the provisions of G.S. 78A-16(11) of this Chapter;

(15) Any offer or sale of limited partnership interests in a partnership organized under the North Carolina Uniform Limited Partnership Act for the sole purpose of constructing, owning and operating a low and moderate income rental housing project located in North Carolina if the total amount of the offering and the total number of limited partners, both within and without this State for each such partnership, does not exceed five hundred thousand dollars ($500,000) and 100 respectively. This exemption shall be allowed without limitation as to (i) the number, either in total or within any time period, of separate partnerships which may be formed by the same general partner or partners, sponsors or individuals in which partnership interests are offered; (ii) the period over which such offerings can be made; (iii) the amount of each limited partner's investment; or (iv) the period over which such investment is payable to the partnership. For purposes of this subdivision (15), the term "low and moderate rental housing project" means:

a. Any housing project with respect to which a mortgage is insured or guaranteed under section 221(d)(3) or 221(d)(4) or 236 of the National Housing Act, or any housing project financed or assisted by direct loan, mortgage insurance or guaranty, or tax abatement under similar provisions of federal, State or local laws, whether now existing or hereafter enacted; or

b. Any housing project, some or all of the units of which are available for occupancy by families or individuals eligible to receive subsidies under section 8 of the United States Housing Act of 1937, as amended, or under the provisions of other federal, State or local law authorizing similar levels of subsidy for lower income families, whether now existing or hereafter enacted; or

c. Any housing project with respect to which a loan is made, insured or guaranteed under Title V, section 515, of the Housing Act of 1949, or under similar provisions of other federal, State or local laws, whether now existing or hereafter enacted.

(16) Any offer to purchase or to sell or any sale or issuance of a security pursuant to a plan approved by the Administrator after a hearing conducted pursuant to the provisions of G.S. 78A-30 of this Chapter. (1925, c. 190, s. 4; 1927, c. 149, s. 4; 1935, cc. 90, 154; 1955, c. 436, s. 3; 1959, c. 1185; 1967, c. 1233, ss. 2, 3; 1971, c. 572, s. 1; 1973, c. 1380; 1977, c. 162; c. 610, s. 1; 1979, c. 647, s. 1.)

Effect of Amendments. — The 1979 amendment added subdivision (16).

Legal Periodicals. — For comment on limited offerings, the federal securities code and increased burdens on the North Carolina Securities Act, see 15 Wake Forest L. Rev. 506 (1979).

CASE NOTES

Questions of Fact. — The questions of whether debentures of a finance company sold to individuals in this State in a given case are exempted securities, and of whether such sales were transactions exempted from the operation, and of whether the debentures sold to individuals in this State in a given case were of a class that should have been registered before being offered for sale or sold within this State are questions of fact. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

Questions of Law. — The questions of what securities are exempted securities and of what transactions are exempted from the operation of the Securities Law and of what securities cannot be offered for sale or sold unless registered are questions of law. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

§ 78A-18. Denial and revocation of exemptions.

(a) The Administrator may by order deny or revoke any exemption specified in subdivisions (8), (9), or (11) of G.S. 78A-16 or in 78A-17 with respect to a specific security or transaction. No such order may be entered without appropriate prior notice to all interested parties, opportunity for hearing, and written findings of fact and conclusions of law, except that the Administrator may by order summarily deny or revoke any of the specified exemptions pending final determination of any proceeding under this section. Upon the entry of a summary order, the Administrator shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within 15 days of the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of an opportunity for hearing to all interested persons, may not modify or vacate the order or extend it until final determination. No order under this subsection may operate retroactively. No person may be considered to have violated G.S. 78A-24 or 78A-49(d) by reason of any offer or sale effected after the entry of an order under this subsection if he sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the order.

(b) In any proceeding under this Chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it. (1925, c. 190, ss. 5, 11; 1927, c. 149, ss. 5, 11; 1973, c. 1380; 1975, c. 19, s. 20.)

Legal Periodicals. — For comment on limited offerings, the federal securities code and increased burdens on the North Carolina Securities Act, see 15 Wake Forest L. Rev. 506 (1979).

§§ 78A-19 to 78A-23: Reserved for future codification purposes.

Article 4.

Registration of Securities.

§ 78A-24. Registration requirement.

It is unlawful for any person to offer or sell any security in this State unless (i) it is registered under this Chapter or (ii) the security or transaction is exempted under G.S. 78A-16 or 78A-17 and such exemption has not been denied or revoked under G.S. 78A-18. (1925, c. 190, s. 6; 1927, c. 149, s. 6; 1955, c. 436, s. 4; 1973, c. 1380.)

CASE NOTES

Invalidation of Indemnity Agreement between Broker and Issuer. — If a jury should find that an issuer of securities knowingly participated in the illegal sales of securities by a broker, public policy would prohibit enforcement of the indemnity agreement between the broker and the issuer. Premier Corp. v. Economic Research Analysts, Inc., 578 F.2d 551 (4th Cir. 1978).

Questions of Fact. — The questions of whether debentures of a finance company sold to individuals in this State in a given case are exempted securities and of whether such sales were transactions exempted from the operation and of whether the debentures sold to individuals in this State in a given case were of a class that should have been registered before being offered for sale or sold within this State are

questions of fact. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

Questions of Law. — The questions of what securities are exempted securities and of what transactions are exempted from the operation of the Securities Law and of what securities cannot be offered for sale or sold unless registered are questions of law. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

§ 78A-25. Registration by notification.

(a) The following securities may be registered by notification whether or not they are also eligible for registration by coordination under G.S. 78A-26:

(1) Any security whose issuer and any predecessors have been in continuous operation for at least five years if

a. There has been no default during the current fiscal year or within the three preceding fiscal years in the payment of principal, interest, or dividends on any security of the issuer (or any predecessor) with a fixed maturity or a fixed interest or dividend provision, and

b. The issuer and any predecessors during the past three fiscal years have had average net earnings, determined in accordance with generally accepted accounting practices, (i) which are applicable to all securities without a fixed maturity or a fixed interest or dividend provision outstanding at the date the registration statement is filed and equal at least five percent (5%) of the amount of such outstanding securities (as measured by the maximum offering price or the market price on a day, selected by the registrant, within 30 days before the date of filing the registration statement, whichever is higher, or book value on a day, selected by the registrant, within 90 days of the date of filing the registration statement to the extent that there is neither a readily determinable market price nor a cash offering price), or (ii) which, if the issuer and any predecessors have not had any security of the type specified in clause (i) outstanding for three full fiscal years, equal at least five percent (5%) of the amount (as measured in clause (i)) of all securities which will be outstanding if all the securities being offered or proposed to be offered (whether or not they are proposed to be registered or offered in this State) are issued;

(2) Any security (other than a certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease) registered for nonissuer distribution if (i) any security of the same class has been registered under this Chapter or a predecessor law within five years of the date of filing the registration statement, or (ii) the security being registered was originally issued within five years of the date of filing the registration statement pursuant to an exemption under this Chapter or a predecessor law;

(3) Any bonds or notes secured by a first mortgage upon agricultural lands used and valuable for agricultural purposes (not including oil, gas or mining property or leases) and the principal value of the bonds or notes does not exceed sixty percent (60%) of the then fair market value of the lands and improvements thereon;

(4) Any bonds or notes secured by a first mortgage on city, town, or village real estate situated in any state or in Canada if the principal value of the bonds and notes does not exceed sixty percent (60%) of the fair market value of the land and improvements thereon and the real estate is used principally to produce through rental a net annual income or has a fair net rental value at least equal to the annual interest on the bonds and notes, plus not less than three percent (3%) of the principal of said mortgage indebtedness;

(5) Any bond or note secured by a first lien on collateral pledged as security with a bank or trust company as trustee, which bank or trust company is incorporated under the laws of and subject to examination and supervision by the United States or by a state of the United States, and which collateral shall consist of (i) a principal amount of first mortgage bonds or notes meeting the requirements of G.S. 78A-25(a)(3) or 78A-25(a)(4) or (ii) a principal amount of obligations of the United States or (iii) cash equal to not less than one hundred percent (100%) of the principal secured, or (iv) a principal amount of obligations meeting the requirements of (i), (ii) or (iii) of this subdivision in any combination.

(b) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in G.S. 78A-28(c) and the consent to service of process required by G.S. 78A-63(f):

(1) A statement demonstrating eligibility for registration by notification;
(2) With respect to the issuer and any significant subsidiary: its name, address, and form of organization; the state (or foreign jurisdiction) and the date of its organization; and the general character and location of its business;
(3) With respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution: his name and address; the amount of securities of the issuer held by him as of the date of the filing of the registration statement; and a statement of his reasons for making the offering;
(4) A description of the security being registered;
(5) The information and documents specified in subdivisions (8), (10) and (12) of G.S. 78A-27(b); and
(6) In the case of any registration under G.S. 78A-25(a)(2) which does not also satisfy the conditions of G.S. 78A-25(a)(1), a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement, and a summary of earnings for each of the two fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessors' existence if less than two years.

(c) If no stop order is in effect and no proceeding is pending under G.S. 78A-29, a registration statement under this section automatically becomes effective at three o'clock Raleigh, North Carolina time in the afternoon of the tenth full business day after the filing of the registration statement or the last amendment, or at such earlier time as the Administrator determines. (1927, c. 149, s. 8; 1955, c. 436, s. 6; 1973, c. 1380; 1975, c. 144, s. 1.)

§ 78A-26. Registration by coordination.

(a) Any security for which a registration statement has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination.

(b) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in G.S. 78A-28(c) and the consent to service of process required by G.S. 78A-63(f):

(1) Three copies of the latest form of prospectus filed under the Securities Act of 1933;
(2) A copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument

governing the issuance of the security to be registered, and a specimen or copy of the security;

(3) If the Administrator requests, any other information or copies of any other documents filed under the Securities Act of 1933; and

(4) An undertaking to forward all future amendments to the federal prospectus, other than an amendment which merely delays the effective date of the registration statement, promptly and in any event not later than the first business day after they are forwarded to or filed with the Securities and Exchange Commission, whichever first occurs.

(c) A registration statement under this section automatically becomes effective at the moment the federal registration statement becomes effective if all the following conditions are satisfied: (i) no stop order is in effect and no proceeding is pending under G.S. 78A-29; (ii) the registration statement has been on file with the Administrator for at least 10 days; and (iii) a statement of the maximum proposed offering price and the maximum underwriting discounts and commissions expressed as a percentage of the final offering price has been on file for two full business days or such shorter period as the Administrator permits by rule or otherwise and the offering is made within those limitations. The registrant shall promptly notify the Administrator by telephone or telegram of the date and time when the federal registration statement became effective and the content of the price amendment, if any, and shall promptly file a post-effective amendment containing the information and documents in the price amendment. "Price amendment" means the final federal amendment which includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price. Upon failure to receive the required notification and post-effective amendment with respect to the price amendment, the Administrator may enter a stop order without notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this subsection, if he promptly notifies the registrant by telephone or telegram (and promptly confirms by letter or telegram when he notifies by telephone) of the issuance of the order. If the registrant proves compliance with the requirements of this subsection as to notice and post-effective amendment, the stop order is void as of the time of its entry. The Administrator may by rule or otherwise waive either or both of the conditions specified in clauses (ii) and (iii). If the federal registration statement becomes effective before all the conditions in this subsection are satisfied and they are not waived, the registration statement automatically becomes effective as soon as all the conditions are satisfied. If the registrant advises the Administrator of the date when the federal registration statement is expected to become effective, the Administrator shall promptly advise the registrant by telephone or telegraph, at the registrant's expense, whether all the conditions are satisfied and whether he then contemplates the institution of a proceeding under G.S. 78A-29; but this advice by the Administrator does not preclude the institution of such a proceeding at any time. (1925, c. 190, s. 6; 1927, c. 149, s. 6; 1955, c. 436, s. 4; 1973, c. 1380.)

§ 78A-27. Registration by qualification.

(a) Any security may be registered by qualification upon the following conditions.

(b) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in G.S. 78A-28(c) and the consent to service of process required by G.S. 78A-63(f):

(1) With respect to the issuer and any significant subsidiary: its name, address, and form of organization; the state or foreign jurisdiction and

date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) With respect to every director and officer of the issuer or person occupying a similar status or performing similar functions: his name, address, and principal occupation for the past five years; the amount of securities of the issuer held by him as of a specified date within 30 days of the filing of the registration statement; the amount of the securities covered by the registration statement to which he has indicated his intention to subscribe; and a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected;

(3) With respect to persons covered by subdivision (2): the remuneration paid during the past 12 months or fiscal year and estimated to be paid during the next fiscal year, directly or indirectly, by the issuer (together with all predecessors, parents, subsidiaries, and affiliates) to all those persons in the aggregate;

(4) With respect to any person owning of record or beneficially if known, ten percent (10%) or more of the outstanding shares of any class of equity security of the issuer: the information specified in subdivision (2) other than his occupation;

(5) With respect to every promoter if the issuer was organized within the past three years: the information specified in subdivision (2), any amount paid to him within that period or intended to be paid to him, and the consideration for any such payment;

(6) With respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution: his name and address; the amount of securities of the issuer held by him as of the date of the filing of the registration statement; a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected; and a statement of his reasons for making the offering;

(7) The capitalization and long-term debt (on both current and a pro forma basis) of the issuer and any significant subsidiary including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration (whether in the form of cash, physical assets, services, patents, goodwill, or anything else) for which the issuer or any subsidiary has issued any of its securities within the past three years or is obligated to issue any of its securities;

(8) The kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation therefrom at which any proportion of the offering is to be made to any person or class of persons other than the underwriters, with a specification of any such person or class; the basis upon which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees (including separately, cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering) or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of every underwriter and every recipient of a finder's fee; a copy of any underwriting or selling-group agreement pursuant to which the dis-

tribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter;

(9) The estimated cash proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amount of any funds to be raised from other sources to achieve the purposes stated; the sources of any such funds; and, if any part of the proceeds is to be used to acquire any property (including goodwill) otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons who have received commissions in connection with the acquisition, and the amounts of any such commissions and any other expense in connection with the acquisition (including the cost of borrowing money to finance the acquisition);

(10) A description of any stock options or other security options outstanding, or to be created in connection with the offering, together with the amount of any such options held or to be held by every person required to be named in subdivisions (2), (4), (5), (6), or (8) and by any person who holds or will hold ten percent (10%) or more in the aggregate of any such options;

(11) The dates of, parties to, and general effect concisely stated of, every management or other material contract made or to be made otherwise than in the ordinary course of business if it is to be performed in whole or in part at or after the filing of the registration statement or was made within the past two years, together with a copy of every such contract; and a description of any pending litigation or proceeding to which the issuer is a party and which materially affects its business or assets (including any such litigation or proceeding known to be contemplated by governmental authorities);

(12) A copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering;

(13) A specimen or copy of the security being registered; a copy of the issuer's articles of incorporation and bylaws, or their substantial equivalents, as currently in effect; and a copy of any indenture or other instrument covering the security to be registered;

(14) A signed or conformed copy of an opinion of counsel as to the legality of the security being registered (with an English translation if it is in a foreign language), which shall state whether the security when sold will be legally issued, fully paid, and nonassessable, and, if a debt security, a binding obligation of the issuer;

(15) The written consent of any accountant, engineer, appraiser, or other person whose profession gives authority to a statement made by him, if any such person is named as having prepared or certified a report or valuation (other than a public and official document or statement) which is used in connection with the registration statement;

(16) A balance sheet of the issuer as of a date within four months prior to the filing of the registration statement; a profit and loss statement and analysis of surplus for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessors' existence if less than three years; and, if any part of the proceeds of the offering is to be applied to the purchase of any business, the same financial statements which would be required if that business were the registrant; and

(17) Such additional information as the Administrator requires by rule or order.

(c) A registration statement under this section becomes effective when the Administrator so orders.

(d) The Administrator may by rule or order require as a condition of registration under this section that a prospectus containing any designated part of the information specified in subsection (b) be sent or given to each person to whom an offer is made before or concurrently with (i) the first written offer made to him (otherwise than by means of a public advertisement) by or for the account of the issuer or any other person on whose behalf the offering is being made, or by any underwriter or dealer who is offering part of an unsold allotment or subscription taken by him as a participant in the distribution, (ii) the confirmation of any sale made by or for the account of any such person, (iii) payment pursuant to any such sale, or (iv) delivery of the security pursuant to any such sale, whichever first occurs. (1927, c. 149, s. 9; 1955, c. 436, s. 7; 1973, c. 1380; 1975, c. 19, s. 21.)

§ 78A-28. Provisions applicable to registration generally.

(a) A registration statement may be filed by the issuer, any other person on whose behalf the offering is to be made, or a registered dealer.

(b) Every person filing a registration statement shall pay a filing fee of twenty-five dollars ($25.00), plus a registration fee of one tenth of one percent (1/10 of 1%) of the maximum aggregate offering price at which the registered securities are to be offered in this State, but the registration fee shall in no case be less than twenty-five dollars ($25.00) or more than two hundred fifty dollars ($250.00). When a registration statement is withdrawn before the effective date or a preeffective stop order is entered under G.S. 78A-29, the Administrator shall retain the filing fee. In the case of a registration statement relating to a security issued by a face-amount certificate company or a redeemable security issued by an open-end management company, unit investment trust, mutual fund or limited partnership interest, the Administrator may by rule or order prescribe the maximum amount of securities, but in no event less than two hundred fifty thousand dollars ($250,000), that may be offered upon payment of the maximum registration fee, and prescribe different amounts for different classes of issuers.

(c) Every registration statement shall specify (i) the amount of securities to be offered in this State; (ii) the states in which a registration statement or similar document in connection with the offering has been or is expected to be filed; and (iii) any adverse order, judgment, or decree entered in connection with the offering by the regulatory authorities in each state or by any court or the Securities and Exchange Commission.

(d) Any document filed under this Chapter or a predecessor law within five years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the document is currently accurate.

(e) The Administrator may by rule or otherwise permit the omission of any item of information or document from any registration statement.

(f) In the case of a nonissuer distribution, information may not be required under G.S. 78A-27 or 78A-28(i) unless it is known to the person filing the registration statement or to the persons on whose behalf the distribution is to be made, or can be furnished by them without unreasonable effort or expense.

(g) The Administrator may by rule or order require as a condition of registration by qualification or coordination (i) that any security issued within the past three years or to be issued to a promoter for a consideration substantially different from the public offering price, or to any person for a consideration other than cash, be deposited in escrow; and (ii) that the proceeds from the sale

of the registered security in this State be impounded until the issuer receives a specified amount from the sale of the securities either in this State or elsewhere. The Administrator may by rule or order determine the conditions of any escrow or impounding required hereunder, but he may not reject a depository solely because of location in another state.

(h) Every registration statement is effective for one year from its effective date, or any longer period during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by any underwriter or dealer who is still offering part of an unsold allotment or subscription taken by him as a participant in the distribution, except during the time a stop order is in effect under G.S. 78A-29. All outstanding securities of the same class as a registered security are considered to be registered for the purpose of any nonissuer transaction (i) so long as the registration statement is effective and (ii) between the thirtieth day after the entry of any stop order suspending or revoking the effectiveness of the registration statement under G.S. 78A-29 (if the registration statement did not relate in whole or in part to a nonissuer distribution) and one year from the effective date of the registration statement. A registration statement may not be withdrawn for one year from its effective date if any securities of the same class are outstanding. A registration statement may be withdrawn otherwise only in the discretion of the Administrator.

(i) So long as a registration statement is effective, the Administrator may by rule or order require the person who filed the registration statement to file reports, not more often than quarterly, to keep reasonably current the information contained in the registration statement and to disclose progress of the offering.

(j) A registration statement filed in accordance with subsection (j) of this section may be amended after its effective date so as to increase the securities specified as proposed to be offered. Such an amendment becomes effective when the Administrator so orders. Every person filing such an amendment shall pay a registration fee, calculated in the manner specified in subsection (b), and such filing fee not to exceed twenty-five dollars ($25.00) as the Administrator may by rule or order require, with respect to the additional securities proposed to be offered. (1973, c. 1380; 1979, 2nd Sess., c. 1148, s. 1.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, substituted "unit investment trust, mutual fund or limited partnership interest," for "or unit investment trust, as those terms are defined in the Investment Company Act of 1940," and made a minor change in punctuation in the last sentence of subsection (b), and substituted "filed in accordance with subsection (j) of this section" for "relating to a security issued by a face-amount certificate company or a redeemable security issued by an open-end management company or unit investment trust, as those terms are defined in the Investment Company Act of 1940," in the first sentence of subsection (j).

§ 78A-29. Denial, suspension, and revocation of registration.

(a) The Administrator may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any registration statement if he finds

(1) That the order is in the public interest and

(2) That:

a. The registration statement as of its effective date or as of any earlier date in the case of an order denying effectiveness, or any amendment under G.S. 78A-28(j) as of its effective date, or any

report under G.S. 78A-28(i) is incomplete in any material respect or contains any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact; or

b. Any provision of this Chapter or any rule, order, or condition lawfully imposed under this Chapter has been willfully violated, in connection with the offering, by (i) the person filing the registration statement, (ii) the issuer, any partner, officer, or director of the issuer, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer, or (iii) any underwriter; or

c. The security registered or sought to be registered is the subject of an administrative stop order or similar order or a permanent or temporary injunction of any court of competent jurisdiction entered under any other federal or state act applicable to the offering; but (i) the Administrator may not institute a proceeding against an effective registration statement under paragraph c more than one year from the date of the order or injunction relied on, and (ii) he may not enter an order under paragraph c on the basis of an order or injunction entered under any other state act unless that order or injunction was based on facts which would currently constitute a ground for a stop order under this section; or

d. The issuer's enterprise or method of business includes or would include activities which are illegal where performed; or

e. The offering has worked or tended to work a fraud upon purchasers or would so operate; or

f. The offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options; or

g. When a security is sought to be registered by notification, it is not eligible for such registration; or

h. When a security is sought to be registered by coordination, there has been a failure to comply with the undertaking required by G.S. 78A-26(b)(4); or

i. The applicant or registrant has failed to pay the proper fees; but the Administrator may enter only a denial order under this paragraph and he shall vacate any such order when the deficiency has been corrected.

The Administrator may not institute a stop-order proceeding against an effective registration statement on the basis of a fact or transaction known to him when the registration statement became effective unless the proceeding is instituted within the next 30 days.

(b) The following provisions govern the application of G.S. 78A-29(a)(2)f:

(1) The Administrator may not enter a stop order against a registration statement based on one or more of the grounds set forth in paragraph f of G.S. 78A-29(a)(2) if the offering, or the dealer, or any dealers, making or participating in the offering, is subject to rules, promulgated by any national securities association registered with the Securities and Exchange Commission pursuant to section 15A of the Securities Exchange Act of 1934, providing safeguards against unreasonable profits or unreasonable rates or commissions or other charges, and such rules are complied with.

(2) The Administrator may by rule or order require such evidence of compliance with such rules as he may deem advisable.

(c) The Administrator may by order summarily postpone or suspend the effectiveness of the registration statement pending final determination of any proceeding under this section. Upon the entry of the order, the Administrator shall promptly notify each person specified in subsection (d) that it has been entered and of the reasons therefor and that within 15 days after the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of an opportunity for hearing to each person specified in subsection (d), may modify or vacate the order or extend it until final determination.

(d) No stop order may be entered under any part of this section except the first sentence of subsection (c) without (i) appropriate prior notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered, (ii) opportunity for hearing, and (iii) written findings of fact and conclusions of law.

(e) The Administrator may vacate or modify a stop order if he finds that the conditions which prompted entry have changed or that it is otherwise in the public interest to do so. (1973, c. 1380.)

§ 78A-30. Application to exchange securities.

(a) When application is made for approval to issue securities or to deliver other consideration (whether or not the security or transaction is exempt from registration or qualification other than by the provisions of G.S. 78A-17(16) or not required to be qualified) in exchange for one or more bona fide securities, claims, or property interests, or partly in such exchange and partly in cash, the Administrator is expressly authorized to approve the terms and conditions of such issuance and exchange or such delivery and exchange and the fairness of such terms and conditions, and is expressly authorized to hold a hearing upon the fairness of such terms and conditions, at which all persons to whom it is proposed to issue securities or to deliver such other consideration in such exchange have the right to appear. Notice of such hearing shall be mailed by United States Mail, Postage Prepaid, to all persons to whom it is proposed to issue securities or to deliver such other consideration in such exchange, not less than 10 days prior to such hearing, and such notice shall be effective upon mailing. The application for approval to issue securities or to deliver other consideration shall be in such form, contain such information and be accompanied by such documents as shall be required by rule or order of the Administrator.

(b) The Administrator shall be required to hold a hearing on an application for approval within 30 days after the filing of the application and supporting documents required by rule of the Administrator.

(c) Within 10 days after holding the hearing under subsection (a), the Administrator shall issue his approval or a statement that his approval will not be forthcoming.

(d) The Administrator's authority under this section shall extend to the issuance of securities or the delivery of other consideration:

(1) By any corporation organized under the laws of this State; or

(2) In any transaction which is subject to the registration or qualification requirements of this Chapter or which would be so subject except for the availability of an exemption under G.S. 78A-16 or 78A-17 or by reason of G.S. 78A-2(8)(f).

(e) The provisions of this section shall be permissive only and no request for approval, failure to request approval, withdrawal of a request for approval, or

denial of approval by the Administrator shall affect the availability of any exemption from the registration or qualification requirements other than the exemption available under G.S. 78A-17(16), and shall not be admissible as evidence in any legal or administrative proceeding.

(f) This section is intended to provide for a fairness hearing before the Administrator with respect to transactions which, if approved by the Administrator, would be exempt from the registration requirements of the federal securities laws under section 3(a)(10) of the Securities Act of 1933, or any section comparable thereto which may subsequently be enacted. (1979, c. 647, ss. 2, 3.)

§§ 78A-31 to 78A-35: Reserved for future codification purposes.

Article 5.

Registration of Dealers and Salesmen.

§ 78A-36. Registration requirement.

(a) It is unlawful for any person to transact business in this State as a dealer or salesman unless he is registered under this Chapter. No dealer shall be eligible for registration under this Chapter, or for renewal of registration hereunder, unless such dealer is at the time registered as a dealer with the Securities and Exchange Commission under the Securities Exchange Act of 1934; any dealer specializing in church securities may be registered to offer or sell only those securities which are issued by churches located within this State.

(b) It is unlawful for any dealer or issuer to employ a salesman unless the salesman is registered. The registration of a salesman is not effective during any period when he is not associated with a particular dealer registered under this Chapter or a particular issuer. When a salesman begins or terminates those activities which make him a salesman, the salesman as well as the dealer or issuer shall promptly notify the Administrator.

The Administrator may by rule or order require the return of a salesman's license upon the termination of those activities which make him a salesman or, if such return is impossible, require a bond or evidence satisfactory to the Administrator of such impossibility.

(c) Every registration expires on the thirty-first day of March of each year (or such other date not more than one year from its effective date as the Administrator may by rule or order provide) unless renewed. (1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1975, c. 144, s. 2; 1979, 2nd Sess., c. 1148, s. 2.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, added at the end of subsection (a) "any dealer specializing in church securities may be registered to offer or sell only those securities which are issued by churches located within this State."

§ 78A-37. Registration procedure.

(a) A dealer or salesman may obtain an initial or renewal registration by filing with the Administrator an application together with a consent to service of process pursuant to G.S. 78A-63(f). The application shall contain whatever information the Administrator by rule requires concerning such matters as (i) the applicant's form and place of organization; (ii) the applicant's proposed method of doing business; (iii) the qualifications and business history of the

applicant; in the case of a dealer, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the dealer, and a representation that the applicant dealer is duly registered as a dealer under the Securities Exchange Act of 1934; (iv) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony; and (v) the applicant's financial condition and history. If no denial order is in effect and no proceeding is pending under G.S. 78A-39, registration becomes effective at noon of the thirtieth day after an application is filed. The Administrator may by rule or order specify an earlier effective date, and he may by order defer the effective date until noon of the thirtieth day after the filing of any amendment. Registration of a dealer automatically constitutes registration of any salesman who is a partner, officer, or director, or a person occupying a similar status or performing similar functions.

(b) Every applicant for initial or renewal registration shall pay a filing fee of fifty dollars ($50.00) in the case of a dealer and ten dollars ($10.00) in the case of a salesman. The Administrator may by rule reduce the registration fee proportionately when the registration will be in effect for less than a full year.

(c) A registered dealer may file an application for registration of a successor, whether or not the successor is then in existence, for the unexpired portion of the year. There shall be no filing fee.

(d) The Administrator may by rule require registered dealers and salesmen to post surety bonds in amounts up to ten thousand dollars ($10,000), and may determine their conditions. Any appropriate deposit of cash or securities shall be accepted in lieu of any bond so required. No bond may be required of any registrant whose net capital, which may be defined by rule, exceeds twenty-five thousand dollars ($25,000). Every bond shall provide for suit thereon by any person who has a cause of action under G.S. 78A-56 and, if the Administrator by rule or order requires, by any person who has a cause of action not arising under this Chapter. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought within two years after the sale or other act upon which it is based. (1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380.)

§ 78A-38. Post-registration provisions.

(a) Every registered dealer shall make and keep such accounts, correspondence, memoranda, papers, books, and other records as the Administrator by rule prescribes. All records so required shall be preserved for three years unless the Administrator by rule prescribes otherwise for particular types of records.

(b) Every registered dealer shall file such financial reports as the Administrator by rule prescribes.

(c) If the information contained in any document filed with the Administrator is or becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a correcting amendment unless notification of the correction has been given under G.S. 78A-36(b).

(d) All the records referred to in subsection (a) are subject at any time or from time to time to such reasonable periodic, special, or other examinations by representatives of the Administrator, within or without this State, as the Administrator deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication of examinations, the Administrator, insofar as he deems it practicable in administering this subsection, may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and any national securities exchange or national securities association registered under the Securi-

ties Exchange Act of 1934. (1925, c. 190, ss. 14, 15; 1927, c. 149, ss. 14, 15; 1973, c. 1380.)

§ 78A-39. Denial, revocation, suspension, cancellation, and withdrawal of registration.

(a) The Administrator may by order deny, suspend, or revoke any registration if he finds

(1) That the order is in the public interest and

(2) That the applicant or registrant or, in the case of a dealer, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the dealer:

a. Has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in light of the circumstances under which it was made, false or misleading with respect to any material fact; or

b. Has willfully violated or willfully failed to comply with any provision of this Chapter or a predecessor law or any rule or order under this Chapter or a predecessor law; or

c. Has been convicted, within the past 10 years, of any misdemeanor involving a security or any aspect of the securities business, or any felony; or

d. Is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business; or

e. Is the subject of an order of the Administrator denying, suspending, or revoking registration as a dealer or salesman; or

f. Is the subject of an order entered within the past five years by the securities administrator of any other state or by the Securities and Exchange Commission denying or revoking registration as a dealer or salesman, or the substantial equivalent of those terms as defined in this Chapter, or is the subject of an order of the Securities and Exchange Commission suspending or expelling him from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States post office fraud order; but (i) the Administrator may not institute a revocation or suspension proceeding under subdivision (2)f of subsection (a) more than one year from the date of the order relied on, and (ii) he may not enter an order under subdivision (2)f of subsection (a) on the basis of an order under another state act unless that order was based on facts which would currently constitute a ground for an order under this section; or

g. Has engaged in dishonest or unethical practices in the securities business; or

h. Is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature; but the Administrator may not enter an order against a dealer under this paragraph without a finding of insolvency as to the dealer; or

i. Is not qualified on the basis of such factors as training, experience, and knowledge of the securities business, except as otherwise provided in subsection (b).

The Administrator may by order deny, suspend, or revoke any registration if he finds

(1) That the order is in the public interest and

(2) That the applicant or registrant:

a. Has failed reasonably to supervise his salesmen if he is a dealer; or

b. Has failed to pay the proper filing fee; but the Administrator may enter only a denial order under this clause, and he shall vacate any such order when the deficiency has been corrected.

The Administrator may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to him when registration became effective unless the proceeding is instituted within the next 30 days.

(b) The following provisions govern the application of G.S. 78A-39(a)(2)i:

(1) The Administrator may not enter an order against a dealer on the basis of the lack of qualification of any person other than (i) the dealer himself if he is an individual or (ii) a salesman of the dealer.

(2) The Administrator may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge or both or, in the case of a dealer if he is registered and in good standing under the Securities Exchange Act of 1934.

(3) The Administrator shall consider that a salesman who will work under the supervision of a registered dealer need not have the same qualifications as a dealer.

(4) The Administrator may by rule provide for an examination which may be written or oral or both, to be taken by any class of or all applicants.

(c) The Administrator may by order summarily postpone or suspend registration pending final determination of any proceeding under this section. Upon the entry of the order, the Administrator shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is a salesman, that it has been entered and of the reasons therefor and that within 15 days after the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the Administrator, the order will remain in effect until it is modified or vacated by the Administrator. If a hearing is requested or ordered, the Administrator, after notice of and opportunity for hearing, may modify or vacate the order or extend it until final determination.

(d) If the Administrator finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as a dealer or salesman, or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the Administrator may by order cancel the registration or application.

(e) Withdrawal from registration as a dealer or salesman becomes effective 30 days after receipt of an application to withdraw or within such shorter period of time as the Administrator may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 30 days after the application is filed. If a proceeding is pending or instituted, withdrawal becomes effective at such time and upon such conditions as the Administrator by order determines. If no proceeding is pending or instituted and withdrawal automatically becomes effective, the Administrator may nevertheless institute a revocation or suspension proceeding under G.S. 78A-39(a)(2)b within one year after withdrawal became effective and enter a revocation or suspension order as of the last date on which registration was effective.

(f) No order may be entered under any part of this section except the first sentence of subsection (c) without (i) appropriate prior notice to the applicant or registrant (as well as the employer or prospective employer if the applicant

or registrant is a salesman), (ii) opportunity for hearing, and (iii) written findings of fact and conclusions of law. (1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380.)

§§ 78A-40 to 78A-44: Reserved for future codification purposes.

ARTICLE 6.

Administration and Review.

§ 78A-45. Administration of Chapter.

(a) This Chapter shall be administered by the Secretary of State and such deputies and assistants as he shall designate. The Secretary of State may appoint such clerks and other assistants as may from time to time be needed.

(b) It is unlawful for the Administrator or any of his officers or employees to use for personal benefit any information which is filed with or obtained by the Administrator and which is not made public. No provision of this Chapter authorizes the Administrator or any of his officers or employees to disclose any such information except among themselves or when necessary or appropriate in a proceeding or investigation under this Chapter. No provision of this Chapter either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under a subpoena directed to the Administrator or any of his officers or employees.

(c) All fees provided for under this Chapter shall be collected by the Administrator and shall be paid over to the State Treasurer to go into the general fund. (1925, c. 190, ss. 20, 21; 1927, c. 149, ss. 20, 21; 1973, c. 1380.)

§ 78A-46. Investigations and subpoenas.

(a) The Administrator in his discretion

(1) May make such public or private investigations within or outside of this State as he deems necessary to determine whether any person has violated or is about to violate any provision of this Chapter or any rule or order hereunder, or to aid in the enforcement of this Chapter or in the prescribing of rules and forms hereunder,

(2) May require or permit any person to file a statement in writing, under oath or otherwise as the Administrator determines, as to all the facts and circumstances concerning the matter to be investigated, and

(3) May publish information concerning any violation of this Chapter or any rule or order hereunder.

(b) For the purpose of any investigation or proceeding under this Chapter, the Administrator or any officer designated by him may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the Administrator deems relevant or material to the inquiry.

(c) In case of contumacy by, or refusal to obey a subpoena issued to any person, any court of competent jurisdiction, upon application by the Administrator, may issue to the person an order requiring him to appear before the Administrator, or the officer designated by him, there to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as a contempt of court.

(d) Repealed by Session Laws 1977, c. 610, s. 2, effective April 1, 1978. (1925, c. 190, s. 16; 1927, c. 149, s. 16; 1973, c. 1380; 1977, c. 610, s. 2.)

§ 78A-47. Injunctions.

Whenever it appears to the Administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter or any rule or order hereunder, he may in his discretion bring an action in any court of competent jurisdiction to enjoin the acts or practices and to enforce compliance with this Chapter or any rule or order hereunder. Upon a proper showing a permanent or temporary injunction, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's assets. The court may not require the Administrator to post a bond. (1925, c. 190, s. 16; 1927, c. 149, s. 16; 1973, c. 1380.)

CASE NOTES

Cited in Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978).

§ 78A-48. Judicial review of orders.

(a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the superior court of any county by filing in court, within 60 days after the entry of the order, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator, and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearing before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The Administrator may modify his findings and order by reason of the additional evidence together with any modified or new findings or order. The judgment of the court is final, subject to review by the Court of Appeals.

(b) The commencement of proceedings under subsection (a) does not, unless specifically ordered by the court, operate as a stay of the Administrator's order. (1925, c. 190, s. 18; 1927, c. 149, s. 18; 1973, c. 1380; 1977, c. 610, s. 3.)

§ 78A-49. Rules, forms, orders, and hearings.

(a) The Administrator may from time to time make, amend, and rescind such rules, forms, and orders as are necessary to carry out the provisions of this Chapter, including rules and forms governing registration statements, applications, and reports, and defining any terms, whether or not used in this Chapter, insofar as the definitions are not inconsistent with the provisions of this Chapter. For the purpose of rules and forms the Administrator may classify securi-

ties, persons, and matters within his jurisdiction, and prescribe different requirements for different classes.

(b) No rule, form, or order may be made, amended, or rescinded unless the Administrator finds that the action is necessary or appropriate in the public interest or for the protection of investors and consistent with the purposes fairly intended by the policy and provisions of this Chapter. In prescribing rules and forms the Administrator may cooperate with the securities administrators of the other states and the Securities and Exchange Commission with a view to effectuating the policy of this statute to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever practicable.

(c) The Administrator may by rule or order prescribe (i) the form and content of financial statements required under this Chapter, (ii) the circumstances under which consolidated financial statements shall be filed, and (iii) whether any required financial statements shall be certified by independent or certified public accountants. All financial statements shall be prepared in accordance with generally accepted accounting practices.

(d) The Administrator may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, unless the security or transaction is exempted by G.S. 78A-16 or 78A-17 and such exemption has not been denied or revoked under G.S. 78A-18.

(e) All rules and forms of the Administrator shall be published.

(f) No provision of this Chapter imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the Administrator, notwithstanding that the rule, form, or order may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(g) Every hearing in an administrative proceeding shall be public unless the Administrator in his discretion grants a request joined in by all the respondents that the hearing be conducted privately. (1925, c. 190, s. 11; 1927, c. 149, s. 11; 1973, c. 1380.)

§ 78A-50. Administrative files and opinions.

(a) A document is filed when it is received by the Administrator.

(b) The Administrator shall keep a register of all applications for registration and registration statements which are or have been effective under this Chapter and all denial, suspension, or revocation orders which have been entered under this Chapter. The register shall be open for public inspection.

(c) The information contained in or filed with any registration statement, application, or report may be made available to the public under such rules as the Administrator prescribes.

(d) Upon request and at such reasonable charges as he prescribes, the Administrator shall furnish to any person photostatic or other copies (certified under his seal of office if requested) of any entry in the register or any document which is a matter of public record. In any proceeding or prosecution under this Chapter, any copy so certified is prima facie evidence of the contents of the entry or document certified.

(e) The Administrator in his discretion may honor requests from interested persons for interpretative opinions. When an exemption is claimed in writing, cites the section relied upon, and is considered eligible upon the showing made, a "no action" letter will be furnished upon request and upon the payment of a fee of ten dollars ($10.00). (1925, c. 190, s. 17; 1927, c. 149, s. 17; 1955, c. 436, s. 8; 1973, c. 1380; 1979, 2nd Sess., c. 1148, s. 3.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, added the second sentence of subsection (e).

§§ 78A-51 to 78A-55: Reserved for future codification purposes.

Article 7.

Civil Liabilities and Criminal Penalties.

§ 78A-56. Civil liabilities.

(a) Any person who

(1) Offers or sells a security in violation of G.S. 78A-10(b), 78A-24, or 78A-36(a), or of any rule or order under G.S. 78A-49(d) which requires the affirmative approval of sales literature before it is used, or of any condition imposed under G.S. 78A-27(d) or 78A-28(g), or

(2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the purchaser not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and did not act in reckless disregard, of the untruth or omission, is liable to the person purchasing the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent (6%) per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate from the date of disposition.

(b) Any person who purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the seller not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, shall be liable to the person selling the security to him, who may sue either at law or in equity to recover the security, plus any income received by the purchaser thereon, upon tender of the consideration received, or for damages if the purchaser no longer owns the security. Damages are the excess of the value of the security when the purchaser disposed of it, plus interest at the legal rate from the date of disposition, over the consideration paid for the security.

(c) Every person who directly or indirectly controls a person liable under subsection (a) or (b), every partner, officer, or director of such a person, every person occupying a similar status or performing similar functions, every employee of such a person who materially aids in the act or transaction, and every dealer or salesman who materially aids in the sale are also liable jointly and severally with and to the same extent as such person, unless the person who is so liable sustains the burden of proof that he did not know, and did not act in reckless disregard, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(d) Any tender specified in this section may be made at any time before entry of judgment. Tender shall require only notice of willingness to exchange the security for the amount specified. Any notice may be given by service as in civil actions or by certified mail addressed to the last known address of the person liable.

(e) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(f) No person may sue under this section more than two years after the sale or contract of sale.

(g) (1) No purchaser may sue under this section if, before suit is commenced, the purchaser has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the purchaser of his rights; offering to repurchase the security for cash payable on delivery of the security equal to the consideration paid, together with interest at six percent (6%) per year from the date of payment, less the amount of any income received on the security or, if the purchaser no longer owns the security, offering to pay the purchaser upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (a); and stating that the offer may be accepted by the purchaser at any time within 30 days of its receipt; and the purchaser has failed to accept such offer in writing within the specified period.

(2) No seller may sue under this section if, before suit is commenced, the seller has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the seller of his rights; offering to return the security plus the amount of any income received thereon upon payment of the consideration received, or, if the purchaser no longer owns the security, offering to pay the seller upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (b); and providing that the offer may be accepted by the seller at any time within 30 days of its receipt; and the seller has failed to accept such offer in writing within the specified period.

(3) Offers shall be in the form and contain the information the Administrator by rule prescribes. Every offer under subsection (g) shall be delivered to the offeree or sent by certified mail addressed to him at his last known address. If an offer is not performed in accordance with its terms, suit by the offeree under this section shall be permitted without regard to this subsection.

(h) No person who has made or engaged in the performance of any contract in violation of any provision of this Chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(i) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this Chapter or any rule or order hereunder is void.

(j) The rights and remedies provided by this Chapter are in addition to any other rights or remedies that may exist at law or in equity, but this Chapter does not create any cause of action not specified in this section or G.S. 78A-37(d). (1925, c. 190, s. 23; 1927, c. 149, s. 23; 1955, c. 436, s. 10; 1971, c. 572, s. 2; 1973, c. 1380; 1975, c. 19, s. 22; c. 144, s. 3; 1977, c. 781, s. 2.)

Legal Periodicals. — For survey of 1974 case law on securities fraud, see 53 N.C.L. Rev. 1104 (1975).

CASE NOTES

Invalidation of Indemnity Agreement between Broker and Issuer. — If a jury should find that an issuer of securities knowingly participated in the illegal sales of securities by a broker, public policy would prohibit enforcement of the indemnity agreement between the broker and the issuer. Premier Corp. v. Economic Research Analysts, Inc., 578 F.2d 551 (4th Cir. 1978).

§ 78A-57. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter except G.S. 78A-9, or who willfully violates any rule or order under this Chapter, or who willfully violates G.S. 78A-9 knowing the statement made to be false or misleading in any material respect, shall upon conviction be fined not more than five thousand dollars ($5,000) or imprisoned in the State prison not more than five years, or both; but no person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter or of any rule or order hereunder to the Attorney General or the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime by statute or at common law. (1925, c. 190, s. 23; 1927, c. 149, s. 23; 1955, c. 436, s. 10; 1971, c. 572, s. 2; 1973, c. 47, s. 2; c. 1380.)

CASE NOTES

Corporate Officers and Agents May Be Held Criminally Liable Individually. — Any officers, directors, or agents of a corporation actively participating in a violation of the provisions of this section in the conduct of the company's business, or which such conduct they have actively directed, may be held criminally liable individually therefor. State v. Franks, 262 N.C. 94, 136 S.E.2d 623 (1964).

§§ 78A-58 to 78A-62: Reserved for future codification purposes.

Article 8.

Miscellaneous Provisions.

§ 78A-63. Scope of the Chapter; service of process.

(a) Sections 78A-8, 78A-10, 78A-24, 78A-36(a), and 78A-56 apply to persons who sell or offer to sell when (i) an offer to sell is made in this State, or (ii) an offer to buy is made and accepted in this State.

(b) Sections 78A-8, 78A-10, 78A-36(a) and 78A-56(b) apply to persons who buy or offer to buy when (i) an offer to buy is made in this State, or (ii) an offer to sell is made and accepted in this State.

(c) For the purpose of this section, an offer to sell or to buy is made in this State, whether or not either party is then present in this State, when the offer (i) originates from this State or (ii) is directed by the offeror to this State and received at the place to which it is directed (or at any post office in this State in the case of a mailed offer).

(d) For the purpose of this section, an offer to buy or to sell is accepted in this State when acceptance (i) is communicated to the offeror in this State and (ii) has not previously been communicated to the offeror, orally, or in writing, outside this State; and acceptance is communicated to the offeror in this State, whether or not either party is then present in this State when the offeree directs it to the offeror in this State reasonably believing the offeror to be in this State and it is received at the place to which it is directed (or at any post office in this State in the case of a mailed acceptance).

(e) An offer to sell or to buy is not made in this State when (i) the publisher circulates or there is circulated on his behalf in this State any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this State, or which is published in this State but has had more than two thirds of its circulation outside this State during the past 12 months, or (ii) a radio or television program originating outside this State is received in this State.

(f) Every applicant for registration under this Chapter and every issuer who proposes to offer a security in this State through any person acting on an agency basis in the common-law sense shall file with the Administrator, in such form as he by rule prescribes, an irrevocable consent appointing the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against him or his successor, executor or administrator which arises under this Chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. A person who has filed such a consent in connection with a previous registration need not file another. Service may be made by leaving a copy of the process in the office of the Administrator, but it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his address on file with the Administrator, and (ii) the plaintiff's affidavit of compliance with the subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(g) When any person, including any nonresident of this State, engages in conduct prohibited or made actionable by this Chapter or any rule or order hereunder, and he has not filed a consent to service of process under subsection (f) and personal jurisdiction over him cannot otherwise be obtained in this State, that conduct shall be considered equivalent to his appointment of the Administrator or his successor in office to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this Chapter or any rule or order hereunder with the same force and validity as if served on him personally. Service may be made by leaving a copy of the process in the office of the Administrator, and it is not effective unless (i) the plaintiff, who may be the Administrator in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and (ii) the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(h) When process is served under this section, the court, or the Administrator in a proceeding before him, shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

(i) Interest charged by a broker or dealer registered under the Securities Exchange Act of 1934, as amended, or registered under this Chapter, as now or hereafter amended, on a debit balance in an account for a customer, shall

be exempt from the provisions of Chapter 24 of the North Carolina General Statutes if such debit balance is payable at will without penalty and is secured by securities as defined in the Uniform Commercial Code, Article 8, Investment Securities, G.S. 25-8-101 through 25-8-406. (1927, c. 149, s. 24; 1955, c. 436, s. 10; 1973, c. 1380; 1975, c. 144, s. 4.)

§ 78A-64. Statutory policy.

This Chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this Chapter with the related federal regulation. (1973, c. 1380.)

§ 78A-65. Repeal and saving provisions.

(a) The Securities Law of the State of North Carolina, G.S. 78-1 through 78-24, is repealed except as saved in this section.

(b) Prior law exclusively governs all suits, actions, prosecution, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before April 1, 1975, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after April 1, 1975.

(c) All effective registrations under prior law, all administrative orders relating to such registrations, and all conditions imposed upon such registrations remain in effect so long as they would have remained in effect if this Chapter had not been passed. They are considered to have been filed, entered, or imposed under this Chapter, but are governed by prior law.

(d) Prior law applies in respect to any offer or sale made within one year after the effective date of this Chapter pursuant to an offering begun in good faith before April 1, 1975, on the basis of an exemption available under prior law.

(e) Judicial review of all administrative orders as to which review proceedings have not been instituted by April 1, 1975, are governed by G.S. 78A-48, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and in any event within 60 days after April 1, 1975. (1973, c. 1380.)

Chapter 78B.

Tender Offer Disclosure Act.

Sec.
78B-1. Title.
78B-2. Definitions.
78B-3. Mandatory provisions of and limitations on tender offers.
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78B-10. Application of Chapter.
78B-11. Severability.

§ 78B-1. Title.

This Chapter shall be known and may be cited as the "Tender Offer Disclosure Act." (1977, c. 781, s. 1.)

Legal Periodicals. — For survey of 1977 law on securities regulation, see 56 N.C.L. Rev. 941 (1978).

For a comment examining the constitutionality of the Tender Offer Disclosure Act, see 14 Wake Forest L. Rev. 1035 (1978).

Cited in Eure v. NVF Co., 481 F. Supp. 639 (E.D.N.C. 1979).

§ 78B-2. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

(1) "Administrator" means the Secretary of State.

(2) "Affiliate" of a person means any person that, directly or indirectly, controls, is controlled by or is under common control with that person.

(3) "Associate" of a person means

a. Any corporation or other organization of which such person is an officer, director or partner, or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities;

b. Any person who is an officer, director, partner or managing agent of such person, or who is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of equity securities of such person;

c. Any trust, guardianship, estate or similar entity in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar capacity; or

d. Any relative or spouse of such person or any relative of such spouse, if in each case such relative or spouse has the same home as such person.

(4) "Business day" means any day other than a Saturday, Sunday, or legal holiday in North Carolina.

(5) "Equity security" means any stock, bond or other obligation, the holder of which presently has the right to vote for the election of directors or other persons who serve in a similar capacity for the issuer; and it includes any security convertible into an equity security and any right, option or warrant to purchase an equity security.

(6) "Executive officer" means a president, vice president, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, and any other person performing similar functions.

(7) "Exempt offer" means, with respect to any class of equity securities of the subject company,

a. An offer made by the subject company or any issuer of equity securities to purchase its own equity securities or equity securities of its subsidiary;

b. Offers to purchase equity securities from not more than 25 offerees within a twelve-month period;

c. An offer, if the acquisition of any equity security pursuant to the offer, together with all other acquisitions by the offeror and his associates of securities of the same class during the preceding 12 months, would not exceed two percent (2%) of the outstanding securities of such class;

d. An offer to purchase equity securities of a class not registered pursuant to section 12 of the Securities Exchange Act of 1934;

e. An offer that is subject to approval by the shareholders of the subject company at a meeting for which proxies have been solicited pursuant to section 14 of the Securities Exchange Act of 1934; or

f. Bids made by a registered broker-dealer in the ordinary course of his business and not with the purpose of changing the control of an issuer of equity securities.

(8) "Offeree" means any person to whom a tender offer is made.

(9) "Offeror" means a person who makes a tender offer, and includes two or more persons,

a. Whose tender offers are made jointly or in concert; or

b. Who intend to exercise jointly or in concert any voting rights attaching to the equity securities for which a tender offer is made.

An "offeror" does not include any bank, insurance company, broker-dealer or other person loaning funds to an offeror in the ordinary course of its business or any broker-dealer, attorney, accountant, consultant, employee or other person furnishing information or advice to or performing administrative or ministerial duties for an offeror in the ordinary course of his business.

(10) "Person" means an individual, a partnership, a corporation, an unincorporated association, a trust, an estate or similar entity.

(11) "Securities Act of 1933" and "Securities Exchange Act of 1934" mean the federal statutes of those names as now or hereafter amended.

(12) "Subject company" means a corporation or other issuer of securities whose equity securities are the subject of a tender offer and which

a. Is organized under the laws of and doing business in this State; or

b. Has its principal place of business and substantial assets in this State.

(13) "Subsidiary" of a person means a person more than fifty percent (50%) of whose outstanding securities representing the right, other than as effected by default, to vote for the election of directors, is owned by such person directly or indirectly.

(14) "Tender offer" means an offer to purchase or invitation to tender, other than an exempt offer, made by an offeror, directly or indirectly, for such amount of any class of equity securities of a subject company that, together with equity securities of such class owned beneficially or of record by the offeror and his associates at the time of the offer or invitation, will in the aggregate exceed five percent (5%) of the outstanding equity securities of such class. A tender offer is "made" when the offer or invitation is first published or sent or given to the offerees. (1977, c. 781, s. 1.)

§ 78B-3. Mandatory provisions of and limitations on tender offers.

The following provisions apply to every tender offer:

(1) Every tender offer shall provide that any equity securities of a subject company deposited or tendered pursuant to such tender offer may be withdrawn by or on behalf of any offeree at any time up to three business days before the termination of the effectiveness of the tender offer, and that any unpurchased equity securities may be so withdrawn at any time after 60 days from the date the tender offer is made. The period of effectiveness of any tender offer shall not be less than 21 days from the date the tender offer is made.

(2) Where a tender offer is made for less than all the equity securities of a class and a greater amount of equity securities is deposited or tendered pursuant thereto than the offeror is bound or willing to accept, the securities shall be accepted by the offeror as nearly as practicable pro rata, disregarding fractions, according to the amount of equity securities deposited or tendered by each offeree.

(3) Where an offeror revises the terms of a tender offer before the expiration thereof by increasing the consideration offered, the offeror shall pay the increased consideration to each offeree whose equity securities are purchased even if such securities were tendered and purchased before the revision of the terms of the tender offer. (1977, c. 781, s. 1.)

§ 78B-4. Disclosure.

(a) No offeror shall make a tender offer unless at least 30 days prior thereto he shall file with the Administrator and deliver to the principal office of the subject company personally or by registered United States mail a statement containing all the information required by subsection (b) of this section.

(b) The statement to be filed with the Administrator and delivered to the subject company pursuant to subsection (a) of this section shall contain the following information:

(1) The name of the subject company and its registered agent and registered office; the title of the equity securities for which the proposed tender offer will be made; and all of the terms and conditions of the proposed tender offer;

(2) With respect to the offeror filing the statement:

a. The name and residence or business address of the offeror;

b. If the offeror is an individual, his citizenship, his principal occupations or employments at the time of the filing and during the past five years, giving the starting and ending dates of each and the name, principal business and address of any corporation or other organization in which such occupation or employment is or has been conducted;

c. If the offeror is not an individual, its form of organization; the date of its organization; the jurisdiction in which it is organized and the name of its registered agent and registered office in that jurisdiction, if any; a description of the amount and characteristics of all of its equity securities that are authorized and that are outstanding; the amount, maturity date and interest rate of all of its outstanding long-term debt; and the name, address, citizenship and principal occupation or employment during the past five years of each director and executive officer of the offeror, and each person owning beneficially, directly or indirectly, to the knowledge of the offeror twenty percent (20%) or more of any class of outstanding equity securities of the offeror, giving the starting and ending dates of each and the name, principal business and address of any business, corporation or other organization in which each such occupation or employment was carried on; and if

the tender offer is for the purchase of less than all the outstanding equity securities issued by the subject company and is made by an offeror which is not subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934, copies of a balance sheet of the offeror as of the end of its last fiscal year and of its income statements for the three fiscal years preceding the offer.

d. Whether or not, during the past five years, the offeror or any associate of the offeror has been convicted of, or has entered a plea of guilty or nolo contendere, in a criminal proceeding in any jurisdiction (excluding traffic violations or similar misdemeanors) and, if so, as to each proceeding the date of such conviction or plea, a description of the crime involved, the name and location of the court, and the penalty imposed or other disposition of the case; and

e. Whether or not, during the past five years, the offeror or any associate of the offeror has been a party to a civil or criminal proceeding before a court or administrative or regulatory agency as a result of which the offeror or any associate of the offeror was or is subject to a judgment, decree or order enjoining future violations of, or prohibiting activities regulated by, federal or State securities or blue sky laws or finding liability under any such laws; and if so, a description of each such proceeding and the date and a summary of the terms of any such judgment, decree or order.

(3) The source and amount of all the funds used or to be used in making the tender offer or purchasing equity securities pursuant thereto, and if any part of such funds is represented or is to be represented by funds borrowed for the purpose of making such offer or purchasing such securities a description of the transaction and the names of the parties thereto, except that where the source of funds is a loan or loans made in the ordinary course of business by a bank or other financial institution regularly engaged in the business of making loans, it will be sufficient to identify such bank or financial institution and so to state;

(4) A statement of the purpose or purposes of the tender offer and of any plans existing at the time such tender offer is made which the offeror, upon successful completion of the proposed tender offer, may have which related to or would result in:

a. Any major change in the business or corporate structure of the subject company or any of its subsidiaries, including without limitation any merger, consolidation, liquidation or sale of all or any substantial portion of its or their assets;

b. Any change in the board of directors or executive officers of the subject company, including without limitation any plans or proposals to change the number or terms of directors and the names, addresses, citizenship and principal occupation or employment of any proposed new members of the board of directors;

c. Any material change in the capitalization of the subject company or any of its subsidiaries;

d. The payment or nonpayment of dividends by the subject company; or

e. The delisting of any equity securities of the subject company from any organized securities exchange, or the termination of the registration of any equity securities of the subject company with the Securities and Exchange Commission;

(5) The aggregate number of each class of equity securities of the subject company owned beneficially or of record, or subject to a right of acqui-

sition, by each offeror and by each affiliate and associate of each offeror, giving the name and address of each such affiliate and associate, and any transactions in any such equity securities during the past 90 days by any such person;

(6) Information as to any contracts, arrangements or understandings, whether in writing or otherwise, between the offeror or any associate or affiliate of the offeror and any person, including without limitation any offeree or the subject company or any director or executive officer thereof, with respect to the subject company or any equity securities thereof, including without limitation the transfer or retention of such securities, joint ventures, option arrangements, puts or calls, loans, guaranties of loans, guaranties against loss or guaranties of profit, division of profits or losses, proxies, voting arrangement, or employment arrangements, naming the persons with whom such contracts, arrangements or understandings have been entered into, and giving the material details thereof; and

(7) The identity of all persons employed, retained or to be compensated by the offeror, or by any person on his behalf, to make solicitations of or recommendations to equity security holders regarding the tender offer, and a brief description of the material terms of such employment, retainer or arrangement.

(c) There shall be delivered, as exhibits to the statement required by subsection (a) of this section, copies of the proposed tender offer and all advertisements and other written material relating thereto, including without limitation solicitations or recommendations to holders of equity securities of the subject company with respect to such tender offer.

(d) In the case of an offer that is registered under section 6 of the Securities Act of 1933, the offeror may, in lieu of the statement and exhibits required pursuant to subsections (a), (b) and (c) of this section, file with the Administrator and deliver to the principal officer of the subject company in the manner set forth in subsection (a) of this section a copy of the form of prospectus filed under the Securities Act of 1933 with respect to such offer. If such prospectus is filed with the Administrator pursuant to G.S. 78A-26, no additional copies shall be required to be filed with the Administrator pursuant to this subsection.

(e) If before the tender offer is made any material amendment is made to the statement furnished or exhibits delivered pursuant to subsections (b) and (c) of this section, the tender offer shall not be made earlier than 10 days after the date of such amendment.

(f) If at any time or from time to time after a tender offer is made, the offeror revises the terms of such offer, the offeror shall file with the Administrator and deliver to the principal office of the subject company personally or by registered United States mail a statement containing all of the terms and conditions of the revised tender offer and explaining in what respect the revised tender offer differs from the tender offer or offers previously made. Such statement shall be filed and delivered not less than six business days prior to the time such revised tender offer is made. All of the provisions of G.S. 78B-3 shall apply to such revised tender offer as if it were an original tender offer.

(g) A notice, in the form of a news release reasonably disseminated, advertisement, or other written communication directed to holders of equity securities of the subject company, which contains the following information shall be given concurrently with the filing required by subsection (a) of this section:

(1) The fact that a tender offer is proposed to be made and that a statement pursuant to subsection (a) of this section has been filed with the Administrator and delivered to the subject company;

(2) The amount of securities to be covered by the proposed tender offer and the date on which such offer is expected to be made;

(3) The consideration proposed to be offered;
(4) The identity of the offeror; and
(5) The purpose of the offer.

Any such notice shall not be deemed to constitute a tender offer and shall contain a statement that the tender offer shall be made only by a communication complying with the provisions of this Chapter.

(h) Whenever the subject company mails or otherwise delivers any written communication to the offerees with respect to the tender offer, the offeror, or any affiliate or associate of the offeror, it shall at the same time file with the Administrator and deliver to the offeror personally or by registered United States mail copies of such written communications.

(i) The Administrator shall maintain in his office copies of all documents and other material filed pursuant to this section for a period of three years from the date of filing, and thereafter all such documents and other material may be destroyed as the Administrator deems appropriate. All documents and other material filed pursuant to this section shall be available for public inspection and copying. (1977, c. 781, s. 1.)

§ 78B-5. Deceptive practices.

It shall be unlawful for an offeror or subject company or any affiliate or associate of any offeror or the subject company or any person acting on its or their behalf to engage in any deceptive or manipulative acts or practices in connection with a tender offer. Deceptive and manipulative acts or practices include, without limitation, making any untrue statement of a material fact or omitting to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, in connection with any tender offer. (1977, c. 781, s. 1.)

§ 78B-6. Civil liabilities.

(a) An offeror who
(1) Makes a tender offer that does not comply in all material respects with the provisions of G.S. 78B-3, or
(2) Makes a tender offer without complying in all material respects with the provisions of G.S. 78B-4, or
(3) Makes a tender offer by means of an untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading (the offeree not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and did not act in reckless disregard, of such untruth or omission,

shall be liable to any offeree whose equity securities are sold to the offeror pursuant to the tender offer and such offeree in a civil action shall be entitled (i) to recover such equity securities, together with all dividends, interest or other payments received thereon upon the tender of the consideration received for such securities from the offeror, or (ii) if the offeror has transferred such equity securities to a third party, to recover such damages as the offeree shall have sustained as the proximate result of the conduct of the offeror which is in violation of this section.

(b) No civil action may be maintained under this section unless commenced before the expiration of two years after the act or transaction constituting the violation.

(c) The rights and remedies of this Chapter are in addition to any other rights or remedies that may exist at law or in equity. (1977, c. 781, s. 1.)

§ 78B-7. Injunctions.

(a) Whenever it appears to the Administrator that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this Chapter, he may in his discretion bring an action in any court of competent jurisdiction to enjoin such acts or practices and to enforce compliance with this Chapter or he may refer such evidence as is available concerning violations of this Chapter to the Attorney General, who may, with or without such a reference, bring such an action. A subject company and an offeror shall also have standing to bring an action in any court of competent jurisdiction to enjoin any person from any act or practice which constitutes a violation of this Chapter.

(b) Upon a proper showing, the court may grant a permanent or temporary injunction or restraining order or may order rescission of any sales or purchases of equity securities determined to be unlawful under this Chapter, or award such other relief as it may deem just and proper, including directing the subject company to refuse to transfer such securities on its books and to refuse to recognize any vote with respect to such securities. (1977, c. 781, s. 1.)

§ 78B-8. Criminal penalties.

(a) Any person who willfully violates this Chapter may be fined not more than five thousand dollars ($5,000) or imprisoned for not more than two years or both. Each of the acts specified herein shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution of conviction for any other offense. No indictment or information may be returned under this Chapter more than two years after the alleged violation.

(b) The Administrator may refer such evidence as is available concerning violations of this Chapter to the Attorney General or the proper district attorney, who may, with or without such a reference, institute the appropriate criminal proceedings under this Chapter.

(c) Nothing in this Chapter limits the power of the State to punish any person for any conduct which constitutes a crime under any other statute. (1977, c. 781, s. 1.)

§ 78B-9. Service of process.

(a) Any person, including any nonresident of this State, who engages in conduct that is subject to the provisions of this Chapter and who has not filed a consent to service of process under subsection (b) of this section, shall be deemed to have appointed the Administrator to be his attorney to receive service of any lawful process in any suit, action or proceeding against him or his successor, executor or Administrator which grows out of that conduct and which is brought under this Chapter, with the same force and validity as if served on him personally. Service may be had by leaving a copy of the process in the office of the Administrator, and it is not effective unless (i) the plaintiff forthwith sends notice of the service and a copy of the process by registered United States mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and (ii) the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

(b) Any person who engages in conduct that is subject to the provisions of this Chapter may appoint and maintain a registered agent, which agent may be either an individual resident of this State, or a domestic corporation, or a foreign corporation authorized to transact business in this State. Such appointment shall take place by filing in the office of the Secretary of State a statement

setting forth the name and address of the person appointing, the registered agent and the name and address in this State of the registered agent. The registered agent appointed by any person pursuant to this section shall be an agent for said person upon whom any process, notice, or demand in any cause of action arising under this Chapter may be served.

(c) When process is served under subsection (a) of this section, the court shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend. (1977, c. 781, s. 1.)

§ 78B-10. Application of Chapter.

This Chapter shall not apply if the subject company is a public utility, public utility holding company, bank, bank holding company, insurance company, insurance holding company or savings and loan association subject to regulation by a federal or State agency and the tender offer is subject to approval by that agency. (1977, c. 781, s. 1.)

§ 78B-11. Severability.

If any provision or clause of this Chapter or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable. (1977, c. 781, s. 1.)

Chapter 79.

Strays.

Sec.
79-1. Notice to owner of stray, or to register of deeds.
79-2. Owner may reclaim.
79-3. When and how strays sold.
79-4. Failure to comply with stray law misdemeanor.

§ 79-1. Notice to owner of stray, or to register of deeds.

Any person who shall take up any stray horse, mare, colt, mule, ass or jennet, neat cattle, hog or sheep, shall within 10 days after taking up such stray inform the owner, if to him known; if not, he shall inform the register of deeds of the supposed age, marks, brands and color of the stray, and that the same was taken up at his plantation or place of abode; whereupon the register of deeds shall record such information in a book kept by him for that purpose, for which service the taker-up of the stray shall pay a fee of twenty-five cents (25¢), except for hogs and sheep, for which the fee shall be ten cents (10¢). The register of deeds shall at once publish a notice of the taking up of such stray, by posting the same at the courthouse door, and if the cost does not exceed two dollars ($2.00), then in some newspaper published in the county. Such notices shall be published for 30 days, and shall contain a full and complete description of the stray and of all marks or brands on the same, and when and where the same was taken up. The fees for publishing such notices shall be paid by the party taking up the stray. (1874-5, c. 258, s. 2; Code, s. 3768; Rev., s. 2833; C. S., s. 3951.)

Cross References. — As to license to look for strays upon the lands of another, see § 14-134.

§ 79-2. Owner may reclaim.

When any stray has been taken up, the owner may at any time before a sale reclaim such stray by proving his ownership and paying to the party capturing the same the actual costs paid the register of deeds as provided in G.S. 79-1, together with the actual costs of keeping such stray, as fixed by the county commissioners. The board of commissioners of the several counties shall fix a scale of costs for keeping strays. (Rev., s. 2834; C. S., s. 3952.)

§ 79-3. When and how strays sold.

If the owner of any stray shall fail to claim the same within 30 days after the publication of the notice required by law, the person taking up the stray shall cause the stray to be appraised by the nearest magistrate and two freeholders, none of whom shall receive any fees for such services. Such appraisement shall give a full and accurate description of such stray and shall by the magistrate be returned to the register of deeds, and by him recorded in his book for strays; and the register of deeds shall issue an order to the sheriff directing him to sell such stray, and the sheriff shall sell such stray at public auction after 10 days' public advertisement as for sales of personal property under execution; and out of the proceeds he shall pay the cost of publishing the notices as to strays, the costs of keeping and the cost of sale, and shall pay the surplus to the county treasurer for the benefit of the public school fund of the county. The county board of education shall at any time within 12 months after such funds have

been paid to the county treasurer, upon due proof of ownership, issue an order commanding the county treasurer to pay to the owner of the stray the net amount paid the county treasurer as the proceeds of the sale of the stray. (Rev., s. 2835; C. S., s. 3953.)

CASE NOTES

Cited in State v. Booker, 250 N.C. 272, 108 S.E.2d 426 (1959).

§ 79-4. Failure to comply with stray law misdemeanor.

If any person shall fail to comply with any of the requirements of law as to strays, he shall be guilty of a misdemeanor and upon conviction be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. (Rev., s. 3306; C. S., s. 3954.)

Cross References. — As to fences and stock law, see Chapter 68.

CASE NOTES

Cited in State v. Booker, 250 N.C. 272, 108 S.E.2d 426 (1959).

Chapter 80.

Trademarks, Brands, etc.

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ARTICLE 1.

Trademark Registration Act.

§ 80-1. Definitions.

(a) The term "applicant" as used herein embraces the person filing an application for registration of a trademark under this Article, his legal representatives, successors or assigns.

(b) The term "mark" as used herein includes any trademark or service mark entitled to registration under this Article whether registered or not.

(c) The term "person" as used herein means any individual, firm, partnership, corporation, association, union or other organization.

(d) The term "registrant" as used herein embraces the person to whom the registration of a trademark under this Article is issued, his legal representatives, successors or assigns.

(e) The term "service mark" as used herein means a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others.

(f) The term "trademark" as used herein means any word, name, symbol, or device or any combination thereof adopted and used by a person to identify goods made or sold by him and to distinguish them from goods made or sold by others.

(g) For the purposes of this Article, a mark shall be deemed to be "used" in this State (i) on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto and such goods are sold or otherwise distributed in the State, and (ii) on services when it is used or displayed in the sale or advertising of services and the services are rendered in this State. (1903, c. 271; Rev., s. 3012; C. S., s. 3971; 1941, c. 255, s. 1; 1967, c. 1007, s. 1.)

Legal Periodicals. — For note on the law of unfair competition in North Carolina, see 46 N.C.L. Rev. 856 (1968).

CASE NOTES

Editor's Note. — The cases cited under the various sections below were decided under this Article as it existed prior to its revision by Session Laws 1967, c. 1007, s. 1.

Theory Underlying Trademark Law. — The law pertaining to trademarks is based upon the dual purpose of protecting the public from inferior products and protecting the reputation and profits of the inventor for the skill given to the invention of the product. Blackwell v. Wright, 73 N.C. 310 (1875).

Common Law Not Abrogated. — State statutes providing for registration of trademarks are in affirmance of the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963), motion denied, 231 F. Supp. 301 (W.D.N.C. 1964).

Chapter Does Not Deal with Trade Names. — This chapter deals with trademarks and service marks and not trade names. Hot Shoppes, Inc. v. Hot Shoppe, Inc., 203 F. Supp. 777 (M.D.N.C. 1962).

Remedies Are Either Declaratory or Cumulative. — The remedies given by statutes providing for registration of trademarks are either declaratory or are cumulative and additional to those recognized and applied by the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963), motion denied, 231 F. Supp. 301 (W.D.N.C. 1964).

Name of Town or Locality. — It seems that the name of a town or locality cannot be exclusively appropriated as a trademark. Blackwell Durham Tobacco Co. v. McElwee, 94 N.C. 425 (1886).

Use of Surname. — As a rule, a trademark cannot be taken in a surname, and any one named Bingham could start a school called the "Bingham School," in the absence of proof of intent to injure, or fraudulently attract the

benefit of the good name and reputation acquired by a previously existing "Bingham School." And certainly there could be no confusion between a Bingham School at Asheville and a school even of the identically same name at Mebane, N.C. Bingham School v. Gray, 122 N.C. 699, 30 S.E. 304, 41 L.R.A. 243 (1898).

It is beyond the scope of the powers of the State legislature to establish a monopoly in a family name or to confer a patent right in its use. Bingham School v. Gray, 122 N.C. 699, 30 S.E. 304, 41 L.R.A. 243 (1898).

But one may, by contract, conclude himself from the use of his own name in a given business, and the agreement will be enforced by the courts. Zagier v. Zagier, 167 N.C. 616, 83 S.E. 913 (1914).

§ 80-2. Registrability.

A mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it

(1) Consists of or comprises immoral, deceptive or scandalous matter; or

(2) Consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute; or

(3) Consists of or comprises the flag or coat of arms or other insignia of the United States, or of any state or municipality, or of any foreign nation, or any simulation thereof; or

(4) Consists of or comprises the name, signature or portrait of any living individual, except with his written consent; or

(5) Consists of a mark which (i) when applied to the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them, or (ii) when applied to the goods or services of the applicant, is primarily geographically descriptive or deceptively misdescriptive of them, or (iii) is primarily merely a surname; provided, however, that nothing in this subdivision (5) shall prevent the registration of a mark used in this State by the applicant which has become distinctive of the applicant's goods or services. The Secretary of State may accept as evidence that the mark has become distinctive, as applied to the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this State or elsewhere for the five years preceding the date of the filing of the application for registration; or

(6) Consists of or comprises a mark which so resembles a mark registered in this State or a mark or trade name previously used in this State by another and not abandoned, as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive. (1903, c. 271; Rev., ss. 3012, 3017; C. S., ss. 3971, 3976; 1941, c. 255, s. 1; 1967, c. 1007, s. 1.)

§ 80-3. Application for registration.

Subject to the limitations set forth in this Article, any person who uses a mark, or any person who controls the nature and quality of the goods or services in connection with which a mark is used by another, in this State may file in the office of the Secretary of State on a form to be furnished by the Secretary of State, an application for registration of that mark setting forth, but not limited to, the following information:

(1) The name and business address of the person applying for such registration; and, if a corporation, the state of incorporation;

(2) The goods or services in connection with which the mark is used and the mode or manner in which the mark is used in connection with such goods or services and the class in which such goods or services fall;

(3) The date when the mark was first used anywhere and the date when it was first used in this State by the applicant, his predecessor in business or by another under such control of applicant; and

(4) A statement that the applicant is the owner of the mark and that no other person except as identified by applicant has the right to use such mark in this State either in the identical form thereof or in such near resemblance thereto as might be calculated to deceive or to be mistaken therefor.

The application shall be signed and verified by the applicant or by a member of the firm or an officer of the corporation or association applying.

The application shall be accompanied by a specimen or facsimile of such mark in triplicate.

The application for registration shall be accompanied by a filing fee of ten dollars ($10.00), payable to the Secretary of State. (1903, c. 271, s. 3; Rev., s. 3014; C. S., s. 3973; 1935, c. 60; 1941, c. 255, s. 2; 1967, c. 1007, s. 1.)

§ 80-4. Certificate of registration.

Upon compliance by the applicant with the requirements of this Article, the Secretary of State shall cause a certificate of registration to be issued and delivered to the applicant. The certificate of registration shall be issued under the signature of the Secretary of State and the seal of the State, and it shall show the name and business address and, if a corporation, the state of incorporation, of the person claiming ownership of the mark, the date claimed for the first use of the mark anywhere and the date claimed for the first use of the mark in this State, the class of goods or services and a description of the goods or services on which the mark is used, a reproduction of the mark, the registration date and the term of the registration.

Any certificate of registration issued by the Secretary of State under the provisions hereof or a copy thereof duly certified by the Secretary of State shall be admissible in evidence as competent and sufficient proof of the registration of such mark in any action or judicial proceedings in any court of this State. (1903, c. 271, s. 4; Rev., s. 3015; C. S., s. 3974; 1967, c. 1007, s. 1.)

§ 80-5. Duration and renewal.

Registration of a mark hereunder shall be effective for a term of 10 years from the date of registration and shall be renewable for successive terms of 10 years upon application filed within six months prior to the expiration of any term. A renewal fee of ten dollars ($10.00), payable to the Secretary of State, shall accompany the application for renewal of the registration.

The Secretary of State shall notify registrants of marks hereunder of the necessity of renewal within the year next preceding the expiration of the 10 years from the date of registration, by writing to the last known address of the registrants.

Any registration in force on January 1, 1968, shall expire 10 years from the date of the registration or of the last renewal thereof hereunder or two years after January 1, 1968, whichever is later, and may be renewed by filing an application with the Secretary of State and paying the aforementioned renewal fee therefor within six months prior to the expiration of the registration. Until so expired, such registration shall be subject to and shall be entitled to the benefits of the provisions of this Article.

All applications for renewals under this Article, whether of registrations made under this Article or of registrations affected under any prior act, shall be filed with the Secretary of State on a form to be furnished by him specifying the information called for by G.S. 80-3 and shall include a statement that the mark is still in use in this State.

The Secretary of State shall notify each registrant of marks under previous acts of the date of expiration of such registrations unless renewed in accordance with the provisions of this Article, by writing to the last known address of the registrants at least six months prior to the date of expiration thereof under the provisions of this Article. (1967, c. 1007, s. 1.)

§ 80-6. Assignment.

Any mark and its registration hereunder shall be assignable with the goodwill of the business in which the mark is used, or with that part of the goodwill of the business connected with the use of and symbolized by the mark. Assignment shall be by instruments in writing duly executed and may be recorded with the Secretary of State upon the payment of a fee of ten dollars ($10.00) payable to the Secretary of State who, upon recording of the assignment, shall issue in the name of the assignee a new certificate for the remainder of the term of the registration or of the last renewal thereof. An assignment of any registration under this Article shall be void as against any subsequent purchaser for valuable consideration without notice, unless it is recorded with the Secretary of State within three months after the date thereof or prior to such subsequent purchase. (Rev., s. 3016; C. S., s. 3975; 1967, c. 1007, s. 1.)

§ 80-7. Records.

The Secretary of State shall keep for public examination all assignments recorded under G.S. 80-6 and a record of all marks registered or renewed under this Article. (1967, c. 1007, s. 1.)

§ 80-8. Cancellation.

The Secretary of State shall cancel from the register:

(1) After two years from January 1, 1968, all registrations under prior acts which are more than 10 years old and not renewed in accordance with this Article;

(2) Any registration concerning which the Secretary of State shall receive a voluntary request for cancellation thereof from the registrant or the assignee of record;

(3) All registrations granted under this Article and not renewed in accordance with the provisions hereof;

(4) Any registration concerning which a court of competent jurisdiction shall find

a. That the registered mark has been abandoned or has become incapable of serving as a mark;

b. That the registrant is not the owner of the mark;

c. That the registration was granted improperly;

d. That the registration was obtained fraudulently.

(5) Any registration when a court of competent jurisdiction shall order cancellation thereof. (1967, c. 1007, s. 1.)

§ 80-9. Classification.

The following general classes of goods and services are established for convenience of administration of this Article, but not to limit or extend the applicant's or registrant's rights, and a single application for registration of a mark may include any or all goods upon which, or services for which, the mark is actually being used comprised in a single class, but in no event shall a single application include goods or services upon or for which the mark is being used

which fall within different classes of goods or services. The Secretary of State shall have the right to amend the classes herein established to conform the same to the classification established for the United States Patent Office as from time to time amended.

The said classes are as follows:

(a) Goods. —

1. Raw or partly prepared materials.
2. Receptacles.
3. Baggage, animal equipments, portfolios, and pocketbooks.
4. Abrasives and polishing materials.
5. Adhesives.
6. Chemicals and chemical compositions.
7. Cordage.
8. Smokers' articles, not including tobacco products.
9. Explosives, firearms, equipments, and projectiles.
10. Fertilizers.
11. Inks and inking materials.
12. Construction materials.
13. Hardware and plumbing and steam-fitting supplies.
14. Metals and metal castings and forgings.
15. Oils and greases.
16. Protective and decorative coatings.
17. Tobacco products.
18. Medicines and pharmaceutical preparations.
19. Vehicles.
20. Linoleum and oiled cloth.
21. Electrical apparatus, machines, and supplies.
22. Games, toys, and sporting goods.
23. Cutlery, machinery, and tools, and parts thereof.
24. Laundry appliances and machines.
25. Locks and safes.
26. Measuring and scientific appliances.
27. Horological instruments.
28. Jewelry and precious-metal ware.
29. Brooms, brushes, and dusters.
30. Crockery, earthenware, and porcelain.
31. Filters and refrigerators.
32. Furniture and upholstery.
33. Glassware.
34. Heating, lighting, and ventilating apparatus.
35. Belting, hose, machinery packing, and nonmetallic tires.
36. Musical instruments and supplies.
37. Paper and stationery.
38. Prints and publications.
39. Clothing.
40. Fancy goods, furnishings, and notions.
41. Canes, parasols, and umbrellas.
42. Knitted, netted and textile fabrics, and substitutes therefor.
43. Thread and yarn.
44. Dental, medical, and surgical appliances.
45. Soft drinks and carbonated waters.
46. Foods and ingredients of foods.
47. Wines.
48. Malt beverages and liquors.
49. Distilled alcoholic liquors.
50. Merchandise not otherwise classified.

51. Cosmetics and toilet preparations.
52. Detergents and soaps.

(b) Services. —

100. Miscellaneous.
101. Advertising and business.
102. Insurance and financial.
103. Construction and repair.
104. Communications.
105. Transportation and storage.
106. Material treatment.
107. Education and entertainment. (1967, c. 1007, s. 1.)

§ 80-10. Fraudulent registration.

Any person who shall for himself, or on behalf of any other person, procure the filing or registration of any mark in the office of the Secretary of State under the provisions hereof, by knowingly making any false or fraudulent representation or declaration, verbally or in writing, or by any other fraudulent means, shall be liable to pay all damages sustained in consequence of such filing or registration, to be recovered by or on behalf of the party injured thereby in any court of competent jurisdiction. (1903, c. 271, s. 5; Rev., s. 3018; C. S., s. 3977; 1967, c. 1007, s. 1.)

§ 80-11. Infringement.

Subject to the provisions of G.S. 80-13, any person who shall

(1) Use in this State without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a mark registered under this Article in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or

(2) Reproduce, counterfeit, copy or colorably imitate any such mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in conjunction with the sale or other distribution in this State of such goods or services;

shall be liable to a civil action by the owner of such registered mark for any or all of the remedies provided in G.S. 80-12, except that under subdivision (2) hereof the registrant shall not be entitled to recover profits or damages or any penalty unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive. (1903, c. 271, s. 6; Rev., s. 3019; C. S., s. 3978; 1967, c. 1007, s. 1.)

§ 80-12. Civil remedies.

Any owner of a mark registered under this Article may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeits or imitations thereof and any court of competent jurisdiction may grant injunctions to restrain such manufacture, use, display or sale as may be by the said court deemed just and reasonable, and may require the defendants to pay to such owner all profits derived from and/or all damages suffered by reason of such wrongful manufacture, use, display or sale; such court may also order that any such counterfeits or imitations in the possession or under the control of any defendant in such case, be delivered to an officer of the court, or to the complainant, to be destroyed; and such court having granted any such injunction or ordered any such payment shall require the defendants to pay to said owner

a penalty of not less than two hundred dollars ($200.00) and not more than one thousand dollars ($1,000) in addition to such other relief, provided that such court shall have found that said owner shall have registered his mark prior to the date said defendants shall have first used the infringing mark in this State.

The enumeration of any right or remedy herein shall not affect a registrant's right to prosecute under any penal law of this State. (1903, c. 271, s. 8; Rev., s. 3021; C. S., s. 3980; 1941, c. 255, s. 3; 1967, c. 1007, s. 1.)

CASE NOTES

When Relief Granted. — Before the owner of a trademark can call upon the courts for relief, he must show not only that he has a clear legal right to the trademark, but that there has been a plain violation of it; and where a violation is alleged, the true inquiry is, whether the mark of the defendant is so assimilated to that of the plaintiff as to deceive purchasers. And it will make no difference whether the party designed to mislead the public or whether the symbol adopted was calculated to deceive. Blackwell v. Wright, 73 N.C. 310 (1875).

If it appears that the trademark alleged to be an imitation, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated. Blackwell v. Wright, 73 N.C. 310 (1875).

§ 80-13. Common-law rights.

Nothing herein shall adversely affect the rights or the enforcement of rights in marks acquired in good faith at any time at common law. (1967, c. 1007, s. 1.)

§ 80-14. Severability of Article.

If any provision hereof, or the application of such provision to any person or circumstance is held invalid, the remainder of this Article shall not be affected thereby. (1967, c. 1007, s. 1.)

Article 2.

Timber Marks.

§ 80-15. Timber dealers may adopt.

Any person dealing in timber in any form shall be known as a timber dealer and as such may adopt a trademark, in the manner and with the effect in this Article provided. (1903, c. 261, s. 1; Rev., s. 3023; C. S., s. 3985.)

§ 80-16. How adopted, registered and published.

Every such dealer desiring to adopt a trademark may do so by the execution of a writing in form and effect as follows:

Notice is hereby given that I (or we, etc., as the case may be) have adopted the following trademark, to be used in my (or our, etc.) business as timber dealer (or dealers), to wit: (Here insert the words, letters, figures, etc., constituting the trademark, or if it be any device other than words, letters or figures, insert a facsimile thereof).

Dated this . . . . . day of . . . . . , 19. . . . A . . . . . B . . . . . .

Such writing shall be acknowledged or proved for record in the same manner as deeds are acknowledged or proved, and shall be registered in the office of the register of deeds of the county in which the principal office or place of business of such timber dealer may be, in a book to be kept for that purpose marked Registry of Timber Marks, also in office of Secretary of State, and a copy thereof shall be published at least once in each week for four successive weeks in some newspaper printed in such county, or if there be no such newspaper printed therein, then in some newspaper of general circulation in such county. (1889, c. 142; 1903, c. 261, s. 2; Rev., s. 3024; C. S., s. 3986.)

§ 80-17. Property in and use of trademarks.

Every trademark so adopted shall, from the date thereof, be the exclusive property of the person adopting the same. The proprietor of such trademark shall, in using the same, cause it to be plainly stamped, branded or otherwise impressed upon each piece of timber upon which the same is placed. (1889, c. 142; 1903, c. 261, ss. 3, 4; Rev., s. 3025; C. S., s. 3987.)

§ 80-18. Effect of branding timber purchased.

When timber is purchased by the proprietor of any such trademark, and the said trademark is placed thereon as hereinbefore provided, such timber shall thenceforth be deemed the property of such purchaser, without any other or further delivery thereof, and such timber shall thereafter be at the risk of the purchaser, unless otherwise provided by contract in writing between the parties. (1889, c. 142; 1903, c. 261, s. 6; Rev., s. 3026; C. S., s. 3988.)

§ 80-19. Trademark on timber evidence of ownership.

In any action, suit or contest in which the title to any timber, upon which any trademark has been placed as aforesaid, shall come in question, it shall be presumed that such timber was the property of the proprietor of such trademark, in the absence of satisfactory proof to the contrary. (1903, c. 261, s. 7; Rev., s. 3027; C. S., s. 3989.)

§ 80-20. Fraudulent use of timber trademark, misdemeanor.

If any person shall use or attempt to use any timber trademark without the written consent of the proprietor thereof, or falsely and fraudulently place any trademark on timber not the property of the owner of such trademark without his written consent, or intentionally and without lawful authority remove, deface or destroy any timber trademark or the imprint thereof on any timber or intentionally put any such timber in such a position or place so remote from the stream from which it was taken or on which it was afloat as to render it inconvenient or unnecessarily expensive to replace the same in such stream, he shall be guilty of a misdemeanor. (1903, c. 261, ss. 3-5; Rev., s. 3854; C. S., s. 3990.)

§ 80-21. Larceny of branded timber.

If any person shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own use, any timber upon which a trademark is stamped, branded or otherwise impressed, or shall knowingly and unlawfully buy, sell, take and carry away, secrete, destroy or convert to his own

use, any timber upon which a trademark has been intentionally and without lawful authority removed, defaced or destroyed, he shall be deemed guilty of larceny thereof and punished as in other cases of larceny. (1903, c. 261, s. 5; Rev., s. 3853; C. S., s. 3991.)

§ 80-22. Altering timber trademark crime.

If any person shall willfully change, alter, erase or destroy any registered timber mark or brand put or cut upon any logs, timber, lumber or boards, except by the consent of the owner thereof, with intent to steal the said logs or timber, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars ($50.00) or imprisoned not more than 30 days, or both. (1889, c. 142, s. 3; 1903, c. 41; Rev., s. 3855; C. S., s. 3992; 1943, c. 543.)

§ 80-23. Possession of branded logs without consent, misdemeanor.

If any person shall knowingly and willfully take up or have in his possession any log, timber, lumber or board upon which a registered timber mark or brand has been put or cut, except by the consent of the owner thereof, he shall be guilty of a misdemeanor, and punished by a fine of not more than fifty dollars ($50.00) or imprisoned not more than 30 days, or both. (1889, c. 142, s. 4; 1903, c. 42; Rev., s. 3856; C. S., s. 3993.)

Article 3.

Mineral Waters and Beverages.

§ 80-24. Description of name, labels, or marks filed and published.

Any person, partnership or corporation engaged in manufacturing, bottling, selling or dealing in mineral, soda or aerated waters, beers, lager beer, milk or other beverages, in kegs, boxes, trays, crates, bottles, syphons, barrels, casks, or other vessels, with his name or other marks or devices printed, impressed, or otherwise produced thereon, or upon labels pasted thereon, shall file with the clerk of the superior court of the county in which his principal office or place of business (or in case of a foreign corporation, its principal office or place of business or agency) is located, a description of the names, marks, or devices so used by him, and cause such description to be printed twice a week for two successive weeks in some daily newspaper published in said county, if there be a daily newspaper published therein, and if not, then in some newspaper published in said county once a week for two successive weeks. The description of the names, marks or devices, before being filed as aforesaid, shall be signed by the person filing the same, or in case of a partnership, by a partner, or in case of a corporation, by one of its officers or managers, and shall be acknowledged by the person signing the same as his act, or as the act of said partnership or corporation, before an officer competent to take acknowledgment of deeds. The publication hereby required need only be a brief description, sufficient for identification, of such names or marks, and need not contain a certified copy of the acknowledgment. The provisions of this Article shall apply to all vessels enumerated above upon which said names or marks shall appear as aforesaid, whether or not any of the same shall be in existence at the time of said filing and publication. (1907, c. 901, s. 1; C. S., s. 3994.)

§ 80-25. Clerk to record description.

The several clerks of the superior courts mentioned in the preceding section [G.S. 80-24] shall record in some book of record in their custody all such descriptions filed with them, and also copies of the said advertisement in the newspaper, certified to by the publishers thereof, and shall furnish copies thereof, duly certified by them in the usual manner, to any person who may apply therefor. Such certified copies shall be evidence that the provisions of the preceding section [G.S. 80-24] have been complied with, and shall be prima facie evidence of the title of the person, named therein, to the vessels upon which his name, marks, labels or devices appear as described in said description. (1907, c. 901, s. 2; C. S., s. 3995; 1973, c. 108, s. 32.)

§ 80-26. Refilling vessels and defacing marks forbidden; punishment.

After any person has filed and published his description of such names, marks or devices, in accordance with the preceding provisions of this Article, it shall be unlawful for any persons to fill in any way the vessels upon which such names or other marks are printed, impressed or otherwise produced, with any water or beverage enumerated in this Article, or to deface, remove or conceal such names or other marks, thereon, with intent to convert the same to his use, or to have on sale, offer for sale, traffic in, handle in the course of business, transport, or to take or collect from ash or garbage receptacles or from public or private premises, or to keep in stock, store or dispose of or deal or traffic in same, or any parts thereof, without the written consent of the person whose name or other marks are upon such vessels, or to willfully break, destroy or otherwise injure any of the articles mentioned in this section. Any person who shall do any of the acts declared to be unlawful by this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished for the first offense by imprisonment of not less than 10 days or more than one year, or by a fine of three dollars ($3.00) for each of such kegs, casks or barrels, and one dollar ($1.00) for each of such boxes, trays, crates, bottles, syphons, or any other vessels so unlawfully used; and for the second and subsequent offense by imprisonment for not less than 20 days or more than one year, or by a fine of not less than two dollars ($2.00) or more than five dollars ($5.00) for each vessel unlawfully used, or by both such fine and imprisonment, at the discretion of the court before whom such offense is tried: Provided, this section shall not apply to such vessels as the bottler charges his customers for at the time of sale of the goods. (1907, c. 901, s. 3; C. S., s. 3996.)

§ 80-27. Possession of vessels as evidence of offense.

If any person shall be found to be in possession of any of the vessels mentioned above in this Article, or any parts thereof, and the persons whose names, marks or devices have been placed thereon, as above provided, have complied with the provisions of this Article, and the persons so found in possession thereof shall be charged with any of the offenses mentioned in the preceding section [G.S. 80-26], then such possession shall be prima facie evidence that such person is guilty of the offenses so charged: Provided, this section shall not apply to bottlers who receive such vessels in the course of business and mixed and exchanged in shipment, when such bottler within a reasonable time notifies the owners thereof of the location thereof. (1907, c. 901, s. 4; C. S., s. 3998.)

§ 80-28. Search warrants.

If the owner of any vessel mentioned in G.S. 80-24 who has complied with the provisions thereof, or the officer, agent or employee of such owner, shall make an affidavit before a magistrate asserting that he has reason to believe and does believe that any person is in actual or constructive possession of, or is making use of, any article above mentioned or any part thereof, or in any way declared to be unlawful by G.S. 80-26, the magistrate may issue his search warrant to any sheriff or other officer of the law to whom such warrant may be directed, and cause the premises designated in the warrant to be searched; and if article above mentioned or any part thereof shall be found upon the premises so designated, the officer executing such search warrant shall thereupon report the same, under his oath, to the magistrate, who shall thereupon, upon said report and upon the oath of any person or persons charging any violations of G.S. 80-26, issue his warrant for the arrest of the person against whom the charge is made, and cause him, together with such articles, to be brought before him. (1907, c. 901, s. 5; C. S., s. 3999; 1973, c. 108, s. 33.)

§ 80-29. Possession of vessels awarded to owner.

If any person shall be found to be guilty of violating any of the provisions of this Article, the court trying such person and imposing the punishment herein prescribed shall also award possession to the owner of all the property involved in such violation. (1907, c. 901, s. 6; C. S., s. 4000; 1973, c. 108, s. 34.)

§ 80-30. Accepting deposit not deemed sale.

The requiring, taking or accepting of any deposit for any purpose upon any vessel above enumerated shall not be deemed to constitute a sale of such property, either optional, conditional or otherwise, in any proceedings under this Article. (1907, c. 901, s. 7; C. S., s. 4001.)

§ 80-31. When refiling description not required.

Any person, partnership, or corporation that has heretofore filed and published a description of his name, marks or devices for the purposes mentioned in G.S. 80-1, in accordance with the law existing at the time of such filing and publication, shall not be required to again file such description but shall be entitled to all the benefits of this Article as fully as if he had complied with all the provisions thereof. (1907, c. 901, s. 8; C. S., s. 4002.)

§ 80-32. Application of Article.

The provisions of this Article do not apply to any person using the vessels enumerated above for the beverages placed therein by the owners, or who after consumption of the contents is in possession of the same, while awaiting the return to the owners, nor shall the provisions of this Article apply to any garbage man collecting the same in the regular course of his business: Provided, this Article shall not apply to beer and mineral water bottles shipped into this State from other states. (1907, c. 901, s. 9; C. S., s. 4003.)

ARTICLE 4.

Farm Names.

§ 80-33. Registration of farm names authorized.

Any owner of a farm in the State of North Carolina may have the name of his farm, together with a description of his lands to which said name applies, recorded in a register kept for that purpose in the office of the register of deeds of the county in which the farm is located, and the register of deeds shall furnish to such landowner a proper certificate setting forth the name and description of the lands. (1915, c. 108, s. 1; C. S., s. 4004.)

Local Modification. — Sampson, Stokes, Surry: C. S., § 4011.

§ 80-34. After registry, similar name not registered.

When any name has been recorded as the name of any farm in such county, the name, or one so nearly like it as to produce confusion, shall not be recorded as the name of any other farm in the same county. (1915, c. 108, s. 1; C. S., s. 4005.)

§ 80-35. Distinctive name required.

No name shall be registered as the name of a farm where such proposed name or one so nearly like it as to produce confusion has been so used in connection with another farm in the same county as to become generally known prior to March 5, 1915, unless the name used has also prior to March 5, 1915, become well known as the name of the farm proposed to be registered; and in this event two or more farms in the same county may be registered with the same name with some prefix or suffix added to distinguish them. (1915, c. 108, s. 2; C. S., s. 4006.)

§ 80-36. Application for registry; publication and hearing.

Before a name shall be registered the clerk shall have publication made at least once a week for four weeks in some secular newspaper published in the county, if one is so published, and if one is not so published, then one having a general circulation in the county, giving the name of the applicant, the proposed name of registration and a sufficient description to identify the farm and the time of the return; and if the owner or clerk knows of another farm in the county of the same or very similar name, a summons shall be served on the owner thereof at least 10 days before the return day. On the return day any person, firm or corporation may file claim to the name, and the clerk may pass upon the claim and award the name to any party, with the right to appeal by the aggrieved party to the superior court within 10 days, as in other cases, and on such appeal the judge shall decide the matters unless a jury be demanded by some party. (1915, c. 108, s. 2; C. S., s. 4007.)

§ 80-37. Fees for registration.

Any person having the name of his farm recorded as provided in this Article shall first pay to the register of deeds a fee of one dollar ($1.00), which fee shall be paid to the county treasurer as other fees are to be paid to the county treasurer by such register of deeds: Provided, that in counties where the fee

system obtains, the fees herein mentioned shall go to the register of deeds of such counties. (1915, c. 108, s. 3; C. S., s. 4008.)

§ 80-38. When transfer of farm carries name.

When any owner of a farm, the name of which has been recorded as provided in this Article, transfers by deed or otherwise the whole of such farm, such transfer may include the registered name thereof; but if the owner shall transfer only a portion of such farm, then, in the event, the registered name thereof shall not be transferred to the purchaser unless so stated in the deed or conveyance. (1915, c. 108, s. 4; C. S., s. 4009.)

§ 80-39. Cancellation of registry; fee.

When any owner of a registered farm desires to cancel the registered name thereof, he shall state on the margin of the record of the register of such name the following: "This name is canceled and I hereby release all rights thereunder," which shall be signed by the person canceling such name, and attested by the register of deeds. For such latter service the register of deeds shall charge a fee of twenty-five cents (25¢), which shall be paid to the county treasurer as other fees are paid to the county treasurer by him. (1915, c. 108, s. 5; C. S., s. 4010.)

Article 5.

Stamping of Gold and Silver Articles.

§ 80-40. Marking gold articles regulated.

It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of gold or any alloy of gold, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark indicating or designed to indicate that the gold, or alloy of gold, therein is of a greater degree of fineness than its actual fineness, unless the actual fineness, in the case of flatware and watchcases, is not less by more than three one-thousandths parts, and in the case of all other articles is not less by more than one-half karat than the fineness indicated, according to the standards and subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of gold or alloy in the articles, according to the required standards, the part of the gold or alloy taken for the test, analysis or assay shall be a part not containing or having attached thereto any solder or alloy of inferior fineness used for brazing or uniting the parts of the articles. In addition to the foregoing tests and standards, the actual fineness of the entire quantity of gold and of its alloys contained in any article mentioned in this section (except watchcases), including all solder or alloy of inferior metal used for brazing or uniting the parts (all such gold, alloys, and solder being assayed as one piece), shall not be less by more than one karat than the fineness indicated by the mark used as above indicated. Violation of this section is a misdemeanor, punishable as provided in this Article. (1907, c. 331, s. 1; C. S., s. 4012.)

§ 80-41. Marking silver articles regulated.

It shall be unlawful to make for sale or sell or offer to sell or dispose of or have in possession with intent to sell or dispose of —

(1) Any article of merchandise made in whole or in part of silver of any alloy of silver, and having marked, stamped, branded or engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "sterling silver" or "sterling" or any colorable imitation thereof, unless nine hundred and twenty-five one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standard.

(2) Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having marked, stamped, branded, engraved or imprinted thereon, or upon any card, tag or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the words "coin" or "coin silver," or any colorable imitation thereof, unless nine hundred one-thousandths of the component parts of the metal appearing or purporting to be silver, of which the article is manufactured, are pure silver, subject to the qualifications hereinafter set forth: Provided, that in the case of all such articles there shall be allowed a divergence in fineness of four one-thousandths parts from the foregoing standards.

(3) Any article of merchandise made in whole or in part of silver or of any alloy of silver, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any mark or word (other than the word "sterling" or the word "coin") indicating, or designed to indicate, that the silver or alloy of silver in the article is of a greater degree of fineness than its actual fineness, unless the actual fineness is not less by more than four one-thousandths parts than the actual fineness indicated by the use of such mark or word, subject to the qualifications hereinafter set forth.

In any test for ascertaining the fineness of the articles mentioned in this section, according to the foregoing standards, the part taken for test, analysis or assays shall be a part not containing or having attached thereto any solder or alloy of inferior metal used for brazing or uniting the parts of such article. In addition to the foregoing test and standards, the actual fineness of the entire quantity of metal purporting to be silver contained in any article mentioned in this section, including all solder or alloy of inferior fineness used for brazing or uniting the parts (all such silver, alloy or solder being assayed as one piece), shall not be less by more than ten one-thousandths parts than the fineness indicated according to the foregoing standards, by the mark employed as above indicated. Violation of this section is a misdemeanor, punishable as provided in this Article. (1907, c. 331, s. 2; C. S., s. 4013.)

§ 80-42. Marking articles of gold plate regulated.

It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto a plate, plating, covering or sheet of gold, or of any alloy of gold, which article is known in the market as "rolled gold plate," "gold plate," "gold-filled," or "gold electroplate," or by any similar desig-

nation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, any word or mark usually employed to indicate the fineness of gold, unless such word be accompanied by other words plainly indicating that such article or some part thereof is made of rolled gold plate, or gold plate, or gold electroplate, or is gold-filled, as the case may be. Violation of this section is a misdemeanor, punishable as provided in this Article. (1907, c. 331, s. 3; C. S., s. 4014.)

§ 80-43. Marking articles of silver plate regulated.

It shall be unlawful to make for sale, or sell, or offer to sell or dispose of, or have in possession with intent to sell or dispose of, any article of merchandise made in whole or in part of inferior metal, having deposited or plated thereon or brazed or otherwise affixed thereto, a plate, plating, covering or sheet of silver or of any alloy of silver, which article is known in the market as "silver plate" or "silver electroplate," or by any similar designation, and having stamped, branded, engraved or imprinted thereon, or upon any tag, card or label attached thereto, or upon any box, package, cover or wrapper in which the article is enclosed, the word "sterling" or the word "coin," either alone or in conjunction with any other words or marks. Violation of this section is a misdemeanor, punishable as provided in this Article. (1907, c. 331, s. 4; C. S., s. 4015.)

§ 80-44. Violation of Article misdemeanor.

Every person, firm, corporation or association guilty of a violation of any one of the preceding sections of this Article, and every officer, manager, director or managing agent of any such person, firm, corporation or association directly participating in such violation or consenting thereto, shall be guilty of a misdemeanor and punished by fine or imprisonment, or both, at the discretion of the court: Provided, that if the person charged with violation of this Article shall prove that the article concerning which the charge was made was manufactured prior to June 13, 1907, then the charge shall be dismissed. (1907, c. 331, s. 5; C. S., s. 4016.)

Article 6.

Cattle Brands.

§ 80-45. Owners of stock to register brand or marks.

Every person who has any horses, cattle, hogs or sheep may have an earmark or brand different from the earmark or brand of all other persons, which he shall record with the clerk of the board of commissioners of the county where his horses, cattle, hogs or sheep are; and he may brand all horses 18 months old and upwards with the said brand, and earmark all his hogs and sheep six months old and upwards with the said earmark; and earmark or brand all his cattle 12 months old and upwards; and if any dispute shall arise about any earmark or brand, the same shall be decided by the record thereof. (R. C., c. 17, s. 1; Code, s. 2317; Rev., s. 3028; C. S., s. 4017.)

Article 7.

Recording of Cattle Brands and Marks with Commissioner of Agriculture.

§§ 80-46 to 80-56: Repealed by Session Laws 1975, c. 261, s. 1.

Article 8.

Registration and Protection of Livestock Brands.

§ 80-57. Purpose.

The purpose of this Article is to discourage livestock theft by allowing for the voluntary individual registration of brand marks for certain livestock. (1975, c. 261, s. 1.)

Editor's Note. — The act inserting this Article repealed Article 7, entitled "Recording of Cattle Brands and Marks with Commissioner of Agriculture." Where former provisions were similar to the new provisions, the historical citations to the repealed sections have been added to the new sections.

§ 80-58. Definitions.

(a) "Board". — The term "Board" means the North Carolina Board of Agriculture.

(b) "Brand". — The term "brand" means an identification mark permanently affixed into the hide of livestock by a hot iron or an extremely cold brand known as a "freeze brand."

(c) "Commissioner". — The term "Commissioner" means the Commissioner of Agriculture of the State of North Carolina.

(d) "Livestock". — The term "livestock" means cattle, horses, ponies, mules, and asses.

(e) "Person". — The term "person" means an individual, firm, company, association, partnership or corporation. (1935, c. 232, s. 1; 1975, c. 261, s. 1.)

§ 80-59. Responsibility and authority of Commissioner of Agriculture; application for registration; transfer of ownership of brand.

The Commissioner shall record livestock brands and maintain a record of such brands pursuant to this Article. Such records shall be public and shall be prima facie evidence of ownership of livestock which is properly branded under this Article. The Commissioner shall authorize such agents within the North Carolina Department of Agriculture as he deems necessary to implement this Article.

Any person desiring the exclusive use of a brand shall make application to the Commissioner on forms prescribed by the Board. The transfer of ownership of a brand registration may be done only at the written request of the brand registrant of record. The Commissioner shall receive a fee of ten dollars ($10.00) for recording such transfer. (1935, c. 232, ss. 3-5; 1975, c. 261, s. 1.)

§ 80-60. No brands duplicated.

No brand shall be registered that is a reasonable facsimile of another registered brand or that will likely be confused with another brand registered under this Article. (1975, c. 261, s. 1.)

§ 80-61. Rules and regulations.

The Board shall have authority to promulgate reasonable rules and regulations for implementation of this Article which shall include, but not be limited to, the location of and the size of brand marks. (1975, c. 261, s. 1.)

§ 80-62. Fees for recording.

The Commissioner is authorized to collect a fee of twenty-five dollars ($25.00) for the recording of each new brand, or for rerecording of each brand, and shall issue one certified copy of each brand recording to the holder of said brand. Duplicate certificates of registration may be issued by the Commissioner upon payment of a fee of two dollars ($2.00). Revenues collected pursuant to this Article shall be deposited with the State Treasurer to the account of the North Carolina Department of Agriculture. (1935, c. 232, ss. 5, 6; 1975, c. 261, s. 1.)

§ 80-63. Records to be kept of sales and slaughter.

Persons or agents selling or bartering or exchanging branded livestock in the State of North Carolina shall provide the purchaser or new owner with a bill of sale showing a reasonable facsimile of the brand on any and all livestock having a brand as defined in this Article. Such bills of sale shall be prima facie evidence of transfer of ownership of branded livestock. Slaughter facilities in the State of North Carolina shall affix to their normal records of receipt of livestock a reasonable facsimile of the brand on any branded livestock received by them. Such records shall be maintained for at least 12 months. (1935, c. 232, ss. 8, 9; 1975, c. 261, s. 1.)

§ 80-64. Defacing of brands prohibited.

No person may change, conceal, deface, disfigure or obliterate any brand previously branded, impressed, or marked on any livestock, or put his or any other brand upon or over any part of any brand previously branded or marked upon any livestock, and no person shall make or use any counterfeit of any brand of any other person. (1935, c. 232, s. 10; 1975, c. 261, s. 1.)

§ 80-65. Rerecording.

Every brand recorded under this Article, in order to remain effective, must be rerecorded with the Commissioner during the tenth year from its next previous recordation. Each person having a brand registered in the State of North Carolina shall be notified in writing by the Commissioner that said brand must be rerecorded to prohibit its disenrollment from the record of such brand maintained by the Commissioner. (1975, c. 261, s. 1.)

§ 80-66. Violation a misdemeanor.

Any person who violates any provision of this Article or any rule or regulation of the Board promulgated hereunder shall be guilty of a misdemeanor and upon conviction thereof fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or imprisoned for not more than 60 days, or both fined and imprisoned, in the discretion of the court. (1935, c. 232, s. 11; 1975, c. 261, s. 1.)

Chapter 81.
Weights and Measures.

§§ 81-1 to 81-82: Recodified as §§ 81A-1 to 81A-88.

Chapter 81A.

Weights and Measures Act of 1975.

Article 1.

Administration of Chapter.

Sec.

81A-1. Weights and measures program provided for.
81A-2. Administration of these Articles.
81A-3. Systems of weights and measures.
81A-4. Board of Agriculture authorized to establish standards of weights and measures for commodities having none.
81A-5. Employment of Director of Weights and Measures and authorized agents.
81A-6. Salaries and expenses.
81A-7. Local inspection of weights and measures.
81A-8. Standards of weights and measures.
81A-9. Definitions.
81A-10 to 81A-14. [Reserved.]

Article 2.

Powers and Duties of Commissioner.

81A-15. General duties.
81A-16. Police powers.
81A-17 to 81A-21. [Reserved.]

Article 3.

Violations.

81A-22. Misrepresentation of quantity.
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81A-24. Commodities to be sold by weight, measure or numerical count.
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81A-26. Sale from bulk.
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81A-28. Declarations of unit price on random packages.
81A-29. Offenses and penalties.
81A-30. Injunction.
81A-31. Presumptive evidence.
81A-32 to 81A-36. [Reserved.]

Article 4.

Uniform Weights and Measures.

81A-37. Standard weight packages of flour, meal, grits and hominy.
81A-38. Sale of cement blocks, cinder blocks and other concrete masonry units.
81A-39. Approval of heating units, etc., for curing tobacco.
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Editor's Note. — This Chapter is Chapter 81 as rewritten by Session Laws 1975, c. 544, effective July 1, 1976, and recodified. Where appropriate, historical citations to the sections of the former Chapter have been added to corresponding sections of the new Chapter.

Article 1.

Administration of Chapter.

§ 81A-1. Weights and measures program provided for.

In order to protect the purchasers or sellers of any commodity, and to provide uniform standards of weight and uniform standards of measure throughout the State, which must be in conformity with the standards of weight and the standards of measure established by Congress, the Commissioner is hereby authorized to establish and maintain a weights and measures program as is hereinafter provided. (1927, c. 261, s. 1; 1945, c. 280, s. 1; 1975, c. 544.)

§ 81A-2. Administration of these Articles.

The provisions of this Chapter shall be administered by the Commissioner or his authorized agent. For the purpose of administering and giving effect to the provisions of this Chapter, the provisions of Handbook 44 as adopted by the National Conference on Weights and Measures, are hereby adopted except insofar as modified or rejected by the North Carolina Board of Agriculture. The North Carolina Board of Agriculture is empowered to make such further rules and regulations as may be necessary to make effective the purposes and provisions of this Chapter. All fees or moneys received by the Commissioner pursuant to this Chapter shall be placed in the Department of Agriculture fund for the purpose of enforcing this Chapter. (1927, c. 261, s. 2; 1931, c. 150; 1943, c. 762, s. 1; 1949, c. 984; 1975, c. 544.)

§ 81A-3. Systems of weights and measures.

The system of weights and measures in customary use in the United States and the metric system of weights and measures are jointly recognized, and either one or both of these systems shall be used for all commercial purposes in the State. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the National Bureau of Standards are recognized and shall govern weighing and measuring equipment and transactions in the State. (1975, c. 544.)

§ 81A-4. Board of Agriculture authorized to establish standards of weights and measures for commodities having none.

The Board of Agriculture is authorized and directed and empowered to establish standards of weights and measures for any commodity if no standard has been established by Congress or by the laws of the State of North Carolina; provided, however, that when a standard is established by Congress, or by the laws of the State of North Carolina, such standard shall supersede the standard or standards established by the Board of Agriculture. (1945, c. 280, s. 1; 1949, c. 984; 1975, c. 544.)

§ 81A-5. Employment of Director of Weights and Measures and authorized agents.

The Commissioner may employ a Director of Weights and Measures and such other employees as may be necessary in carrying out the provisions of this Chapter and he may fix and regulate their duties. All authority vested in the Commissioner by virtue of the provisions of this Chapter may with like force and effect, be executed by such authorized agents of the Commissioner as defined in this Chapter. (1927, c. 261, ss. 3, 4; 1949, c. 984; 1975, c. 544.)

§ 81A-6. Salaries and expenses.

The Commissioner shall request sufficient funds for the proper administration of the duties prescribed in this Chapter. (1927, c. 261, s. 5; 1931, c. 150; 1949, c. 984; 1975, c. 544.)

§ 81A-7. Local inspection of weights and measures.

When any city or county appoints a local inspector of weights and measures, the appointment and regulation of his work must be pursuant to the rules and regulations of the Department of Agriculture and his work shall be subject to the supervision of the Commissioner or his authorized agent. (1927, c. 261, s. 6; 1949, c. 984; 1975, c. 544.)

§ 81A-8. Standards of weights and measures.

Weights and measures that are traceable to the U.S. Prototype Standards supplied by the United States, or approved as being satisfactory by the National Bureau of Standards, shall be the State primary standards of weights and measures, and shall be maintained in such calibration as prescribed by the National Bureau of Standards. All secondary standards may be prescribed by the Commissioner and shall be verified upon their initial receipt and as often thereafter as deemed necessary by the Commissioner or his authorized agent. Complete record of the standards belonging to the State shall be maintained by the Commissioner. (1927, c. 261, s. 9; 1943, c. 543; 1949, c. 984; 1975, c. 544.)

§ 81A-9. Definitions.

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) Adjustment. — "Adjustment" is an act involving the tightening or loosening, or lengthening or shortening, or movement, of any part of a scale or weighing device, or the coordination of mechanical action of parts or electronic components with or upon each other, so as to make

the scale or weighing device give correct indications of applied weight values within legal tolerance, and the correctness of indications shall be determined by test provided for under definition of the term "service" as defined in this Chapter.

(2) Authorized Agent. — An "authorized agent" is any employee of the North Carolina Department of Agriculture designated by the Commissioner to enforce any provisions of this Chapter and who is designated by an official identification card issued by the Commissioner.

(3) Barrel. — The term "barrel," when used in connection with beer, ale, porter, and other similar fermented liquor is a unit of 31 liquid gallons; fractional parts of a barrel shall be understood to mean like fractional parts of 31 gallons.

(4) Bulk Sale. — The term "bulk sale" is the sale of commodities when the quantity is determined at the time of sale.

(5) Bushel. — The term "bushel" when used in connection with dry measure and standard containers is a unit of 2150.42 cubic inches, of which the dry quart and dry pint, respectively, are the one-thirty-second and one-sixty-fourth parts.

(6) Commissioner of Agriculture. — "Commissioner" is the Commissioner of Agriculture of the State of North Carolina.

(7) Condemned Equipment. — "Condemned equipment" is equipment that is permanently out of service.

(8) Cord. — "Cord" when used in connection with purchases of wood is a quantity of wood consisting of any number of sticks, bolts or pieces laid parallel and together so as to form a rick or stack occupying a space four feet wide, four feet high and eight feet long, or such other dimensions that will when multiplied together equal 128 cubic feet by volume, construed as being seventy percent (70%) solid and thirty percent (30%) air space or 90 solid cubic feet.

(9) Correct. — "Correct" is conformance to all applicable requirements of this Chapter.

(10) Flour. — "Flour" is any finely ground product of wheat, or other grain, corn, peas, beans, seed or other substance, with or without added ingredients, intended for use as food for man.

(11) Gallon. — "Gallon" when used in connection with liquid measure is a unit of 231 cubic inches, of which the liquid quart, liquid pint and gill are, respectively, the quarter, the one-eighth and the one-thirty-second parts.

(12) Installation. — "Installation" is an act involving the erection, or building, or assembling of parts, or the placing or setting up of a scale or weighing device so as to give correct indications of applied weight values within legal tolerance when used for the purpose intended, and the correctness of indications shall be determined by test provided for under definition of the term "service" as defined in this Chapter.

(13) Maintenance. — "Maintenance" is an act pursuant to the retention of a scale or weighing device in such working condition as to give correct applied weight value indications within legal tolerance when used as intended, which may involve either or both adjustment or repair before or after inaccuracy develops in fact, and the correctness of indications shall be determined by test provided for under the term "service" as defined in this Chapter.

(14) Meal. — "Meal" is any product of grain, corn, peas, beans, seed or other substance coarsely ground, with or without added ingredients, either bolted, or unbolted, including grits and hominy, intended for use as food for man.

(15) Package. — "Package" is any commodity put up or packaged in any manner in advance of sale in units suitable for either wholesale or retail sale.

(16) Person. — "Person" is both plural and singular, as the case demands, and includes individuals, partnerships, corporations, companies, firms, societies, and associations.

(17) Pound. — "Pound," used in connection with weight is the avoirdupois pound as declared by act of the United States Congress, except in those cases where it is common practice to use the "troy" pound or "apothecaries" pound, and the "ounce" is one-sixteenth part of an avoirdupois pound.

(18) Primary Standards. — "Primary standards" are the physical standards of the State which serve as the legal reference from which all other standards, weights and measures are derived.

(19) Rejected Equipment. — "Rejected equipment" is equipment that is incorrect, which is considered susceptible of proper repair.

(20) Repair. — "Repair" is an act involving the replacement or mending of a broken or nonadjustable part or parts and the restoration of a scale or weighing device to such working condition as to give correct indications of applied weight values within legal tolerance when used for the purpose intended, and the correctness of indications shall be determined by test provided for under the term "service" as defined in this Chapter.

(21) Sale or Sell. — "Sale" or "sell" is the ordinary meaning of said words and includes barter and exchange.

(22) Scale Technician. — A "scale technician" is any person who, for hire or award, renders service involving adjustment, installation, repair, or maintenance of a scale or weighing device, either used or intended to be used in determining weight value, or values, by either physical act, instruction, or supervision.

(23) Secondary Standards. — "Secondary standards" are the physical standards which are traceable to the primary standards through comparisons, using acceptable laboratory procedures, and used in the enforcement of weights and measures laws and regulations.

(24) Service. — "Service" is activity involving adjustment, installation, repair, or maintenance or a combination of two or more of these activities with respect to a scale or weighing device, and, in addition thereto, a test for determination of the accuracy of weight value indication in the following manner: Applying a series of loads of standard weight on a platter or platform up to capacity on a scale of 30 pounds capacity, and on all other scales except vehicle scales, standard weight loads equal to the first dial and/or unit weight on dial scales, and on beam scales and digital instruments a standard weight load equal to three-fourths scale capacity shall be applied. On vehicle scales up to and including 10 tons a minimum of 5,000 pounds of standard weight load and 5,000 pounds of build-up load equally distributed. On vehicle scales with a rated capacity in excess of 10 tons a standard weight load (build-up load if standard weights are not available) of not less than 20,000 pounds. If scale is so equipped all tare mechanisms shall be included in test.

(25) Ton. — "Ton" is a unit of 2,000 pounds, avoirdupois weight.

(26) Weight. — "Weight" when used in connection with any commodity is net weight; provided, however, where the label declares that the product is sold by drained weight, weight means net drained weight.

(27) Weight(s) and (or) Measure(s). — "Weight(s) and (or) measure(s)" are all weights and measures of every kind, instruments, and devices for weighing and measuring, and any appliance and accessories associated with any or all such instruments and devices. (1927, c. 261, ss. 20, 21; 1941, c. 237, s. 2; 1945, c. 280, s. 1; 1947, c. 380; 1975, c. 544.)

§§ 81A-10 to 81A-14: Reserved for future codification purposes.

ARTICLE 2.

Powers and Duties of Commissioner.

§ 81A-15. General duties.

The Commissioner shall:

(1) Have and keep general supervision of commercial weighing and measuring devices offered for sale, sold or used in the State.

(2) Upon written request from any person or educational institution in the State test or cause to be tested, or calibrate, weights, measures and weighing and measuring devices used as standards in the State.

(3) Enforce all the provisions of this Chapter.

(4) Conduct investigations to insure compliance with this Chapter.

(5) Inspect and test weights and measures kept, offered, or exposed for sale.

(6) Inspect, and test to ascertain if they are correct, weights and measures commercially used (i) in determining the weight, measure, or count of commodities or things sold, or offered or exposed for sale, on the basis of weight, measure or count or (ii) in computing the basic charge or payment for services rendered on the basis of weight, measure or count.

(7) Approve for use, and may mark, such weights and measures and weighing and measuring devices as he finds to be correct, and shall reject and mark as rejected such weights and measures as he finds incorrect. Weights and measures and weighing and measuring devices that have been rejected may be seized if not corrected within 10 days, or if used or disposed of in a manner not specifically authorized. Weights and measures found to be incorrect that are not capable of being made correct shall be condemned and may be seized by the Commissioner without any court order or other legal process.

(8) Weigh, measure, or inspect packaged commodities kept, offered, or exposed for sale, sold or in the process of delivery, to determine whether they contain the amounts represented and whether they are kept, offered, or exposed for sale in accordance with this Chapter or regulations promulgated pursuant thereto. In carrying out the provisions of this section, recognized sampling procedures, such as are designated in National Bureau of Standards Handbook 67, "Checking Prepackaged Commodities," shall be used.

(9) Allow reasonable variations from the stated quantity of contents, which shall include those caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice only after the commodity has entered intrastate commerce.

(10) Delegate to authorized agents any of these responsibilities for the proper administration of this Chapter. (1927, c. 261, s. 10; 1949, c. 984; 1975, c. 544.)

§ 81A-16. Police powers.

When necessary for the enforcement of this Chapter or regulations promulgated pursuant thereto the Commissioner or his authorized agent is:

(1) Authorized to enter any commercial premises during normal business hours, except that in the event such premises are not open to the public, he shall first present his credentials and obtain consent before making entry thereto, unless a search warrant has previously been obtained.
(2) Empowered to issue stop-use, hold, and removal orders with respect to any weights and measures commercially used, and stop-sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale.
(3) Empowered to seize, for use as evidence, without warrant or other legal writ, any incorrect or unapproved weight, measure, package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of the provisions of this Chapter or regulations promulgated pursuant thereto.
(4) Empowered to stop any commercial vehicle wherever found in the State and, after presentment of his credentials, inspect the contents, require that the person in charge of that vehicle produce any documents in his possession concerning the contents, and require him to proceed with the vehicle to some specified place for inspection.
(5) Authorized to arrest, without warrant, any violator of this Chapter. Such authorized agent shall proceed forthwith with such person before a magistrate or other person authorized to issue arrest warrants. (1927, c. 261, ss. 11-13; 1975, c. 544.)

§§ 81A-17 to 81A-21: Reserved for future codification purposes.

Article 3.

Violations.

§ 81A-22. Misrepresentation of quantity.

No person shall sell, offer or expose for sale less than the quantity he represents. No buyer shall take more than the quantity he represents when he furnishes the weight or measure by means of which the quantity of any commodity, thing or service is determined. (1927, c. 261, s. 19; 1945, c. 280, s. 1; 1949, c. 984; 1975, c. 544.)

§ 81A-23. Misrepresentation of pricing.

No person shall misrepresent the price of any commodity or service sold, offered, exposed, or advertised for sale by weight, measure, or count, nor represent the price in any manner calculated or tending to mislead or in any way deceive a person. (1975, c. 544.)

§ 81A-24. Commodities to be sold by weight, measure or numerical count.

It shall be unlawful to sell, except for immediate consumption by the purchaser, on the premises of the seller, liquid commodities in any other manner than by weight or liquid measure, or commodities not liquid in any other manner than by measure of time, by length, by volume, by weight or by numerical count. When a commodity is sold by numerical count in excess of one unit, the units which constitute said numerical count shall be uniform in size and/or weight, and be so exposed as to be readily observed by the purchaser. (1945, c. 280, s. 1; 1949, c. 973; 1975, c. 544.)

§ 81A-25. Unlawful for package to mislead purchaser.

It shall be unlawful to keep for the purpose of sale, offer or expose for sale, or sell, any commodity in package form when said package is so made, or formed, or filled, or wrapped, or exposed, or marked, or labeled as to mislead or deceive the purchaser as to the quantity of its contents. (1945, c. 280, s. 1; 1975, c. 544.)

§ 81A-26. Sale from bulk.

Whenever the quantity is determined by the seller, bulk sales in excess of twenty dollars ($20.00) and all bulk deliveries of heating fuel shall be accompanied by a delivery ticket containing the following information:

(1) The name and address of the vendor and purchaser,
(2) The date delivered,
(3) The quantity delivered and the quantity upon which the price is based, if this differs from the delivered quantity,
(4) The identity of the most descriptive terms commercially practicable, including any quality representation made in connection with the sale, and
(5) The count of individually wrapped packages, if more than one. (1975, c. 544.)

§ 81A-27. Information required on packages.

Except as otherwise provided in this Chapter or by regulations promulgated pursuant thereto, any package kept for the purpose of sale or offered or exposed for sale shall bear on the outside of the package a definite, plain, and conspicuous declaration of:

(1) The identity of the commodity in the package, unless the same can easily be identified through the wrapper or container,
(2) The quantity of contents in terms of weight, measure, or count, and
(3) The name and place of business of the manufacturer, packer, or distributor, in the case of any package kept, offered, or exposed for sale, or sold in any place other than on the premises where packed. (1927, c. 261, s. 16; 1945, c. 280, s. 1; 1975, c. 544.)

§ 81A-28. Declarations of unit price on random packages.

In addition to the declarations required by G.S. 81A-27, any package being one of a lot containing random weights of the same commodity and bearing the total selling price of the package shall bear on the outside of the package a plain and conspicuous declaration of the price per single unit of weight at the time it is offered for retail sale. (1975, c. 544.)

§ 81A-29. Offenses and penalties.

Any person who violates any provision of this section or any provision of this Chapter or regulations promulgated pursuant thereto for which a specific penalty has not been prescribed shall be guilty of a misdemeanor, and upon a first conviction thereof shall be punished by a fine of not less than fifty dollars ($50.00) or more than five hundred dollars ($500.00), or by imprisonment for not more than three months, or both. Upon a subsequent conviction thereof, said person shall be punished by a fine of not less than one hundred dollars ($100.00) or more than one thousand dollars ($1,000) or by imprisonment for up to one year, or both. No person shall:

(1) Use or have in possession for use in commerce any incorrect weight or measure.

(2) Remove any tag, seal, or mark from any weight or measure without specific written authorization from the Commissioner or his authorized agent.

(3) Hinder or obstruct any weights-and-measures official in the performance of his duties.

(4) Impersonate in any way any employee of the North Carolina Department of Agriculture designated by the Commissioner to enforce any part of this Chapter.

(5) Use in retail trade, except in the preparation of packages put up in advance of sale, a weighing or measuring device which is not so positioned so that its indications may be accurately read and the weighing or measuring operation observed from some position which may be reasonably assumed by a customer. (1927, c. 261, ss. 14, 15, 19; 1945, c. 280, s. 1; 1949, c. 984; 1975, c. 544.)

§ 81A-30. Injunction.

The Commissioner or his authorized agent is authorized to apply to any court of competent jurisdiction for a temporary restraining order or a preliminary or permanent injunction restraining any person from violating any provision of this Chapter. (1975, c. 544.)

§ 81A-31. Presumptive evidence.

Whenever there shall exist a weight or measure or weighing or measuring device in or about any place in which or from which buying or selling is commonly carried on, there shall be a rebuttable presumption that such weight or measure or weighing or measuring device is regularly used for the business purposes of that place. (1975, c. 544.)

§§ 81A-32 to 81A-36: Reserved for future codification purposes.

Article 4.

Uniform Weights and Measures.

§ 81A-37. Standard weight packages of flour, meal, grits and hominy.

All flour and meal packed for sale, offered or exposed for sale, or sold in this State shall be one of the following standard weight packages and no other, namely: five pounds, 10 pounds, 25 pounds, 50 pounds, 100 pounds, and multiples of 100 pounds; provided, however, nonstandard-weight packages may be packed for sale, offered or exposed for sale, or sold in this State, weighing three pounds or less, if said nonstandard-weight packages shall be plainly and conspicuously marked showing net contents in avoirdupois weight; provided further that nothing in this section shall be construed to prevent the retail sale of any amount of flour or meal direct to the consumer from bulk, upon order and weight at time of delivery to the consumer. (1945, c. 280, s. 1; 1949, c. 984; 1975, c. 544.)

§ 81A-38. Sale of cement blocks, cinder blocks and other concrete masonry units.

In order to protect the purchasers of concrete block, cinder block, and other concrete masonry units and to provide for a minimum load-bearing strength, all concrete block, cinder block, and other concrete masonry units offered for sale or sold in this State shall have a load-bearing strength of not less than 700 pounds per square inch of gross bearing area, or the minimum load-bearing strength approved by the National Underwriters Laboratory or by the American Society of Testing Materials, whichever is less. The manufacturer shall furnish proof, acceptable to the Board of Agriculture, that the concrete block, cinder block, or other concrete masonry units being offered for sale or sold comply with the minimum load-bearing strength required by this section. Each sale shall be accompanied with a bill of sale or invoice on which shall be printed or stamped in ink or other indelible substance a statement guaranteeing that the products covered by said bill of sale or invoice meet the minimum load-bearing strength as required by this section signed by a duly authorized official or agent of the manufacturer; provided, however, that the provisions of this section shall not prohibit the sale or offer for sale of cement block, cinder block, or other concrete masonry units, known as "seconds" or "rejects," due to size, shape or less than minimum load-bearing requirement, if and when said sale is accompanied with a bill of sale or invoice on which is printed or stamped in ink or other indelible substance in bold letters a statement that the cement block, cinder block, or other concrete masonry units so billed or invoiced are inferior in quality and do not comply with minimum load-bearing requirement signed by a duly authorized official or agent of the manufacturer. (1947, c. 788; 1975, c. 544.)

§ 81A-39. Approval of heating units, etc., for curing tobacco.

All heating units and/or curing assemblies offered for sale or sold in this State intended for use in curing the so-called flue-cured tobacco shall bear a label or seal of approval, authorized by the Board of Agriculture, and be accompanied with a statement, including drawings and instructions, signed by the manufacturer thereof, specifying how said heating unit shall be installed, operated, and/or used, so as to reduce to a minimum the fire hazard involved.

In order to obtain from the Board of Agriculture a label or seal of approval herein referred to, the manufacturer of the heating unit and/or curing assembly, hereinafter referred to as a "curer," shall first, and at his own expense, submit, set up and demonstrate a representative curer, so as to prove to the Commissioner or his authorized agent that said curer will, when installed and operated in accordance with drawings and instructions furnished by said manufacturer, in accordance with the rules and regulations adopted by the Board of Agriculture, reduce to a minimum the fire hazard involved; and second, shall obtain from the Department of Agriculture the label or seal of approval to be known as the "approval tag" and attach same to each curer which he (the manufacturer) offers for sale, sells, or installs either by himself or through his agent.

The Board of Agriculture is hereby authorized and empowered to make such rules and regulations as may be necessary to make effective the provisions of this section, and to make a charge for the approval tag not in excess of fifty cents (50¢) per curer. The said charge shall include the cost of issuing the tag of approval, and the cost of ascertaining by on-the-farm inspection whether or not the curers are being installed in accordance with the manufacturer's drawings and instructions, and/or the rules and regulations as adopted by the

Board of Agriculture. In making and formulating its rules and regulations, the Board of Agriculture will observe certain standards, such as the nature, type and technical construction of a tobacco curer referred to in this section, the type of fuel to be used, distance of flame from combustible materials, safety cut-off valves, method of installation, thermal or heating problems, inspection of curers, both before and after use, and any and all changes and standards that should be promulgated and made to reduce fire hazards and lower insurance costs and to protect the tobacco crops of farmers. The enumeration of certain standards as herein given shall not limit the authority of the Board of Agriculture to make rules and regulations involving other standards suggested by scientific information as the same relates to curers and related problems. (1947, c. 787; 1953, c. 727; 1975, c. 544.)

§ 81A-40. Sale of coal, coke and charcoal by weight.

(a) All coal, coke, or charcoal sold in this State shall be sold by weight only. The standard unit of weight shall be the avoirdupois pound, and a ton shall be 2,000 pounds.

(b) All coal, coke, or charcoal sold or offered for sale in this State, or which is being transported on any public street or highway in North Carolina, shall be weighed on scales suitable for such weighing which have been tested and sealed by the Commissioner or his authorized agent. It shall not be unlawful to transport such coal, coke, or charcoal to the nearest such scale for the purpose of having same weighed, but no sale or delivery of same shall take place until the load shall have been weighed.

(c) Each sale or delivery of coal, coke, or charcoal to the consumer shall be accompanied by a weight certificate on which shall be expressed in ink or other indelible substance the name and address of the seller or dealer, name and address of the purchaser or receiver, the kind and size of coal being delivered and the gross tare and net weights, the date of weighing, the signature of the weighmaster, a place for signature of receiver, the name of deliveryman, and the license number of delivery vehicle. The weight certificate shall be made with an original and two carbon copies, with one copy going to the purchaser or receiver, one copy to be held by the deliveryman, and the third copy to be held by the weighmaster; provided, however, that when coal, coke or charcoal is delivered in this State in railway carload lots, the railway bill of lading may be used in lieu of the weight certificate required by this section. (1949, c. 860; 1975, c. 544.)

§ 81A-41. Establishment of standard loaves of bread; "loaf" defined.

When loaves of bread are offered for sale or sold in this State, each loaf shall be one of the following weights and lengths and no other, to wit: one pound, 11 ½ inches maximum length, five inches maximum width at bottom; one and one-half pounds, 13 ½ inches maximum length, five inches maximum width at bottom; two pounds, 15 inches maximum length, five inches maximum width at bottom; two and one-half pounds, 16 ½ inches maximum length, five inches maximum width at bottom. The term "loaf" as used in this section shall be construed to mean a loaf which is baked in a pan of rectangular shape, either with straight-up or flared side, either with or without cover, and shall be known hereafter as the standard loaf. (1949, c. 1005; 1957, c. 374; 1975, c. 544.)

§ 81A-42. Standard weights and measures.

Whenever any commodity named in this section shall be quoted or sold by the bushel, the bushel shall be the number of pounds stated in this section and whenever quoted or sold in subdivisions of the bushel, the number of pounds shall be the fractional part of the number of pounds as set forth herein for the bushel, and when sold by the barrel shall consist of the number of pounds constituting 3.281 bushels.

Commodity	*Lbs. per bu.*
Alfalfa	60
Apples, dried	24
Apple seed	40
Barley	48
Beans, castor	46
Beans, dry lima	60
Beans, green in-pod lima	30
Beans, soy	60
Beef, net (per bbl.)	200
Beets	50
Blackberries	48
Blackberries, dried	28
Bran	20
Broomcorn	44
Buckwheat	50
Cabbage	50
Canary seed	60
Carrots	50
Cement	80
Charcoal	22
Cherries, with stems	56
Cherries, without stems	64
Clover seed, red and white	60
Clover, Burr	8
Clover, German	60
Clover, Japan, Lespedeza	25
Coal, stone	80
Coke	40
Corn, shelled	56
Corn, Kaffir	50
Corn, pop	70
Cotton seed	30
Cotton seed, Sea Island	44
Cucumbers	48
Fish	100
Flax seed	56
Grapes, with stems	48
Grapes, without stems	60
Gooseberries	48
Grass seed, Bermuda	14
Grass seed, blue	14
Grass seed, Hungarian	48
Grass seed, Johnson	25
Grass seed, Italian rye	20
Grass seed, orchard	14
Grass seed, tall meadow and fescue	24
Grass seed, all meadow and fescue except tall	14
Grass seed, perennial rye	14
Grass seed, timothy	45
Grass, redtop	14
Grass seed, velvet	7
Hair, plaster	8
Hemp seed	44
Hominy	62
Horseradish	50
Land plaster	100
Lime, unslaked	80
Lime, slaked	40
Meal, corn, whether bolted or un-bolted	48
Melon, cantaloupe	50
Millet	50
Mustard	58
Nuts, chestnuts	50
Nuts, hickory, without hulls	50
Nuts, walnut, without hulls	50
Oats, seed	32
Onions, button sets	32
Onions, top buttons	28
Onions, matured	57
Osage orange seed	33
Parsnips	50

Commodity	*Lbs. per bu.*	*Commodity*	*Lbs. per bu.*
Peaches, matured	50	Raspberries	48
Peaches, dried	25	Rice, rough	44
Peach seed	50	Rye seed	56
Peanuts, Spanish	30	Sage	4
Peanuts	22	Salads, mustard, spinach, turnips, and kale	10
Pears, matured	56	Salt	50
Pears, dried	26	Sorghum molasses (per gal.)	12
Peas, dry field	60	Sorghum seed	50
Peas, green in hull field	30	Strawberries	48
Pieplant	50	Sunflower seed	24
Plums	64	Teosinte	59
Pork net (per bbl.)	200	Tomatoes	56
Potatoes, Irish	56	Turnips	50
Potatoes, sweet green	56	Wheat	60
Potatoes, sweet, dry weight	47		
Quinces, matured	48		

It shall be unlawful to purchase or sell, or barter or exchange, any article named in this section on any other basis than as stated herein; provided, however, that any such articles may be sold by weight. (Code, ss. 3849, 3850; 1885, c. 26; 1905, c. 126; Rev., s. 3066; 1909, c. 555, s. 1; c. 835; 1915, c. 230, s. 1; 1917, c. 34; Ex. Sess. 1921, c. 87; 1931, c. 76; 1933, c. 523, s. 3; 1937, c. 354; 1949, c. 984; 1975, c. 544.)

§ 81A-43. Standard rule for measurement of logs.

The standard rule for determining the number of board feet in a tree or log shall be the so-called "International ¼ inch Log Rule." None of the provisions of this section shall apply to contracts entered into prior to June 11, 1975, nor to the measure of damages in any action in tort. This section shall not prevent the buyer and the seller from agreeing that some other log rule shall be used to determine the number of board feet in trees or logs covered by the contract between them. (1947, c. 400, s. 1; 1975, c. 544.)

Legal Periodicals. — For brief discussion of section, see 25 N.C.L. Rev. 428.

§ 81A-44. Authority to prescribe standards of weight or measurement for sale of milk or milk products.

The Board of Agriculture is hereby authorized and empowered to adopt and promulgate, after notice and hearing, rules and regulations prescribing standards or units of weight or measure by which milk, cream or other fluids containing milk or milk products may be sold at retail in bottles or other capped or sealed containers, and the sale thereof by any other standards or units of weight or measure shall be unlawful. (1949, c. 982; 1975, c. 544.)

§§ 81A-45 to 81A-49: Reserved for future codification purposes.

Article 5.

Public Weighmasters.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 81A-50. Weighing livestock sold at public livestock market; weight certificates.

Whenever livestock is offered or exposed for sale, or sold by weight at a public livestock market, the livestock shall be weighed by a public weighmaster and each individual sale shall be accompanied with a weight certificate in duplicate on which shall be expressed in ink or other indelible substance, the name and address of seller, the kind, number and weight of livestock being offered for sale, or sold, the time of day and date of weighing and the name of the weighmaster. The information expressed on said certificate shall be announced or otherwise made known immediately preceding the sale, if said sale be by auction. (1943, c. 762, s. 1; 1975, c. 544.)

§ 81A-51. Public weighmaster defined; to be licensed.

Any person, either for himself or as a servant or agent of any other person, firm, or corporation, or who is elected by popular vote, who shall weigh, or measure, or count, or who shall ascertain from, or record, the indications or readings of, a weighing, or measuring, or recording, device or apparatus for any other person, firm, or corporation, and declare the weight, or measure or count, or reading, or recording to be the true weight, or measure, or count, or reading, or recording of any commodity, thing, article, or product upon which the purchase, or sale, or exchange, is based, and make a charge for, or collect pay, a fee, or any other compensation for such act, shall issue a certificate of weight, or measure, or count, in accordance with the provisions of this Chapter, shall be licensed and shall be known as a public weighmaster in the State of North Carolina. (1939, c. 285, s. 1; 1945, c. 1067; 1971, c. 1085, s. 1; 1975, c. 544.)

§ 81A-52. Application for license permit.

Any person not less than 18 years of age desiring to be a public weighmaster in this State shall apply for and obtain a license from the North Carolina Department of Agriculture by filing formal application under oath as follows: "I, ..., a citizen of the United States, residing at . . . . . ., county of . . . . . have familiarized myself with the law and with full knowledge of the provisions contained therein relative to licensing of public weighmaster, do hereby file application for license to be issued accordingly. I certify that I am of sound mind and am physically fit to perform the duties imposed upon a public weighmaster and that I will, if licensed, abide

by and enforce all laws, rules and regulations relating to a public weighmaster to the best of my knowledge and ability." (1939, c. 285, s. 2; 1949, c. 983, s. 1; 1975, c. 544.)

§ 81A-53. Forms of certificates of weight, etc., to be approved by Commissioner or authorized agent.

It shall be the duty of every public weighmaster licensed under this act to issue a certificate of weight, measure, count, reading, or recording on forms approved by the Commissioner or his authorized agent, and to enforce the provisions of this Chapter, together with rules and regulations relating thereto. Said public weighmasters shall not receive compensation from the State for the duties performed. (1939, c. 285, s. 3; 1975, c. 544.)

§ 81A-54. Official seal of public weighmaster.

It shall be the duty of every public weighmaster so licensed under this Article to obtain from the North Carolina Department of Agriculture an official seal for the sum of five dollars ($5.00), which seal shall have inscribed thereon the following words: "North Carolina Public Weighmaster" and such other design and/or legend as the Commissioner or his authorized agent may deem appropriate. The seal shall be stamped or impressed upon each and every weight, measure, count, reading or recording certificate issued by such public weighmaster, and when so applied the certificate shall be recognized and accepted as a declaration of the official, true, and accurate and undisputed weight, measure, count, reading or recording of the commodity, product, or article weighed, or measured, or counted within the tolerance allowed by this Chapter; provided, however, that the weighers of tobacco in leaf tobacco warehouses may use, in lieu of said seal, a signature, which signature shall also appear, in ink or other indelible substance on the weighmaster's formal application, and again, posted in a conspicuous and accessible place in the tobacco warehouse where he is acting as a weighmaster. All public weighmasters' seals shall remain the property of the State of North Carolina. (1939, c. 285, s. 4; 1941, c. 317, s. 1; 1975, c. 544.)

§ 81A-55. Violations of provisions by weighmasters made misdemeanor.

Any public weighmaster who shall refuse to issue a certificate as prescribed by this Article, or who shall issue a certificate giving a false weight, or measure, or count, or reading, or recording, or who shall misrepresent the weight, or measure, or count, or reading, or recording of the quantity of any commodity, product or article to any person, firm or corporation, or who shall otherwise violate any of the provisions of this Article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00), or by imprisonment for not more than three months, or by both such fine and imprisonment in the discretion of the court, and, in addition thereto, his license shall be revoked and he shall forfeit his seal which, when so forfeited, shall be turned over to the Commissioner or his authorized agent. (1939, c. 285, s. 5; 1975, c. 544.)

§ 81A-56. Requesting weighmaster to falsify weights; impersonation of weighmaster; alteration of certificate, etc.

Any person, firm, or corporation who shall request a public weighmaster to weigh, measure, count, read, or record any commodity, product or article falsely or incorrectly, or who shall request a false or inaccurate certificate of weight, measure, count, reading, or recording, or any person issuing a certificate of weight, or measure, or count, or reading, or recording within the meaning of this Article, who is not a public weighmaster as provided for by this Article, or who shall act as, or for, or in any way impersonate, a public weighmaster, or who shall erase, change, or alter any certificate issued by a public weighmaster, or who shall make incorrect the certificate by increasing or decreasing the weight or measure or count of the commodity, product or article certified to for the purpose of deception, or who shall violate any provision of this Article for which a special penalty has not been provided, shall be guilty of misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or by imprisonment for not more than three months, or by both such fine and imprisonment in the discretion of the court. (1939, c. 285, s. 6; 1975, c. 544.)

§ 81A-57. Certificate of weighmasters presumed accurate and correct.

When a public weighmaster certificate is used in the sale, or purchase, or barter, or exchange of any commodity, product, or article, the certified weight, or measure, or count or reading or recording shall be deemed to be the true, accurate and undisputed weight, or measure or count, or reading or recording at time said commodity, product, or article is put into the natural channels of trade, which is, at the time of sale or purchase or barter or exchange; provided, however, that reasonable variations, or tolerances shall be permitted as established by rules and regulations as provided for by this Chapter. (1939, c. 285, s. 7; 1941, c. 317, s. 2; 1975, c. 544.)

§ 81A-58. Duty of custodian of product during time intervening between weighing and issuance of certificate.

If any commodity, product or article is to be offered for sale, or sold and is weighed or measured or counted by any public weighmaster and a certificate issued prior to sale, or acceptance of such commodity, product or article by the purchaser, his agent, or consignee, or if any commodity, product or article is offered for sale, sold, and/or delivered pending the weighing or measuring or counting of such commodity, product, or article by a public weighmaster and the issuance of a certificate, the person, firm, or corporation in whose custody said commodity, product or article is, shall keep, protect and prevent any increase or decrease in weight, measure or count, in the interim so that the declaration of weight, or measure, or count shall be true in accordance with G.S. 81A-57. The term "interim" as used in this section shall be construed to mean the time intervening between the weighing and issuance of certificate and the sale or purchase and the time intervening between the sale or purchase and the presentation of such commodity, product, or article to the public weighmaster for weighing or measuring or counting, and the issuance of certificate. Any loss sustained in the weight or measure or count of any commodity,

product, or article while in custody shall be borne by the person, firm or corporation in whose custody said commodity, product, or article is. (1939, c. 285, s. 8; 1975, c. 544.)

§ 81A-59. Weighing tobacco in sales warehouses.

All leaf tobacco offered for sale in a leaf tobacco warehouse in this State shall be weighed by a public weighmaster, shall be accompanied by a public weighmaster certificate, and shall be and remain in custody of the warehouse operator from and after the time it is weighed by the public weighmaster until it is sold or the bid is rejected by the owner thereof. (1945, c. 1067; 1975, c. 544.)

§ 81A-60. Complaints to weighmaster or Commissioner of Agriculture.

When doubt or difference arises as to the correctness of the weight, or measure, or count, or reading, or recording of any amount or part of any commodity, product, or article for which a certificate of weight, measure, count, reading or recording, has been issued by a public weighmaster, the owner, agent or consignee shall make complaint before moving said commodity, product, or article from city, town or community where weight certificate was issued, to the public weighmaster issuing said certificate or to the Commissioner or his authorized agent setting forth the cause or causes for such doubt and/or difference, and have said amount, or part of the amount, or any commodity, product, or article reweighed, or remeasured, or recounted by the weighmaster issuing the certificate or by an authorized agent of the Commissioner; provided, the commodity, product or article is kept and protected as is required during the interim period provided for in G.S. 81A-58. If, on reweighing, remeasuring, or recounting, a difference in original weight, or measure or count, is sustained the difference thus sustained shall be that, and that only, which is in excess of tolerance allowed by this Chapter, and any desired adjustment as a result of such difference shall be made accordingly, and the cost of reweighing or remeasuring or recounting shall be borne by the public weighmaster responsible for the issuance of such faulty certificate; otherwise, the cost shall be borne by the complainant. (1939, c. 285, s. 9; 1941, c. 317, s. 3; 1975, c. 544.)

§ 81A-61. Approval of devices used.

It shall be unlawful for any public weighmaster to use any weights or measures, or weighing or measuring or reading or recording device, which has not been tested and approved by the Commissioner or his authorized agent in accordance with the provisions of this Chapter and the rules and regulations governing same. (1939, c. 285, s. 10; 1975, c. 544.)

§ 81A-62. Annual license for public weighmaster.

Public weighmasters shall be licensed for a period of one year beginning on the first day of July and ending on the thirtieth day of June, next, and a fee of ten dollars ($10.00) shall be paid for each person so licensed to the Department of Agriculture at time of filing application, as set forth in G.S. 81A-52. (1939, c. 285, s. 11; 1943, c. 543; 1975, c. 544.)

§ 81A-63. Seal declared property of State.

The seal herein provided for shall be the property of the State of North Carolina and shall be forfeited and returned to the Commissioner or his authorized agent upon termination of the performance of duties herein described as being the duties of a public weighmaster. Failure or refusal of a person licensed as a public weighmaster under this Article to return, turn over, or surrender the official seal furnished by the Department of Agriculture upon expiration of term of license or for malfeasance in office shall be a misdemeanor and any person convicted thereof shall forfeit the amount paid for use of such seal and shall be punished by a fine of not less than ten dollars ($10.00) nor more than two hundred dollars ($200.00), or by imprisonment for not more than three months, or both such fine and imprisonment, in the discretion of the court. (1939, c. 285, s. 14; 1975, c. 544.)

§ 81A-64. Cotton weighing.

If any weigher or purchaser of cotton shall make any deduction from the weight of any bag, bale, or package of lint cotton, for or on account of the draft, turn, or break of the scales, steelyards, or other implement used in weighing the same, or for any other cause except as herein allowed, the person so offending shall be guilty of a misdemeanor, and fined not more than three hundred dollars ($300.00) or imprisoned, in the discretion of the court; provided, however, that deductions may be made by the weigher for water, dirt, or other foreign substances on such bag, bale, or package of cotton, or for other just cause, but if such deductions are made, the nature of such deductions shall be indicated upon the principal weight ticket which shall also show the gross weight of the cotton, the amount deducted as tare, and the net weight of said cotton. (1874-5, c. 58, ss. 1, 3; Code, s. 1007; Rev., s. 3816; C. S., s. 5085; 1943, c. 762, s. 2; 1975, c. 544.)

§§ 81A-65 to 81A-69: Reserved for future codification purposes.

Article 6.

Scale Technician.

§ 81A-70. Purpose of Article.

The purpose of this Article shall be to protect the owners and users of scales and weighing devices in their needs for scale repair and service, to provide for scale technician registration, and to provide for financial underwriting of services rendered. (1941, c. 237, s. 1; 1947, c. 380; 1975, c. 544.)

Legal Periodicals. — For comment on the 1941 act, see 19 N.C.L. Rev. 447.

§ 81A-71. Prerequisites for scale technician.

It shall be unlawful for any scale technician to render service as a scale technician until after he or she has complied with the following requirements:

(1) Obtained from the Department of Agriculture a copy of this Article, a copy of regulations pertinent to said Article, and an application form for registration.

(2) Obtained bond in the sum of one thousand dollars ($1,000) issued by a surety company licensed to do business in North Carolina.
(3) Filed bond with the clerk of superior court of the county in which such applicant resides, unless he or she be a resident of some other state, in which event such bond shall be filed with the Clerk of Superior Court in Wake County, North Carolina.
(4) Obtained a receipt in duplicate for such bond and filed the receipt with the clerk of superior court and mailed or delivered one copy of such receipt together with the application form for registration, completely filled out, to the Department of Agriculture, Raleigh, North Carolina.
(5) Obtained a registration card or certificate from the Commissioner or his authorized agent and a model form of service certificate.

The provisions of this Article shall not apply to a full-time employee who renders service only on a scale or weighing device, or on scales or weighing devices, owned solely by his or her employer unless additional pay or compensation is received for such service. (1941, c. 237, s. 3; 1947, c. 380; 1975, c. 544.)

§ 81A-72. Registration; certificate of registration; annual renewal.

The Commissioner or his authorized agent shall register any person who has complied with the requirements of this Article by making a record of receipt of application and of bond, and the issuing of a certificate or card of registration to applicant, whereupon the applicant becomes a registered scale technician and shall be known thereafter as such. Such registration shall be in effect from date of registration until July 1 next and shall be renewed on the first day of July of each year thereafter. (1941, c. 237, ss. 4, 5; 1943, c. 543; 1947, c. 380; 1975, c. 544.)

§ 81A-73. Service certificate.

Whenever any service is rendered on any scale or weighing device used or intended to be used in this State by a scale technician, a certificate shall be issued by such scale technician who rendered said service, which shall be known as a "service certificate." The size and form of said service certificate shall be determined by the Commissioner or his authorized agent. Inclusive of other pertinent information or statements, the said certificate shall bear a statement expressed in ink or other indelible substance naming the kind of service rendered, whether adjustment, installation, repair, or maintenance, and stating that a service test as defined under the term "service" has been made, and that the service rendered is guaranteed to be as represented. The service certificate shall be made out in triplicate, with original going to the owner of such scale or weighing device or his agent, and a duplicate shall be sent to the Commissioner or his authorized agent if service is upon a scale or weighing device which has been rejected or condemned by an authorized agent, and the triplicate copy shall be retained by the scale technician issuing such certificate. (1947, c. 380; 1975, c. 544.)

§ 81A-74. Bond.

The bond required by this Article shall underwrite the guarantee of a refund or compensation, covering any claim by owner of scale or weighing device for damage or injury, which claim is sustained by the court, resulting in misrepresentation of service rendered, or failure to comply with all the provisions of this Article, by the scale technician, regardless of his or her intent;

provided, however, that the aggregate liability of the surety to all claimants sustained by the court shall in no event exceed the amount of said bond. (1947, c. 380; 1975, c. 544.)

§ 81A-75. Scale removal.

When a scale or weighing device is removed from the premises where located by a scale technician, the scale technician or his servant or agent shall issue a receipt for said scale or weighing device, on which shall be written in ink or other indelible substance the name and address of the owner, the name and address of receiving agent, date of receipt, anticipated date of return, name or make of scale, and such other information pertinent to its identification. The form of receipt shall be approved by the Commissioner or his authorized agent. (1947, c. 380; 1975, c. 544.)

§ 81A-76. Control of condemned or rejected scale.

It shall be unlawful for any owner of a scale or weighing device which has been condemned or rejected by the Commissioner or his authorized agent to either use or dispose of same in any manner other than at the direction of the Commissioner or his authorized agent; provided, however, said rejected scale or weighing device may be removed from the premises temporarily for repairs or service only. (1947, c. 380; 1975, c. 544.)

§ 81A-77. Secondhand scale.

It shall be unlawful for any person to sell, or offer for sale, or put into use, a secondhand or rebuilt or reconditioned scale or weighing device unless said scale shall have been tested and approved by the Commissioner or his authorized agent, or shall be accompanied by a service certificate as provided for in this Article. Said service certificate shall be retained by the purchaser or user of said scale until an inspector of weights and measures has tested and approved such secondhand scale. The said certificate shall serve as proof of the accuracy of scale at the time scale was purchased or put into service. A secondhand or rebuilt or reconditioned scale or weighing device as referred to in this section shall be considered as being a scale or weighing device in the channels of trade which does not belong to the previous user. (1947, c. 380; 1975, c. 544.)

§ 81A-78. Scale location.

It shall be unlawful for any scale or weighing device to be installed, set up, put into service, or used on a foundation or support that aids in giving false indication of weight values applied to platter, platform, or other load receiving element. (1947, c. 380; 1975, c. 544.)

§ 81A-79. Exemption.

The provisions of this Article shall not prohibit the user of a scale or weighing device from employing some person other than a scale technician to render service as defined by this Article upon his or her scale or weighing device, nor apply to the person so employed, who does not solicit such employment, provided that said user shall not be relieved of his or her responsibility or liability concerning the accuracy of the scale or weighing device after service has been rendered. (1947, c. 380; 1975, c. 544.)

§ 81A-80. Penalty.

Any person who violates any of the provisions of this Article, or who for hire or award renders service as a scale technician on a scale or weighing device without registering as a scale technician or who shall fail to issue a service certificate or who shall issue a service certificate bearing false statements regarding service rendered, shall be guilty of a misdemeanor, and upon conviction, shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or imprisoned for not more than three months, or both fined and imprisoned. Upon conviction of violating this Article, a scale technician shall forfeit any charges or remuneration for service rendered, if service be involved. The scale technician and his bonding company shall, at the discretion of the court, reimburse or compensate the owner of the scale or weighing device in question for such damage, or injury, sustained. Upon a subsequent conviction of violation of this Article, the court in its discretion, may deny a scale technician the privilege to act as or in the capacity of a scale technician for a specified length of time. His registration card or certificate may be seized by the court and turned over to the Commissioner or his authorized agent with instruction concerning reinstatement or renewal. (1941, c. 237, s. 7; 1947, c. 380; 1949, c. 983, s. 2; 1975, c. 544.)

§§ 81A-81 to 81A-85: Reserved for future codification purposes.

Article 7.

General Provisions.

§ 81A-86. Regulations to be unaffected by repeal of prior enabling statute.

The adoption of this Chapter or any of its provisions shall not affect any regulations promulgated pursuant to the authority of any earlier enabling statute unless inconsistent with this Chapter or modified or revoked. (1975, c. 544.)

§ 81A-87. Severability provision.

If any provision of this Chapter is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Chapter and the applicability thereof to other persons and circumstances shall not be affected thereby. (1975, c. 544.)

§ 81A-88. Repeal of conflicting laws.

All laws and parts of laws contrary to or inconsistent with the provisions of this Chapter are repealed except as to offenses committed, liabilities incurred, and claims made thereunder prior to July 1, 1976. (1975, c. 544.)

Chapter 82.
Wrecks.

§§ 82-1 to 82-18: Repealed by Session Laws 1971, c. 882, s. 5.

Cross References. — As to salvage of abandoned shipwrecks and other underwater archeological sites, see §§ 121-22 to 121-28.

Chapter 83.
Architects.

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§§ 83-1 to 83-15: Recodified as §§ 83A-1 to 83A-17.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 871, s. 1, and has been recodified as Chapter 83A.

Chapter 83A.

Architects.

Sec.
83A-1. Definitions.
83A-2. North Carolina Board of Architecture; creation; appointment, terms and oath of members; vacancies; officers; bond of treasurer; notice of meetings; quorum.
83A-3. Expenses of Board members; Board finances.
83A-4. Fees.
83A-5. Board records; rosters; seal.
83A-6. Board rules; bylaws; standards of professional conduct.
83A-7. Qualifications and examination requirements.
83A-8. Qualification for corporate practice.
83A-9. Partnership practice.
83A-10. Professional seals.
83A-11. Expirations and renewals.
83A-12. Prohibited practice.
83A-13. Exemptions.
83A-14. Disciplinary action and procedure.
83A-15. Denial, suspension or revocation of license.
83A-16. Violations of Chapter; penalties.
83A-17. Power of Board to seek injunction.

§ 83A-1. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Architect" means a person who is duly licensed to practice architecture.

(2) "Board" means the North Carolina Board of Architecture.

(3) "Corporate certificate" means a certificate of corporate registration issued by the Board recognizing the corporation named in the certificate as meeting the requirements for the corporate practice of architecture.

(4) "Corporate practice of architecture" means "practice" as defined in G.S. 83A-1(7) by a corporation which is organized or domesticated in this State, and which holds a current "corporate certificate" from this Board.

(5) "Good moral character" means such character as tends to assure the faithful discharge of the fiduciary duties of an architect to his client. Evidence of lack of such character shall include the willful commission of an offense justifying discipline under this Chapter, the practice of architecture in violation of this Chapter, or of the laws of another jurisdiction, or the conviction of a felony.

(6) "License" means a certificate of registration issued by the Board recognizing the individual named in the certificate as meeting the requirements for registration under this Chapter.

(7) "Practice of architecture" means performing or offering to perform or holding oneself out as legally qualified to perform professional services in connection with the design, construction, enlargement or alteration of buildings, including consultations, investigations, evaluations, preliminary studies, the preparation of plans, specifications and contract documents, administration of construction contracts and related services or combination of services in connection with the design and construction of buildings, regardless of whether these services are performed in person or as the directing head of an office or organization. (1915, c. 270, s. 9; C.S., s. 4985; 1941, c. 369, s. 3; 1951, c. 1130, s. 1; 1957, c. 794, ss. 1, 2; 1979, c. 871, s. 1.)

Editor's Note. — This Chapter is former Chapter 83, as rewritten by Session Laws 1979, c. 871, s. 1, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten and recodified.

§ 83A-2. North Carolina Board of Architecture; creation; appointment, terms and oath of members; vacancies; officers; bond of treasurer; notice of meetings; quorum.

(a) The North Carolina Board of Architecture shall have the power and responsibility to administer the provisions of this Chapter in compliance with the Administrative Procedure Act.

(b) The Board shall consist of seven members appointed by the Governor. Five of the members of the Board shall be licensed architects appointed for five year terms; the terms shall be staggered so that the term of one architect member expires each year. No architect member shall be eligible to serve more than two consecutive terms; if a vacancy occurs during a term, the Governor shall appoint a person to fill the vacancy for the remainder of the unexpired term. Two of the members of the Board shall be persons who are not licensed architects and who represent the interest of the public at large; the Governor shall appoint these members not later than July 1, 1979. The public members shall have full voting powers and shall serve at the pleasure of the Governor. Each Board member shall file with the Secretary of State an oath faithfully to perform duties as a member of the Board, and to uphold the Constitution of North Carolina and the Constitution of the United States.

(c) Officers of the Board shall include a president, vice-president, secretary and treasurer elected at the annual meeting for terms of one year. The treasurer shall give bond in such sum as the Board shall determine, with such security as shall be approved by the Board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. Notice of the annual meeting, and the time and place of the annual meeting shall be given each member by letter at least 10 days prior to such meeting and public notice of annual meetings shall be published at least once each week for two weeks preceding such meetings in one or more newspapers of general circulation in this State. A majority of the members of the Board shall constitute a quorum. (1915, c. 270, ss. 1, 2; C.S., ss. 4986-4988, 4990; 1957, c. 794, ss. 3, 4, 6; 1979, c. 871, s. 1.)

§ 83A-3. Expenses of Board members; Board finances.

(a) Each member of the Board shall be entitled to receive travel and expense reimbursement as authorized by G.S. 93B-5 for similar boards.

(b) All funds received by the Board under the provisions of this Chapter shall be deposited by the treasurer or such other officer or staff employee as the Board may designate in such depository and under such security as the Board may direct. All expenses incurred by the Board shall be paid out of funds derived from examination, licensing, renewal or other fees herein provided and shall be paid by the treasurer upon vouchers drawn by the secretary and approved by the president. The Board shall have the power to determine necessary expenses, and to fix the compensation for board employees and for professional services. The State of North Carolina shall not be liable for the compensation of any Board members or officers. Payment of expenses and salaries pursuant to administration of this Chapter may not exceed available funds of the Board. All Board receipts and disbursements shall be subject to audit and accounting procedures established by the State for similar boards. (1915, c. 270, s. 6; C.S., s. 4994; 1957, c. 794, s. 9; 1979, c. 871, s. 1.)

§ 83A-4. Fees.

All fees and charges by the Board shall be established by Board rule subject to the provisions of the Administrative Procedure Act.

Fees set by the Board shall not exceed the following amounts:

Initial Application	
Individual	
Residents	$25.00
Nonresidents	$50.00
Corporate	$50.00
Reexamination	$15.00
Annual License Renewal	
Individual	$40.00
Corporate	$50.00
Late Renewal Penalty	
Up-to-30 days	$25.00
30 days to 1 year	$50.00
Reciprocal Registration	$75.00

The above fees are provided in addition to any other fees prescribed by law. Reasonable fees for examination materials, certificates, rosters and other published materials shall be established by the Board, but the Board shall not collect any fees not authorized by this Chapter. (1915, c. 270, ss. 3, 6; 1919, c. 336, ss. 1, 2; C. S., ss. 4992, 4994, 4995; 1951, c. 1130, s. 2; 1957, c. 794, ss. 7, 9, 10; 1971, c. 1231, s. 1; 1979, c. 871, s. 1.)

§ 83A-5. Board records; rosters; seal.

(a) The Board shall maintain records of board meetings, of applications for individual or corporate registration and the action taken thereon, of the results of examinations, of all disciplinary proceedings, and of such other information as deemed necessary by the Board or required by the Administrative Procedure Act or other provisions of the General Statutes.

(b) A complete roster showing the name and last known address of all resident and nonresident architects and architectural firms holding current licenses from the Board shall be published by the Board at least once each year, and shall include each registrant's authorization or registration number. Copies of the roster shall be filed with the Secretary of State and the Attorney General, and other applicable State or local agencies, and upon request, may be distributed or sold to the public.

(c) The Board shall adopt a seal containing the name of the Board for use on its official records and reports. (1915, c. 270, ss. 1, 5; C. S., ss. 4989, 4991; 1957, c. 794, s. 5; 1979, c. 871, s. 1.)

§ 83A-6. Board rules; bylaws; standards of professional conduct.

(a) The Board shall have the power to adopt bylaws, rules, and standards of professional conduct to carry out the purposes of this Chapter, including, but not limited to:

(1) The adoption of bylaws governing its meetings and proceedings;

(2) The establishment of qualification requirements for admission to examinations, and for individual or corporate licensure as provided in G.S. 83A-7 and 83A-8;

(3) The establishment of the types and contents of examinations, their conduct, and the minimum scores or other criteria for passing such examinations;

(4) The adoption of mandatory standards of professional conduct concerning misrepresentations, conflicts of interest, incompetence, disability, violations of law, dishonest conduct, or other unprofessional conduct for those persons or corporations regulated by this Chapter, which standards shall be enforceable under the disciplinary procedures of the Board;

(5) The establishment or approval of requirements for renewal of licenses designed to promote the continued professional development and competence of licensees. Such requirements shall be designed solely to improve the professional knowledge and skills of a licensee directly related to the current and emerging bodies of knowledge and skills of the licensee's profession.

When necessary to protect the public health, safety, or welfare, the Board shall require such evidence as it deems necessary to establish the continuing competency of architects as a condition of renewal of licenses.

(b) The Board shall not adopt any rule or regulation which prohibits advertising.

(c) The adoption, amendment or revocation of rules, regulations, and standards of professional conduct, and the publication and distribution of the same shall be subject to the provisions of the Administrative Procedure Act. (1979, c. 871, s. 1.)

§ 83A-7. Qualifications and examination requirements.

(a) Licensing by Examination. — Any individual who is at least 18 years of age and of good moral character may make written application for examination by completion of a form prescribed by the Board accompanied by the required application fee. Subject to qualification requirements of this section, the applicant shall be entitled to an examination to determine his qualifications for licensure. All candidates must successfully complete a professional examination in order to be licensed.

(1) The qualification requirements for registration as a duly licensed architect shall be:

a. A degree in architecture from a college or university where the degree program has been approved by the Board, at least three years practical training and experience as defined by rules of the Board, and successful completion of the professional examination;

b. The successful completion of a qualifying test by applicants who do not hold the required degree for direct admission to the professional examination but have a combination of education and practical training and experience as defined by rules of the Board.

(2) The Board may adopt as its own rules for academic and practical training, and for examination, and grading procedures, the published guidelines of nationally recognized councils or agencies for the accreditation, examination, and licensing for the architectural profession.

(b) Licensing by Reciprocity. — Any individual holding a current license for the practice of architecture from another state or territory, and holding a certificate of qualification issued by the National Council of Architectural Registration Boards, may upon application and within the discretion of the Board be licensed without written examination. The Board may waive the requirement for National Council registration if the qualifications, examination and licensing requirements of the state in which the applicant is licensed are substantially equivalent to those of this State and the applicant otherwise meets the requirements of this Chapter. (1915, c. 270, s. 3; 1919, c. 336, s. 1; C.S., s. 4992; 1957, c. 794, s. 7; 1971, c. 1231, s. 1; 1979, c. 871, s. 1.)

§ 83A-8. Qualification for corporate practice.

(a) Any corporation desiring to practice architecture in this State shall file corporate application on forms provided by the Board, accompanied by the required application fee. To be eligible for a corporate certificate, the corporation must meet all requirements of the Professional Corporation Act.

(b) Architectural corporations of other states may be granted corporate certificates for practice in this State upon filing application with the Board and satisfying the Board that they meet the requirements of subsection (a) above. Such corporations shall designate the individual or individuals licensed to practice architecture in this State who shall be in responsible charge of all architectural work offered or performed by such corporation in this State. Such corporations shall notify the Board of changes in such designation.

(c) All corporations holding corporate certificates from the Board shall be subject to the applicable rules and regulations adopted by the Board, and to all the disciplinary powers applicable to individual licensees who are officers or employees of the corporation. Corporations may perform no acts or things forbidden to officers or employees as licensees. (1979, c. 871, s. 1.)

§ 83A-9. Partnership practice.

This Chapter neither prevents practice of architecture by a partnership nor requires partnership seals or certificates of practice provided that the members of the partnership are duly licensed to practice architecture, and, provided that the partnership files with the Board and keeps current a list of the partners, their license identifications, and the types of services offered by the partnership. (1979, c. 871, s. 1.)

§ 83A-10. Professional seals.

Every licensed architect shall have a seal of a design authorized by the Board, and shall imprint all drawings and sets of specifications prepared for use in this State with an impression of such seal. Licensed architectural corporations shall employ corporate professional seals, of a design approved by the Board, for use in identifying plans, specifications and other professional documents issued by the corporation, but use of such corporate seals shall be in addition to and not in substitution for the requirement that the individual seal of the author of such plans and professional documents be affixed. (1915, c. 270, s. 7; C.S., s. 4997; 1979, c. 871, s. 1.)

§ 83A-11. Expirations and renewals.

Certificates must be renewed on or before the first day of July in each year. No less than 30 days prior to the renewal date, a renewal application shall be mailed to each individual and corporate licensee. The completed application together with the required renewal fee shall be returned to the Board on or before the renewal date. When the Board is satisfied as to the continuing competency of an architect, it shall issue a renewal of the certificate. Upon failure to renew within 30 days after the date set for expiration, the license shall be automatically revoked but such license may be renewed at any time within one year following the expiration date upon proof of continuing competency and payment of the renewal fee plus a late renewal fee. After one year from the date of revocation, reinstatement may be made by the Board, or in its discretion, the application may be treated as new subject to reexamination and qualification requirements as in the case of new applications. (1919, c. 336, s. 2; C.S., s. 4995; 1951, c. 1130, s. 2; 1957, c. 794, s. 10; 1979, c. 871, s. 1.)

§ 83A-12. Prohibited practice.

The purpose of the Chapter is to safeguard life, health and property. It shall be unlawful for any individual, firm or corporation to practice or offer to practice architecture in this State as defined in this Chapter, or to use the title "Architect" or any form thereof, except as provided in Chapter 89A for Landscape Architects, or to display or use any words, letters, figures, titles, sign, card, advertisement, or other device to indicate that such individual or firm practices or offers to practice architecture as herein defined or is an architect or architectural firm qualified to perform architectural work, unless such person holds a current individual or corporate certificate of admission to practice architecture under the provisions of this Chapter. (1915, c. 270, s. 4; C.S., s. 4996; 1941, c. 369, ss. 1, 2; 1951, c. 1130, s. 3; 1957, c. 794, s. 11; 1965, c. 1100; 1969, c. 718, s. 21; 1973, c. 1414, s. 1; 1979, c. 871, s. 1.)

§ 83A-13. Exemptions.

(a) Nothing in this Chapter shall be construed to prevent the practice of general contracting under the provisions of Article 1 of Chapter 87, or the practice by any person who is qualified under law as a "registered professional engineer" of such architectural work as is incidental to engineering projects or utilities, or the practice of any other profession under the applicable licensure provisions of the General Statutes.

(b) Nothing in this Chapter shall be construed to prevent a duly licensed general contractor, professional engineer or architect, acting individually or in combination thereof, from participating in a "Design/Build" undertaking including the preparation of plans and/or specifications and entering individual or collective agreements with the owner in order to meet the owner's requirements for pre-determined costs and unified control in the design and construction of a project, and for the method of compensation for the design and construction services rendered; provided, however, that nothing herein shall be construed so as to allow the performance of any such services or any division thereof by one who is not duly licensed to perform such service or services in accordance with applicable licensure provisions of the General Statutes; provided further, that full disclosure is made in writing to the owner as to the duties and responsibilities of each of the participating parties in such agreements; and, provided further, nothing in this Chapter shall prevent the administration by any of the said licensees of construction contracts and related services or combination of services in connection with the construction of buildings.

(c) Nothing in this Chapter shall be construed to require an architectural license for the preparation, sale, or furnishing of plans, specifications and related data, or for the supervision of construction pursuant thereto, where the building, buildings, or project involved is in one of the following categories:

(1) A family residence, up to eight units attached with grade level exit, which is not a part of or physically connected with any other buildings or residential units;

(2) A building upon any farm for the use of any farmer, unless the building is of such nature and intended for such use as to substantially involve the health or safety of the public;

(3) An institutional or commercial building if it does not have a total value exceeding ninety thousand dollars ($90,000);

(4) An institutional or commercial building if the total building area does not exceed 2,500 square feet in gross floor area;

(5) Alteration, remodeling or renovation of an existing building which is exempt under this section, or alteration, remodeling, or renovation of an existing building or building site which does not alter or affect the structural system of the building;

(6) The preparation and use of details and shop drawings, assembly or erection drawings, or graphic descriptions utilized to detail or illustrate a portion of the work required to construct the project in accordance with the plans and specifications prepared or to be prepared under the requirements or exemptions of this Chapter.

(d) Nothing in this Chapter shall be construed to prevent any individual from making plans or data for buildings for himself.

(e) Plans and specifications prepared by persons or corporations under these exemptions shall bear the signature and address of such person or corporate officer. (1979, c. 871, s. 1.)

§ 83A-14. Disciplinary action and procedure.

Any person may file with the Board a charge of unprofessional conduct, negligence, incompetence, dishonest practice, or other misconduct or of any violation of this Chapter or of a Board rule adopted and published by the Board. Upon receipt of such charge, or upon its own initiative, the Board may give notice of an administrative hearing under the Administrative Procedure Act, or may dismiss the charge as unfounded or trivial, upon a statement of the reasons therefor which shall be mailed to the architect and the person who filed the charge by registered or certified mail. (1979, c. 871, s. 1.)

§ 83A-15. Denial, suspension or revocation of license.

The Board shall have the power to suspend or revoke a license or certificate of registration, and to deny a license or certificate of registration or to reprimand any registrant who is found guilty of:

(1) Dishonest conduct, including but not limited to:
   a. The commission of any fraud, deceit or misrepresentation in any professional relationship with clients or other persons; or with reference to obtaining or maintaining license, or with reference to qualifications, experience and past or present service; or
   b. Using or permitting an individual professional seal to be used by or for others, or otherwise representing registrant as the author of drawings or specifications other than those prepared personally by or under direct supervision of registrant.

(2) Incompetence, including but not limited to:
   a. Gross negligence, recklessness, or excessive errors or omissions or building failures in registrant's record of professional practice; or
   b. Mental or physical disability or addiction to alcohol or drugs so as to endanger health, safety and interest of the public by impairing skill and care in professional services.

(3) Unprofessional conduct, including but not limited to:
   a. Practicing or offering to practice architecture without a current license from this Board;
   b. Knowingly aiding or abetting others to evade or violate the provisions of this Chapter, or the health and safety laws of this or other states;
   c. Knowingly undertaking any activity or having any significant financial or other interest, or accepting any compensation or reward except from registrant's clients, any of which would reasonably appear to compromise registrant's professional judgment in serving the best interest of clients or public;
   d. Willfully violating this Chapter or any rule or standard of conduct published by the Board, or pleading guilty or nolo contendere to a felony or any crime involving moral turpitude. (1915, c. 270, s. 5; 1919, c. 336, s. 3; C.S., s. 4993; 1953, c. 1041, s. 1; 1957, c. 794, s. 8; 1973, c. 1331, s. 3; 1979, c. 871, s. 1.)

§ 83A-16. Violations of Chapter; penalties.

(a) Any individual or corporation not registered under this Chapter, who shall wrongfully use the title "Architect" or represent himself or herself to the public as an architect, or practice architecture as herein defined, or seek to avoid the provisions of this Chapter by the use of any other designation than "Architect": (i) shall be guilty of a misdemeanor and shall upon conviction be sentenced to pay a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00), or suffer imprisonment for a period not exceeding three months or both such fine and imprisonment; and (ii) be subject to a civil penalty not to exceed five hundred dollars ($500.00) per day of such violation. Each day of such unlawful practice shall constitute a distinct and separate violation. Any civil penalty collected hereunder shall be deposited to the General Fund.

(b) Actions and prosecutions under this section shall be commenced in the county in which the defendant resides, or has his principal place of business, or in the case of an out-of-state corporation, is conducting business.

(c) Actions to recover civil penalties shall be initiated by the Attorney General. (1915, c. 270, s. 4; C.S., s. 4996; 1941, c. 369, ss. 1, 2; 1951, c. 1130, s. 3; 1957, c. 794, s. 11; 1965, c. 1100; 1969, c. 718, s. 21; 1973, c. 1414, s. 1; 1979, c. 871, s. 1.)

Legal Periodicals. — For case law survey of cases decided under this section, see 44 N.C.L. Rev. 889 (1966).

CASE NOTES

Editor's Note. — The cases cited under this section were decided under this Chapter as it existed prior to its revision and recodification by Session Laws 1979, c. 871, s. 1.

A single act of unauthorized practice is sufficient, if shown, to invoke the criminal penalties of this section or the injunctive relief of former § 150-31. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

Buildings for Himself. — The words "buildings for himself" contained in the express statutory exception are broad and comprehensive, and contain no limitation of any kind. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

The statutory exception, "buildings for himself," contemplates possession by the designer of the building for whatever lawful purpose he may choose. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

If the General Assembly had intended the statutory exception, "buildings for himself," to be limited to buildings actually occupied by the designer, and not for lease and use by the public, it could quite easily have said so. The General Assembly in its wisdom and discretion did not so limit the statutory exception. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

The express statutory exception, pertaining to plans for a person's own building, contains no provision preventing defendant from selling an interest in the building for which he made the plans. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

Included Building on Property Held as Tenants by the Entirety. — Taking into consideration that during the existence of the tenancy by the entirety the husband has the absolute and exclusive right to the control, use, possession, rents, income, and profits of the lands held by him and his wife as tenants by the entirety, when defendant made plans for the construction of an automobile sales and service building upon lands composed of several tracts, title to some of the component tracts being in him, and some in him and his wife as tenants by the entirety, it seems clear that he was making plans for a building for himself within the meaning of the specific exception contained in this section. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

But Not a Church of Which Defendant Was a Member. — Where defendant was a member of the church and title to the land upon which the educational building was constructed was held by five trustees of whom he was one, and he executed the mortgage to finance the construction of the educational building, the judge's findings of fact clearly showed that

defendant made the "plans" for the building for Salem Baptist Church, and not for himself. North Carolina Bd. of Arch. v. Lee, 264 N.C. 602, 142 S.E.2d 643 (1965).

Right of Unregistered Person to Recover for Work on Plans. — Plaintiff, a builder-designer, but not a licensed architect, who made preliminary studies, consulted with defendants and made changes on plans calling for the construction of a residence originally intended to cost about $18,000, could recover on a quantum meruit basis for the work he performed on the plans up to the time the residence designed did not exceed in value $20,000, but he was not entitled to recover for any work performed after the plans called for a residence of a value in excess of $20,000. Tillman v. Talbert, 244 N.C. 270, 93 S.E.2d 101 (1956).

Cited in Snow v. North Carolina Bd. of Arch., 273 N.C. 559, 160 S.E.2d 719 (1968).

§ 83A-17. Power of Board to seek injunction.

The Board may appear in its own name and apply to courts having jurisdiction for injunctions to prevent violations of this Chapter or of rules issued pursuant thereto, and such courts are empowered to grant such injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of such violation. A single act of unauthorized or illegal practice shall be sufficient, if shown, to invoke the injunctive relief of this section or criminal penalties under G.S. 83A-16. (1979, c. 871, s. 1.)

Chapter 84.

Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

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North Carolina State Bar.

Sec.
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84-26. Pay of Board of Law Examiners.
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84-35. Saving as to North Carolina Bar Association.
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84-37. State Bar may investigate and enjoin unauthorized practice.
84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-1. Oaths taken in open court.

Attorneys before they shall be admitted to practice law shall, in open court before a justice or judge of the General Court of Justice, take the oath prescribed for attorneys, and also the oaths of allegiance to the State, and to support the Constitution of the United States, prescribed for all public officers,

and the same shall be entered on the records of the court; and, upon such qualification had, and oath taken may act as attorneys during their good behavior. (1777, c. 115, s. 8; R. C., c. 9, s. 3; Code, s. 19; Rev., s. 209; C. S., s. 197; 1969, c. 44, s. 58; 1973, c. 108, s. 35.)

CASE NOTES

Nonresident Attorneys. — As this section requires the oath of allegiance to the State, it debars a citizen of another state from obtaining a license to practice law, and a nonresident attorney does not acquire the right to practice habitually in this State by having been previously allowed, through the courtesy of the courts, to appear in special cases. Manning v. Roanoke & T.R.R.R., 122 N.C. 824, 28 S.E. 963 (1898).

§ 84-2. Persons disqualified.

No justice, judge, full-time district attorney, full-time assistant district attorney, public defender, assistant public defender, clerk, deputy or assistant clerk of the General Court of Justice, nor register of deeds, nor sheriff, shall practice law. Persons violating this provision shall be guilty of a misdemeanor and fined not less than two hundred dollars ($200.00). (C. C. P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C. S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1965, c. 418, s. 1; 1969, c. 44, s. 59; 1973, c. 47, s. 2; c. 108, s. 36.)

Local Modification. — Anson: 1951, c. 7; Burke: 1933, c. 135; Madison: 1935, c. 214; New Hanover: 1959, c. 483.

CASE NOTES

Cited in State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976).

§ 84-2.1. "Practice law" defined.

The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, or assisting by advice, counsel, or otherwise in any such legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of such term, but shall be construed to include the foregoing particular acts, as well as all other acts within said general definition. (C. C. P., s. 424; 1870-1, c. 90; 1871-2, c. 120; 1880, c. 43; 1883, c. 406; Code, ss. 27, 28, 110; Rev., ss. 210, 3641; 1919, c. 205; C. S., s. 198; 1933, c. 15; 1941, c. 177; 1943, c. 543; 1945, c. 468.)

Legal Periodicals. — For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

CASE NOTES

What Constitutes Practicing Law. — To constitute the practice of law, within the prohibition of this section, it is necessary that the person charged with its violation shall have customarily or habitually held himself out to the public as a lawyer, or that he has demanded compensation for his services as such. State v. Bryan, 98 N.C. 644, 4 S.E. 522 (1887).

The fact that a person on one occasion acted as an attorney for a party to an action is some evidence for the jury to consider, but is not conclusive of the question. State v. Bryan, 98 N.C. 644, 4 S.E. 522 (1887). See § 84-4.

Practice of law embraces the preparation of legal documents and contracts by which legal rights are secured. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962).

Not All Activities within Definition Are Unlawful for Lay Persons. — It was not the purpose and intent of this section to make unlawful all activities of lay persons which come within the general definition of practicing law. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962). See note to § 84-4.

Solicitation and Acceptance of Money for Investment. — An attorney from outside the State coming to North Carolina and suggesting to the plaintiff that he be allowed to invest the plaintiff's money is not acting in any legal capacity when he accepts the money from the plaintiff for investment. Smith v. Travelers Indem. Co., 343 F. Supp. 605 (M.D.N.C. 1972).

§ 84-3: Repealed by Session Laws 1973, c. 108, s. 37.

§ 84-4. Persons other than members of State Bar prohibited from practicing law.

It shall be unlawful for any person or association of persons, except members of the Bar of the State of North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding in any court in this State or before any judicial body or the North Carolina Industrial Commission, Utilities Commission, or the Employment Security Commission; to maintain, conduct, or defend the same, except in his own behalf as a party thereto; or, by word, sign, letter, or advertisement, to hold out himself, or themselves, as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor-at-law, or in furnishing the services of a lawyer or lawyers; and it shall be unlawful for any person or association of persons except members of the Bar, for or without a fee or consideration, to give legal advice or counsel, perform for or furnish to another legal services, or to prepare directly or through another for another person, firm or corporation, any will or testamentary disposition, or instrument of trust, or to organize corporations or prepare for another person, firm or corporation, any other legal document. Provided, that nothing herein shall prohibit any person from drawing a will for another in an emergency wherein the imminence of death leaves insufficient time to have the same drawn and its execution supervised by a licensed attorney-at-law. The provisions of this section shall be in addition to and not in lieu of any other provisions of Chapter 84. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina. (1931, c. 157, s. 1; 1937, c. 155, s. 1; 1955, c. 526, s. 1; 1969, c. 718, s. 19.)

Cross References. — As to officers disqualified to practice law, see § 84-2.

Legal Periodicals. — For note on unauthorized practice of law by corporations, see 41 N.C.L. Rev. 225 (1963).

For case law survey on unauthorized practice of law, see 41 N.C.L. Rev. 447 (1963).

CASE NOTES

This section is constitutional and valid, the right to practice law being subject to legislative regulation within constitutional restrictions and limitations, and the statute not being in contravention of any provision of the State or federal Constitutions. State ex rel. Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936).

The purpose of this section is for the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

The right to practice law is personal and may not be exercised by a corporation either directly or indirectly by employing lawyers to practice for it. State ex rel. Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936).

The practice of law is not limited to the conduct of cases in court, but embraces, in its general sense, legal advice and counsel and the preparation of legal documents and contracts by which legal rights are secured, although such matter may or may not be pending in court. State ex rel. Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936).

Services of Motor Clubs Held to Violate Section. — Where defendant corporations, as a part of their services, were engaged in giving legal advice, in employing attorneys for members, in allowing lay members of the incorporated club to write letters on club stationery to persons involved in accidents with members of the club advising that such persons were liable in damages in law for negligence in causing such accidents, and in drawing up receipts stating that a certain sum was received as settlement of such damages when collections were made as a result of such letters, they were held to be engaged in the practice of law in violation of this section. State ex rel. Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 540 (1936).

Right to Enjoin Unlawful Practice of Law. — A cemetery lot owner could not enjoin a cemetery corporation from practicing law without a license — a criminal offense, since he had an adequate remedy at law by having the corporation indicted and convicted by the State. Mills v. Carolina Cem. Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955).

Section Does Not Confer Absolute Monopoly in Preparation of Legal Documents. — This section was not enacted for the purpose of conferring upon the legal profession an absolute monopoly in the preparation of legal documents. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Persons Having Primary Interest in Transaction May Prepare Necessary Papers. — A person, firm or corporation having a primary interest, not merely an incidental interest, in a transaction, may prepare legal documents necessary to the furtherance and completion of the transaction without violating this section. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Automobile, furniture, and appliance dealers prepare conditional sale contracts. Banks prepare promissory notes, drafts and letters of credit. Many lending institutions prepare deeds of trust and chattel mortgages. Owner-vendors and purchasers of land prepare deeds. All such activities are legal and do not violate the statute so long as the actor has a primary interest in the transaction. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Preparation of Documents by Employees of Corporations. — A person who, in the course of his employment by a corporation, prepares a legal document in connection with a business transaction in which the corporation has a primary interest, the corporation being authorized by law and its charter to transact such business, does not violate the statute, for his act in so doing is the act of the corporation in the furtherance of its own business. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

A deed of trust is a legal document. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

The grantor or the beneficiary in a deed of trust may prepare the instrument with impunity if the latter is extending credit to the former; the named trustee may not do so, for his interest is only incidental. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Any adult person desiring to do so may prepare his own will. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

A person involved in litigation, though not a lawyer, may represent himself and either defend or prosecute the action or proceeding in a tribunal or court, even in Supreme Court, and may prepare and file pleadings and other papers in connection with the litigation. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337 (1962), commented on in 41 N.C.L. Rev. 225 (1963).

Applied in Resort Dev. Co. v. Phillips, 9 N.C. App. 158, 175 S.E.2d 782 (1970).

Cited in North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney regularly admitted to practice in the courts of record of another state and in good standing therein, having been retained as attorney for any party to a legal proceeding, civil or criminal, pending in the General Court of Justice of North Carolina, or the North Carolina Utilities Commission or the North Carolina Industrial Commission may, on motion, be admitted to practice in the General Court of Justice or North Carolina Utilities Commission or the North Carolina Industrial Commission for the sole purpose of appearing for his client in said litigation, but only upon compliance with the following conditions precedent:

(1) He shall set forth in his motion his full name, post-office address and status as a practicing attorney in such other state.

(2) He shall attach to his motion a statement, signed by his client, in which the client sets forth his post-office address and declares that he has retained the attorney to represent him in such proceeding.

(3) He shall attach to his motion a statement that unless permitted to withdraw sooner by order of the court, he will continue to represent his client in such proceeding until the final determination thereof, and that with reference to all matters incident to such proceeding, he agrees that he shall be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if he were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

(4) He shall attach to his motion a statement to the effect that the state in which he is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

(5) He shall attach to his motion a statement to the effect that he has associated and has personally appearing with him in such proceeding an attorney who is a resident of this State and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with such legal proceedings, or any disciplinary matter, with the same effect as if personally made on such foreign attorney within this State.

(6) Compliance with the foregoing requirements shall not deprive the court of the discretionary power to allow or reject the application. (1967, c. 1199, s. 1; 1971, c. 550, s. 1; 1975, c. 582, ss. 1, 2; 1977, c. 430.)

Legal Periodicals. — For note on equal protection and residence requirements, see 49 N.C.L. Rev. 753 (1971).

CASE NOTES

When Attorneys Not Considered as Participating Attorneys. — Where two attorneys purportedly appearing for defendants in appeal from criminal conviction are not members of the North Carolina Bar and are not authorized to appear in a case in compliance with this section, they are not considered as participating attorneys. State v. Daughtry, 8 N.C. App. 318, 174 S.E.2d 76 (1970).

An out-of-state attorney has no absolute right to practice law in another forum. It is permissive and subject to the sound discretion of the court. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

Prohibition of Habitual Practice in Courts of State by Nonresident Counsel. — This section forbids the courts from allowing

nonresident counsel, when citizens of other states and not holding license from this court, from practicing habitually in our courts, and they cannot acquire the right to do so. State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

Effect of Partial Compliance with Section. — In a criminal prosecution the trial court did not err in permitting the defendant's retained counsel from Alabama to appear before the court in his behalf without complying strictly with the provisions of this section for two reasons. First, the defendant was allowed to have those counsel whom he wanted to defend him. They were retained by him and allowed to practice in the North Carolina courts on his motion. At no time during the proceedings did he express concern regarding their competency, and any such objection was waived. Secondly, the statute was not designed for his protection, and did not vest in him any rights to counsel other than what he would ordinarily possess in the absence of the statute. State v. Scarboro, 38 N.C. App. 105, 247 S.E.2d 273, cert. denied, 295 N.C. 652, 248 S.E.2d 256 (1978), 440 U.S. 938, 99 S. Ct. 1286, 59 L. Ed. 2d 497 (1979).

Conditional Application for Admission for Limited Purpose. — This section does not permit an out-of-State attorney to move for admission for a limited purpose in this State on a conditional basis. The requirement of subdivision (3) of this section calls for a firm commitment from the movant which is contrary in spirit to a conditional application for admission for a limited purpose. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23, appeal dismissed, 300 N.C. 373, 267 S.E.2d 678 (1980).

Effect of Court Order Waiving Local Counsel. — Even if the trial judge has no discretion to waive the requirement for local counsel found in subdivision (5) of this section, before permitting a foreign attorney to practice on a limited basis in this State, the court's order waiving local counsel, permitting foreign counsel to appear in a case, and ordering that foreign counsel appear for trial on a certain date would be merely erroneous, not void ab initio, and could be the basis for contempt proceedings against the attorney because of his failure to appear as ordered. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23, appeal dismissed, 300 N.C. 373, 267 S.E.2d 678 (1980).

Withdrawal of Out-of-State Counsel Controlled. — It does not seem equitable to allow adequately compensated trial counsel to withdraw after they have exhausted defendant's resources and to cast the burden of court appointment upon new counsel. Conduct in this regard by out-of-state counsel is controllable under subdivision (3) of this section as an initial condition upon which he is allowed to appear for trial. State v. Nickerson, 13 N.C. App. 125, 185 S.E.2d 326 (1971), cert. denied, 280 N.C. 304, 186 S.E.2d 179, 408 U.S. 925, 92 S. Ct. 2503, 33 L. Ed. 2d 336 (1972).

Applied in Resort Dev. Co. v. Phillips, 9 N.C. App. 158, 175 S.E.2d 782 (1970).

§ 84-4.2. Summary revocation of permission granted out-of-state attorneys to practice.

Permission granted under the preceding section [G.S. 84-4.1] may be summarily revoked by the General Court of Justice or North Carolina Utilities Commission, on its own motion and in its discretion. (1967, c. 1199, s. 2; 1971, c. 550, s. 2.)

§ 84-5. Prohibition as to practice of law by corporation.

It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State, or before any judicial body or the North Carolina Industrial Commission, Utilities Commission, or the Employment Security Commission, or hold itself out to the public or advertise as being entitled to practice law; and no corporation shall organize corporations, or draw agreements, or other legal documents, or draw wills, or practice law, or give legal advice, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular. The provisions of this section shall be in addition to and not in lieu of any other provisions of Chapter 84. Provided, that nothing in this section shall be construed to prohibit a banking corporation authorized and licensed to act in a fiduciary capacity from performing any clerical, accounting, financial or business acts required of it in the performance of its duties as a fiduciary or from performing ministerial and clerical acts in the

preparation and filing of such tax returns as are so required, or from discussing the business and financial aspects of fiduciary relationships. Provided, however, this section shall not apply to corporations authorized to practice law under the provisions of Chapter 55B of the General Statutes of North Carolina.

To further clarify the foregoing provisions of this section as they apply to corporations which are authorized and licensed to act in a fiduciary capacity:

(1) A corporation authorized and licensed to act in a fiduciary capacity shall not:

a. Draw wills or trust instruments; provided that this shall not be construed to prohibit an employee of such corporation from conferring and cooperating with an attorney who is not a salaried employee of the corporation, at the request of such attorney, in connection with the attorney's performance of services for a client who desires to appoint the corporation executor or trustee or otherwise to utilize the fiduciary services of the corporation.

b. Give legal advice or legal counsel, orally or written, to any customer or prospective customer or to any person who is considering renunciation of the right to qualify as executor or administrator or who proposes to resign as guardian or trustee, or to any other person, firm or corporation.

c. Advertise to perform any of the acts prohibited herein; solicit to perform any of the acts prohibited herein; or offer to perform any of the acts prohibited herein.

(2) When any of the following acts are to be performed in connection with the fiduciary activities of such a corporation, said acts shall be performed for the corporation by a duly licensed attorney, not a salaried employee of the corporation, retained to perform legal services required in connection with the particular estate, trust or other fiduciary matter:

a. Offering wills for probate.

b. Preparing and publishing notice of administration to creditors.

c. Handling formal court proceedings.

d. Drafting legal papers or giving legal advice to spouses concerning dissent from their spouses' wills.

e. Resolving questions of domicile and residence of a decedent.

f. Handling proceedings involving year's allowances of widows and children.

g. Drafting deeds, notes, deeds of trust, leases, options and other contracts.

h. Drafting instruments releasing deeds of trust.

i. Drafting assignments of rent.

j. Drafting any formal legal document to be used in the discharge of the corporate fiduciary's duty.

k. In matters involving estate and inheritance taxes, gift taxes, and federal and State income taxes:

1. Preparing and filing protests or claims for refund, except requests for a refund based on mathematical or clerical errors in tax returns filed by it as a fiduciary.

2. Conferring with tax authorities regarding protests or claims for refund, except those based on mathematical or clerical errors in tax returns filed by it as a fiduciary.

3. Handling petitions to the tax court.

l. Performing legal services in insolvency proceedings or before a referee in bankruptcy or in court.

m. In connection with the administration of an estate or trust:
1. Making application for letters testamentary or letters of administration.
2. Abstracting or passing upon title to property.
3. Handling litigation relating to claims by or against the estate or trust.
4. Handling foreclosure proceedings of deeds of trust or other security instruments which are in default.

(3) When any of the following acts are to be performed in connection with the fiduciary activities of such a corporation, the corporation shall comply with the following:
a. The initial opening and inventorying of safe deposit boxes in connection with the administration of an estate for which the corporation is executor or administrator shall be handled by, or with the advice of, an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with that particular estate.
b. The furnishing of a beneficiary with applicable portions of a testator's will relating to such beneficiary shall, if accompanied by any legal advice or opinion, be handled by, or with the advice of, an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with that particular estate or matter.
c. In matters involving estate and inheritance taxes and federal and State income taxes, the corporation shall not execute waivers of statutes of limitations without the advice of an attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services in connection with that particular estate or matter.
d. An attorney, not a salaried employee of the corporation, retained by the corporation to perform legal services required in connection with an estate or trust shall be furnished copies of inventories and accounts proposed for filing with any court and proposed federal estate and North Carolina inheritance tax returns and, on request, copies of proposed income and intangibles tax returns, and shall be afforded an opportunity to advise and counsel the corporate fiduciary concerning them prior to filing. (1931, c. 157, s. 2; 1937, c. 155, s. 2; 1955, c. 526, s. 2; 1969, c. 718, s. 20; 1971, c. 747.)

Legal Periodicals. — For comment on the 1955 amendment, see 33 N.C.L. Rev. 528 (1952).

For comment on tax and corporate aspects of professional incorporation in North Carolina, see 48 N.C.L. Rev. 573 (1970).

§ 84-5.1. Rendering of indigent legal services by nonprofit corporations.

Subject to the rules and regulations of the North Carolina State Bar, as approved by the Supreme Court of North Carolina, a nonprofit corporation, organized under Chapter 55A of the General Statutes of North Carolina for the sole purpose of rendering indigent legal services, may render such services through attorneys duly licensed to practice law in North Carolina. (1977, c. 841, s. 1.)

§ 84-6. Exacting fee for conducting foreclosures prohibited to all except licensed attorneys.

It shall be unlawful to exact, charge, or receive any attorney's fee for the foreclosure of any mortgage under power of sale, unless the foreclosure is conducted by licensed attorney-at-law of North Carolina, and unless the full amount charged as attorney's fee is actually paid to and received and retained by such attorney, without being directly or indirectly shared with or rebated to anyone else, and it shall be unlawful for any such attorney to make any showing that he has received such a fee unless he has received the same, or to share with or rebate to any other person, firm, or corporation such fee or any part thereof received by him; but such attorney may divide such fee with another licensed attorney-at-law maintaining his own place of business and not an officer or employee of the foreclosing party, if such attorney has assisted in performing the services for which the fee is paid, or resides in a place other than that where the foreclosure proceedings are conducted, and has forwarded the case to the attorney conducting such foreclosure. (1931, c. 157, s. 3.)

§ 84-7. District attorneys, upon application, to bring injunction or criminal proceedings.

The district attorney of any of the superior courts shall, upon the application of any member of the Bar, or of any bar association, of the State of North Carolina, bring such action in the name of the State as may be proper to enjoin any such person, corporation, or association of persons who it is alleged are violating the provisions of G.S. 84-4 to 84-8, and it shall be the duty of the district attorneys of this State to indict any person, corporation, or association of persons upon the receipt of information of the violation of the provisions of G.S. 84-4 to 84-8. (1931, c. 157, s. 4; 1973, c. 47, s. 2.)

Cross References. — As to the power of the North Carolina State Bar to investigate and enjoin unauthorized practice of law, see § 84-37.

CASE NOTES

Cited in North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

§ 84-8. Punishment for violations; legal clinics of law schools excepted.

Any person, corporation, or association of persons violating the provisions of G.S. 84-4 to 84-8 shall be guilty of a misdemeanor and punished by a fine or imprisonment, or both, in the discretion of the court. Provided, that G.S. 84-4 to 84-8 shall not apply to any law school or law schools conducting a legal clinic and receiving as their clientage only those persons unable financially to compensate for legal advice or services rendered. (1931, c. 157, s. 5; c. 347.)

§ 84-9. Unlawful for anyone except attorney to appear for creditor in insolvency and certain other proceedings.

It shall be unlawful for any corporation, or any firm or other association of persons other than a law firm, or for any individual other than an attorney duly

licensed to practice law, to appear for another in any bankruptcy or insolvency proceeding, or in any action or proceeding for or growing out of the appointment of a receiver, or in any matter involving an assignment for the benefit of creditors, or to present or vote any claim of another, whether under an assignment or transfer of such claim or in any other manner, in any of the actions, proceedings or matters hereinabove set out. (1931, c. 208, s. 2.)

Cross References. — As to unlawful solicitation of claims of creditors in insolvency, etc., proceedings, see § 23-46.

§ 84-10. Violation of § 84-9 a misdemeanor.

Any individual, corporation, or firm or other association of persons violating any provision of G.S. § 84-9 shall be guilty of a misdemeanor. (1931, c. 208, s. 3.)

CASE NOTES

Cited in North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

ARTICLE 2.

Relation to Client.

§ 84-11. Authority filed or produced if requested.

Every attorney who claims to enter an appearance for any person shall, upon being required so to do, produce and file in the clerk's office of the court in which he claims to enter an appearance, a power or authority to that effect signed by the persons or some one of them for whom he is about to enter an appearance, or by some person duly authorized in that behalf, otherwise he shall not be allowed so to do: Provided, that when any attorney claims to enter an appearance by virtue of a letter to him directed (whether such letter purport a general or particular employment), and it is necessary for him to retain the letter in his own possession, he shall, on the production of said letter setting forth such employment, be allowed to enter his appearance, and the clerk shall make a note to that effect upon the docket. (R. C., c. 31, s. 57; Code, s. 29; Rev., s. 213; C. S., s. 200.)

Cross References. — As to appearance by attorney, see § 1-11.

CASE NOTES

Sufficiency of Writing. — The power of attorney which a lawyer may be required to file, pursuant to this section, is some writing addressed to him by the client or an agent for the client. Therefore, letters written by the client to third persons expressing gratification because of the employment of a particular attorney will not suffice to supply the want of power. Day v. Adams, 63 N.C. 254 (1869).

A power of attorney, signed by the purchaser of a note, in the name of the payee, is sufficient authority under this section for an attorney-at-law to appear in a cause in court, although the agent has no written authority to make the power. Johnson ex rel. Adams v. Sikes, 49 N.C. 70 (1856).

A power of attorney given by a married woman to dismiss an action need not be registered. Hollingsworth v. Harman, 83 N.C. 153 (1880).

Right to Question Authority of Attorney. — While an attorney who claims to enter an appearance for any party to an action may be required to produce and file a power or authority as provided in this section, once an attorney has entered an appearance and has been recognized by the court as an attorney in the cause, the opposite party may not call in question his authority. Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950).

Time of Demand for Authority. — In Reece v. Reece, 66 N.C. 377 (1872), it is held that the defendant has the right, because of this section to demand the authority at the return term of a summons.

If the demand for the power of attorney is made at the return term, it is the practice and within the discretion of the judge to extend the time; if, however, such demand is not made at the proper time, and before the right to appear has been recognized, it comes too late, unless there are peculiar circumstances tending to excuse the party for not making it in apt time. Reece v. Reece, 66 N.C. 377 (1872).

After an attorney has entered an appearance and has been recognized by the court as attorney in the cause, no written authority can be required of him at a subsequent time. This means that the opposite party shall not call in question his authority, unless he does so within the time and in accordance with the provision of this section. Day v. Adams, 63 N.C. 254 (1869); City of New Bern v. Jones, 63 N.C. 606 (1869).

When Client Present. — If a written authority is required under this section the attorney must produce the same, even if his client is present at the bar of the court. Day v. Adams, 63 N.C. 254 (1869).

Special Appearance for Nonresident. — Upon special appearance of the attorneys of a husband who was a nonresident and a fugitive from justice, and whose property had been attached by his wife, for the purpose of moving to dismiss the action, the court should, on motion made, have required them to file their written authority under this section. Walton v. Walton, 178 N.C. 73, 100 S.E. 176 (1919).

Cited in Byrd v. Trustees of Watts Hosp., 29 N.C. App. 564, 225 S.E.2d 329 (1976).

§ 84-12. Failure to file complaint, attorney liable for costs.

When a plaintiff is compelled to pay the costs of his suit in consequence of a failure on the part of his attorney to file his complaint in proper time, he may sue such attorney for all the costs by him so paid, and the receipt of the clerk may be given in evidence in support of such claim. (1786, c. 253, s. 6; R. C., c. 9, s. 5; Code, s. 22; Rev., s. 214; C. S., s. 201.)

CASE NOTES

This section is not exhaustive, and the courts have power to order counsel to pay costs of cases in which they have been guilty of gross negligence (even of a kind not included in this section), such conduct being a sort of contempt. Ex parte Robins, 63 N.C. 309 (1869).

§ 84-13. Fraudulent practice, attorney liable in double damages.

If any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages. (1743, c. 37; R. C., c. 9, s. 6; Code, s. 23; Rev., s. 215; C. S., s. 202.)

CASE NOTES

Aliens Prevented from Practicing. — In Ex parte Thompson, 10 N.C. 355 (1824), the court said: "No one should be presented to the public under the panoply of such a license (to practice law), against whom an injured suitor would not have the full benefit of such remedy

as the laws of the State provide, in the event of fraudulent or negligent practice." Hence the court reasoned that an alien could not be admitted to practice, as actions under this section would be removable to the United States courts.

Presumption of Fraud. — The relation of attorney and client is one of a fiduciary character, and gives rise to a presumption of fraud when the former, in dealing with the latter, obtains an advantage. Egerton v. Logan, 81 N.C. 172 (1879).

Article 3.

Arguments.

§ 84-14. Court's control of argument.

In all trials in the superior courts there shall be allowed two addresses to the jury for the State or plaintiff and two for the defendant, except in capital felonies, when there shall be no limit as to number. The judges of the superior court are authorized to limit the time of argument of counsel to the jury on the trial of actions, civil and criminal as follows: to not less than one hour on each side in misdemeanors and appeals from justices of the peace; to not less than two hours on each side in all other civil actions and in felonies less than capital; in capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side. Where any greater number of addresses or any extension of time are desired, motion shall be made, and it shall be in the discretion of the judge to allow the same or not, as the interests of justice may require. In jury trials the whole case as well of law as of fact may be argued to the jury. (1903, c. 433; Rev., s. 216; C. S., s. 203; 1927, c. 52.)

Legal Periodicals. — For survey of 1976 case law on criminal procedure, see 55 N.C.L. Rev. 989 (1977).

For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

CASE NOTES

The language of this section is clear. State v. Feldstein, 21 N.C. App. 446, 204 S.E.2d 551 (1974).

Discretion of Court. — The trial judge has a large discretion in controlling and directing the argument of counsel, but, under this section, this does not include the right to deprive a litigant of the benefit of his counsel's argument when it is confined within proper bounds and is addressed to the material facts of the case. Puett v. Railroad, 141 N.C. 332, 53 S.E. 852 (1906); Irvin v. Southern Ry., 164 N.C. 5, 80 S.E. 78 (1913); In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970); Kennedy v. Tarlton, 12 N.C. App. 397, 183 S.E.2d 276 (1971).

It is the duty of the judge to interfere when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury. State v. Howley, 220 N.C. 113, 16 S.E.2d 705 (1941).

Conduct of counsel in presenting their causes to the jury is left largely to the discretion of the trial judge. In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970).

When the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere. In re Will of Farr, 277 N.C. 86, 175 S.E.2d 578 (1970).

Argument of counsel must be left largely to the control and discretion of the presiding judge. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Control of the arguments of counsel to the jury must be left largely in the sound discretion of the trial judge. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Arguments of counsel are largely in the control and discretion of the trial judge who must allow wide latitude in the argument of the

law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

What constitutes an abuse of the privilege of argument to the jury must ordinarily be left to the sound discretion of the trial judge. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

The conduct of the arguments of counsel is left to the sound discretion of the trial judge. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

The control of the argument of the solicitor and counsel must be left largely to the discretion of the trial court. State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

The trial judge is allowed discretion in controlling the arguments before the jury and he may restrict comment on facts not material to the case. State v. Moore, 34 N.C. App. 141, 237 S.E.2d 339 (1977).

The only manner in which the trial judge is restrained by law with respect to the control over arguments by counsel is found in this section which applies to jury trials in the superior court. Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

Counsel's freedom of argument should not be impaired without good reason, but where both the impropriety and the prejudicial effect are clear, the court should act. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967).

Defense counsel in a felony case is entitled to at least two hours for jury argument. State v. Feldstein, 21 N.C. App. 446, 204 S.E.2d 551 (1974).

Counsel May Argue Both Law and Fact. — Counsel have the right to argue the whole case as well of law as of fact. Brown v. Vestal, 231 N.C. 56, 55 S.E.2d 797 (1949); In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970).

The right of counsel to state in his argument to the jury what he conceives the law of the case to be has been upheld in numerous decisions. State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951).

Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

It is a basic right of a litigant to have his counsel argue his case to the jury on questions of law and of fact. Board of Transp. v. Wilder, 28 N.C. App. 105, 220 S.E.2d 183 (1975).

Counsel may argue the facts in evidence and all reasonable inferences to be drawn therefrom, together with the relevant law, so as to present his case. State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

It is reversible error for the trial judge not to permit attorneys to argue law to the jury and to apply in the argument the decisions of the court as provided by this section. Howard v. Western Union Tel. Co., 170 N.C. 495, 87 S.E. 313 (1915).

Failure to charge upon a certain point is reversible error, especially after counsel has argued the whole case "as well of law as of fact" as is permitted by this section. Nichols v. Champion Fibre Co., 190 N.C. 1, 128 S.E. 471 (1925).

It is the duty of the trial judge to instruct the jury upon the law, and he may correctly tell them to disregard the law as argued to them by counsel. Sears, Roebuck & Co. v. Rouse Banking Co., 191 N.C. 500, 132 S.E. 468 (1926).

The right to argue the whole case has been expressly conferred by statute. In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970).

Under this section counsel's right to argue law generally to the jury has been upheld or expressly recognized. In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970).

Counsel may not argue principles of law not relevant to the case. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

The law which this provision allows to be argued must of course be the law applicable to the facts of the case. The whole corpus juris is not fair game. State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

Wide latitude is given counsel in the exercise of the right to argue to the jury the whole case, as well of law as of fact, but counsel is not entitled to travel outside of the record and argue facts not included in the evidence, and when counsel attempts to do so it is the right and duty of the court to correct the argument, either at the time or in the charge to the jury. State v. Little, 228 N.C. 417, 45 S.E.2d 542 (1947); State v. Graves, 252 N.C. 779, 114 S.E.2d 770 (1960).

Counsel must be allowed wide latitude in the argument of hotly contested cases. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

Because it is the duty of the prosecuting attorney to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction, in the discharge of that duty he should not be so restricted as to discourage a vigorous presentation of the State's case to the jury. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Wide latitude is given to counsel in the argument of contested cases. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Wide latitude should be given counsel to argue to the jury all the law and the facts presented by the evidence and all reasonable inferences therefrom. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

Counsel is given wide latitude to argue the facts and all reasonable inferences which may be drawn therefrom, together with the relevant law, in presenting the case to the jury. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

Counsel may read or state to the jury a statute or other rule of law relevant to such case, including the statutory provision fixing the punishment for the offense charged. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

But May Not State Law Incorrectly or Read Unconstitutional Statute. — Counsel may not state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

And May Not Argue That Law Should Be Otherwise or That Punishment Is Too Severe. — Counsel may not argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, that the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Reading and Commenting on Reported Cases. — As counsel have the right under this section to argue "the whole case as well of law as of fact," they may read to the jury reported cases and comment thereon; but the facts contained in the cases cannot be read as evidence of their existence in another case. Horah v. Knox, 87 N.C. 483 (1882).

This section permits counsel, in his argument to the jury, to state his view of the law applicable to the case on trial and to read, in support thereof, from the published reports of decisions of the Supreme Court. It is often necessary for counsel to do so in order that the jury may understand the issue to which counsel's argument on the evidence is addressed. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967), commented on in 47 N.C.L. Rev. 262.

In order to make meaningful a statement of a rule of law found in a reported decision, it is sometimes necessary to recount some of the facts which the court had before it when it pronounced the rule in question. For this purpose, counsel, in his argument in a subsequent case, may not only read the rule of law stated in the published opinion in the former case but may also state the facts before the court therein. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967), commented on in 47 N.C.L. Rev. 262.

It is not permissible argument for counsel to read, or otherwise state, the facts of another case, together with the decision therein, as premises leading to the conclusion that the jury should return a verdict favorable to his client in the case on trial. This is but an application of the rule that, in his argument to the jury, counsel may not go outside the record and inject into his argument facts of his own knowledge, or other facts not included in the evidence. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967), commented on in 47 N.C.L. Rev. 262.

The ultimate test is whether the reading from the reported case "would reasonably tend to prejudice either party upon the facts" of the case on trial. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967), commented on in 47 N.C.L. Rev. 262.

Reading Reported Cases Discussing Inapplicable Principles of Law. — Broad and comprehensive as the provisions of this section are, they do not permit counsel to read to the jury decisions discussing principles of law which are irrelevant to the case and have no application to the facts in evidence. State v. Crisp, 244 N.C. 407, 94 S.E.2d 402 (1956).

Reading Dissenting Opinion as Law of Case. — It is not permissible for counsel, in his argument to the jury, to read a dissenting opinion by a Justice of the Supreme Court as the law of the case over the defendant's objection, and where this has been done a new trial will be awarded on the defendant's exception thereto. It is the duty of the trial court, either to direct counsel not to read the dissenting opinion or to plainly and unequivocally instruct that the dissenting opinion has no legal bearing upon the case. Conn v. Seaboard Air Line Ry., 201 N.C. 157, 159 S.E. 331 (1931).

Reading Portions of Final Pleadings. — The trial court did not commit prejudicial error by allowing counsel for plaintiff to read portions of the final pleadings upon which the case was tried in his argument to the jury. Kennedy v. Tarlton, 12 N.C. App. 397, 183 S.E.2d 276 (1971).

Commenting on Testimony. — The testimony of a witness being competent, material, and relevant, there can be no doubt of the right of counsel to make proper comment upon it in his address to the jury. In re Will of Farr, 7 N.C. App. 250, 172 S.E.2d 78, rev'd on other grounds, 277 N.C. 86, 175 S.E.2d 578 (1970).

This section does not authorize counsel to argue law which is not applicable to the issues, for such arguments could only lead to confusion in the minds of the jury. In re Will of Farr, 277 N.C. 86, 175 S.E.2d 578 (1970); Fonville v. Dixon, 16 N.C. App. 664, 193 S.E.2d 406 (1972), cert. denied, 282 N.C. 672, 194 S.E.2d 152 (1973).

The State or the defendant should not be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976).

Right to Inform Jury of Punishment. — This section, as interpreted by the Supreme Court, gives a defendant the right to inform the jury of the punishment that may be imposed upon conviction of the crime for which he is being tried. State v. Walters, 33 N.C. App. 521, 235 S.E.2d 906 (1977), aff'd, 294 N.C. 311, 240 S.E.2d 628 (1978).

Statements in the defense counsel's jury argument which informed the jury of the consequences of a conviction and stated that, in light of those consequences, the jury should give the matter close attention and its most serious consideration were in all respects proper. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

This section secures to counsel the right to inform the jury of the punishment prescribed for the offense for which defendant is being tried. Counsel may exercise this right by reading the punishment provisions of the statute to the jury. State v. Walters, 294 N.C. 311, 240 S.E.2d 628 (1978).

A defendant deprived of the right to inform the jury of the punishment that might be imposed upon conviction of the crime for which he was being tried was entitled to a new trial. State v. Walters, 33 N.C. App. 521, 235 S.E.2d 906 (1977), aff'd, 294 N.C. 311, 240 S.E.2d 628 (1978).

But Not to Attack Validity of Punishment. — Counsel may not argue the question of punishment in the sense of attacking the validity, constitutionality, or propriety of the prescribed punishment. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely. State v. Walters, 294 N.C. 311, 240 S.E.2d 628 (1978).

Or Its Severity. — Where the defense counsel implied in his jury argument that identification of the defendant was based on a fleeting view and that, while such a view may be sufficient to convict in some situations, it was inadequate to convict in the immediate case because the punishment was so severe, thus asking the jury to consider the punishment as part of its substantive deliberations, the trial judge correctly excluded that portion of defendant's jury argument. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

Incompetent and Prejudicial Matters. — Counsel may not place before the jury incompetent and prejudicial matters, and may not "travel outside the record" by injecting into his argument facts of his own knowledge or other facts not included in the evidence. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Counsel may not by his argument place before the jury incompetent and prejudicial matter not admissible into evidence. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

When evidence forbidden by statute is argumentatively placed before the jury and used to the prejudice of the defense, it is the duty of the trial judge to intervene on his own motion and instruct the jury that the evidence, and the improper argument concerning the evidence, must be disregarded and under no circumstances used to the prejudice of the defendant. State v. McCall, 289 N.C. 570, 223 S.E.2d 334, vacated, 429 U.S. 912, 97 S. Ct. 30, 50 L. Ed. 2d 278 (1976).

A prosecuting attorney may not place before the jury incompetent and prejudicial matters not admissible in evidence or include in his argument facts not included in the evidence. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

As a general rule, it is improper for the prosecuting attorney to express his personal opinion or belief in the guilt of the accused, unless it is apparent that such opinion is based solely on the evidence, and not on any reasons or information outside the evidence. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

Comment Relating to Dismissed Charge Is Not Relevant. — Where the case before the jury at the time of counsel's argument consisted of two assault indictments, and a murder charge had been dismissed, comment relating to a possible sentence under that charge was neither relevant nor material to the remaining assault charges before the jury and was not within the protection of this section. State v. Moore, 34 N.C. App. 141, 237 S.E.2d 339 (1977).

Racially Inflammatory Remarks. — In a prosecution of three black men, the racially inflammatory remarks in the prosecutor's closing argument before an all-white jury were so prejudicial as to make a fair trial impossible. Miller v. State, 583 F.2d 701 (4th Cir. 1978).

Language may be used consistent with the facts in evidence to present each side of the case. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Counsel may not "travel outside the record" in his argument to the jury. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Counsel may not travel outside the record and place before the jury an incompetent and

prejudicial theory of the case grounded wholly on personal beliefs and opinions not supported by the evidence. State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975).

Improper to Comment on Character or Conduct of Opposing Party or Attorney. — Where counsel's remarks are not sustained by the facts it is improper for counsel in argument to make statements reflecting on the character or conduct of the opposite party or his attorney. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defense Counsel "Opened the Door" to Prosecutor's Attacks. — Defendant's contention that the district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied the defendant due process and the effective assistance of counsel was overruled where defense counsel had opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, vacated, 429 U.S. 912, 97 S. Ct. 30, 50 L. Ed. 2d 278 (1976).

It is improper for a lawyer in his argument to assert his opinion that a witness is lying. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, vacated, 429 U.S. 912, 97 S. Ct. 30, 50 L. Ed. 2d 278 (1976).

While counsel can argue to the jury that they should not believe a witness, he should not call him a liar. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, vacated, 429 U.S. 912, 97 S. Ct. 30, 50 L. Ed. 2d 278 (1976).

An objection to argument of counsel must be made at the time of the argument, so as to give the court an opportunity to correct the transgression, if any. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Or Before Verdict. — Exception to improper remarks of counsel during argument must be taken before verdict. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Ordinarily, an objection to the arguments by counsel must be made before verdict, since only when the impropriety is gross is the trial court required to correct the abuse ex mero motu. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

Or Else Waived. — Objection to any impropriety in counsel's argument to the jury is waived by waiting until after the verdict to enter the objection. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Exceptions to improper remarks of counsel during argument to the jury, like those to the admission of incompetent evidence, must be made in apt time or else be lost. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

After verdict, an objection to an impropriety in the argument comes too late. State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

Capital Case Exception. — An exception to the general rule that objections to counsel's argument to the jury must be made before verdict is recognized in capital cases where the improper argument was so prejudicial in nature that, in the opinion of the court, no instruction by the trial court could have removed it from the minds of the jury had the objection been seasonably made. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

The general rule that exceptions to improper remarks of counsel during argument must be taken before verdict has been modified so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge might have given. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Under the capital case exception the first attention of the reviewing court is to consider if the challenged argument was improper and, if so, whether it was improper to the extent that doubt remains as to whether a curative instruction would remove its prejudicial effect. If a convicted defendant was so prejudiced, the failure to object is no bar and his claim may be decided on the merits. If, on the other hand, it can be said that the argument was not prejudicial or that a curative instruction would have removed any prejudice, his failure to object to the argument is treated as a bar to appellate relief. Miller v. State, 583 F.2d 701 (4th Cir. 1978).

If argument of counsel in a capital case is so grossly improper that removal of its prejudicial effect, after a curative instruction, remains in doubt, the general rule requiring objection before verdict does not apply. Miller v. State, 583 F.2d 701 (4th Cir. 1978).

Application of the capital case exception entails an inquiry by the reviewing court into the merits of the claim; waiver is not automatic. Miller v. State, 583 F.2d 701 (4th Cir. 1978).

Duty of Court to Censor Remarks. — The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

If the impropriety in counsel's closing argument is gross, it is proper for the court, even in the absence of objection, to correct the abuse ex

mero motu. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

The trial court is required, upon objection, to censor remarks either not warranted by the law or facts or made only to prejudice or mislead the jury. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

Scope of Argument in Sentencing Phase of Bifurcated Trial. — In the sentencing phase of a bifurcated trial, a reference to any statutory provision, which would have the effect of minimizing in the jurors' minds their role in recommending the sentence to be imposed, is precluded. The matters which a jury may consider in the sentencing phase of a bifurcated trial are clearly set forth in § 15A-2000(e) and (f). State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

During the sentencing phase of a bifurcated prosecution for murder, it was error for the district attorney to read to the jury § 15A-2000(d), relating to the review of judgment and sentence by the Supreme Court. A reference to appellate review has no relevance with regard to the jury's task of weighing any aggravating and mitigating circumstances for the purpose of recommending a sentence. More importantly such reference will, in all likelihood, result in the jury's reliance on the Supreme Court for the ultimate determination of sentence. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

The rule precluding any argument which suggests to the jurors that they can depend on judicial or executive review to correct an erroneous verdict and thereby lessen the jurors' responsibility applies with equal force to a sentence recommendation in a bifurcated trial. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

In a prosecution for murder, during the sentencing phase of a bifurcated trial, the district attorney's reference to the parole statute was erroneous. Neither the State nor the defendant should be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. The jury's sentence recommendation should be based solely on their balancing of the aggravating and mitigating factors before them. State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979).

Application to District Court Proceedings. — This section would seem to control district court proceedings, when applicable, by virtue of § 7A-193, despite the fact that there is no specific reference to § 84-14 in that section. Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

In a trial without a jury, argument of counsel is a privilege, not a right, which is subject to the discretion of the presiding judge. Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

The implication is clear that the legislature's failure to grant counsel the statutory right to argue to the court in non-jury matters left the authority to refuse to hear arguments within the discretion of the presiding judge. Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

Grounds for Review of Judge's Discretion. — Exercise of the trial judge's discretion in controlling jury arguments is not reviewed unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

It is well settled that the control of the jury arguments of counsel must be left largely to the discretion of the trial court and its rulings thereon will not be disturbed in the absence of gross abuse of discretion. State v. Small, 31 N.C. App. 556, 230 S.E.2d 425 (1976), cert. denied, 291 N.C. 715, 232 S.E.2d 207 (1977).

The argument of counsel must ordinarily be left to the sound discretion of the judge who tries the case and this court will not review his discretion unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury. State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977).

Limitation of Argument under Former Section. — See State v. Miller, 75 N.C. 73 (1876).

Applied in Jenkins v. Harvey C. Hines Co., 264 N.C. 83, 141 S.E.2d 1 (1965); Wiles v. Mullinax, 270 N.C. 661, 155 S.E.2d 246 (1967); State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. Campbell, 14 N.C. App. 596, 188 S.E.2d 558 (1972).

Stated in Continental Ins. Co. v. Foard, 9 N.C. App. 630, 177 S.E.2d 431 (1970).

Cited in Teasley v. Burwell, 199 N.C. 18, 153 S.E. 607 (1930).

ARTICLE 4.

North Carolina State Bar.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

There is hereby created as an agency of the State of North Carolina, for the purposes and with the powers hereinafter set forth, the North Carolina State Bar. (1933, c. 210, s. 1.)

Legal Periodicals. — For a review of this section and those immediately following, see 11 N.C.L. Rev. 191.

For article on "The Organized Bar in North Carolina," see 30 N.C.L. Rev. 337 (1952).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

CASE NOTES

The purpose of the statute creating the North Carolina State Bar is to enable the Bar to render more effective service in improving the administration of justice, particularly in dealing with the problem of admission to the Bar, and of disciplining and disbarring attorneys-at-law. Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

Quoted in In re Parker, 209 N.C. 693, 184 S.E. 532 (1936).

Cited in North Carolina State Bar v. Hall, 293 N.C. 539, 238 S.E.2d 521 (1977).

§ 84-16. Membership and privileges.

The membership of the North Carolina State Bar shall consist of two classes, active and inactive.

The active members shall be all persons who shall have heretofore obtained, or who shall hereafter obtain, a license or certificate, which shall at the time be valid and effectual, entitling them to practice law in the State of North Carolina, who shall have paid the membership dues hereinafter specified, unless classified as an inactive member by the Council as hereinafter provided. No person other than a member of the North Carolina State Bar shall practice in any court of the State except foreign attorneys as provided by statute.

Inactive members shall be all persons found by the Council to be not engaged in the practice of law and not holding themselves out as practicing attorneys and not occupying any public or private positions in which they may be called upon to give legal advice or counsel or to examine the law or to pass upon the legal effect of any act, document, or law.

Only active members shall be required to pay annual membership fees, and shall have the right to vote. A member shall be entitled to vote at all annual or special meetings of the North Carolina State Bar, and at all meetings of and

elections held by the bar of each of the judicial districts in which he resides: Provided, that if he desires to vote with the bar of some district in which he practices, other than that in which he resides, he may do so upon filing with the resident judge of the district in which he resides (and, after the North Carolina State Bar shall have been organized as hereinafter set forth, with the secretary-treasurer of the North Carolina State Bar), his statement in writing that he desires to vote in such other district: Provided, however, that in no case shall he be entitled to vote in more than one district. (1933, c. 210, s. 2; 1939, c. 21, s. 1; 1941, c. 344, ss. 1, 2, 3; 1969, c. 44, s. 60; c. 1190, s. 52; 1973, c. 1152, s. 1.)

Legal Periodicals. — For comment on the 1939 and 1941 amendments, see 17 N.C.L. Rev. 341, and 19 N.C.L. Rev. 453.

§ 84-17. Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar hereinafter referred to as the "council", which shall be composed of 50 councilors exclusive of officers, except as hereinafter provided, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president, whose term of office expires at the 1973 annual meeting or after. Notwithstanding any other provisions of the law, the North Carolina State Bar shall have the power and authority to acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The North Carolina State Bar Council is authorized and empowered in its discretion to utilize the services of the Purchase and Contract Division of the Department of Administration for the procurement of personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes. Notwithstanding any provisions of this Article as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in G.S. 84-33 provided. There shall be one councilor from each judicial district and additional councilors as are necessary to make the total number of councilors 50. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years on the basis of the number of the active members of each judicial district bar according to the records of the North Carolina State Bar and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

In the event a judicial district is divided after any allocation as hereinafter provided, then the total number of councilors shall be increased until the next allocation, so as to provide one councilor for each such district, unless the district has one or more councilors who are members of such judicial district. (1933, c. 210, s. 3; 1937, c. 51, s. 1; 1955, c. 651, s. 1; 1961, c. 641; 1973, c. 1152, s. 2; 1977, c. 841, s. 2; 1979, c. 570, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote the first and fifth sentences of the first paragraph, added the last sentence of the first paragraph, and rewrote the second paragraph, which formerly read: "All councilors elected from any additional judicial district will be elected for a term of three years, except as may be hereinafter provided in G.S. 84-18 and G.S. 84-19."

§ 84-18. Terms, election and appointment of councilors.

(a) The terms of councilors are fixed at three years. No councilor may serve more than three successive three-year terms but a councilor may serve an unlimited number of three successive three-year terms provided a three-year period of nonservice intervenes in each instance. This paragraph shall not apply to officers of the State Bar.

All councilors serving at the effective date of these changes shall remain in office and continue to represent their district for the remainder of their term. Those who have already served for 18 months or more shall be eligible for election to two additional three-year terms and be ineligible for election thereafter until a period of three years has expired. Those who have served less than 18 months shall be eligible for election to three consecutive three-year terms and be ineligible for election thereafter until an intervening three-year period has expired.

When a judicial district loses a councilor or is entitled to an additional councilor by virtue of reallocation of councilors as provided in G.S. 84-17 above, or is entitled to a councilor by virtue of the creation of a new district, then the affected judicial districts shall certify to the State Bar Council the identity of that judicial district's authorized councilor or councilors. This certification shall be made within 90 days of the date the reallocation is made and reported to the judicial districts affected. Until this certification is received, the district shall have no representation on the State Bar Council. In the case of reallocation, the certification shall be made within 90 days.

Any North Carolina State Bar member, other than an inactive member, is eligible to serve as a councilor from the judicial district in which he or she is eligible to vote.

(b) The election and appointment of councilors shall be as follows:

Each judicial district bar, under rules established by the district, shall elect one eligible North Carolina State Bar member for each State Bar Council vacancy in the district. Any vacancy occurring after the election, whether caused by resignation, death or otherwise shall be filled by the judicial district bar in which the vacancy occurs, under rules established by the district. The appointment shall be for the unexpired portion of the term and shall be certified to the State Bar Council by the judicial district bar. Any appointed councilor shall be subject to the terms set forth in paragraph (a) of G.S. 84-18. (1933, c. 210, s. 4; 1953, c. 1310, s. 1; 1979, c. 570, s. 3.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section.

§ 84-18.1. Membership fees of district bars.

Any district bar may from time to time by a majority vote of its membership prescribe an annual membership fee to be paid by its active members as a service charge to promote and maintain its administration, activities and programs. Such fee shall be in addition to, but shall not exceed, the amount of the membership fee prescribed by G.S. 84-34 for active members of the North Carolina State Bar. Every active member of a district bar which has prescribed an annual membership fee shall keep its secretary-treasurer notified of his

correct mailing address and shall pay the prescribed fee at the time and place set forth in the demand for payment mailed to him by its secretary-treasurer. The name of each active member of a district bar who shall be more than 12 full calendar months in arrears in the payment of any such fee shall be furnished by the secretary-treasurer of the district bar to the council of the North Carolina State Bar. In the exercise of its powers as set forth in G.S. 84-23, the council shall thereupon take such disciplinary or other action with reference to the delinquent as it considers necessary and proper. (1969, c. 241.)

§ 84-19. Change of judicial districts.

In the event that a new district shall hereafter be carved out of an existing district, the council for the old district shall remain in office and continue to represent the district constituting that portion of the old district in which he resides or with which he has elected to be affiliated; and within 30 days after the division of the old district shall have become effective, or so soon thereafter as practicable, the same procedure shall be followed for the organization of the North Carolina State Bar, constituting the remaining and unrepresented portion of the old district, and for the election of a councilor to represent the same, as is prescribed by G.S. 84-18; and if a new district or more than one new district shall be formed by a recombination or reallocation of the counties in more than one existing district, the same procedure shall be followed as is prescribed by G.S. 84-18, in said new district, or in each of them if there be more than one, within 30 days after the election or appointment of the judge or judges thereof; but in that event the office of councilor for each of the old districts the counties in which shall have been so recombined into or reallocated to such new district or districts shall cease, determine, and become vacant so soon as the bar or bars of such new district or all of such new districts if there shall be more than one, shall have been organized and shall have elected a councilor or councilors therefor, but not earlier.

As soon as may be practicable following the organization of the several district bars where the composition of such districts shall have had a change in the counties comprising said district, the officers of the district being divided or rearranged shall for the purpose of preservation, forward the records of the expiring district bar to the council of the North Carolina State Bar who shall preserve the same in the offices of the North Carolina State Bar. (1933, c. 210, s. 5; 1955, c. 651, s. 2; 1979, c. 570, s. 4.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, at the end of the first paragraph, deleted a proviso which read: "Provided, that if at such time any councilor whose office shall thus become vacant be actually serving upon a committee before which there is pending any trial of a case of professional misconduct or malpractice, he shall, notwithstanding the election of a new councilor, continue to serve as councilor for the purpose of trying such case until judgment shall have been rendered therein." The amendment also deleted a former second paragraph which provided for terms of councilors.

§ 84-20. Compensation of councilors.

The members of the council and members of committees when actually engaged in the performance of their duties, including committees sitting upon disbarment proceedings, shall receive as compensation not exceeding ten dollars ($10.00) per day for the time spent in attending meetings, and shall receive actual expenses of travel and subsistence while engaged in his duties provided that for transportation by use of private automobile the expense of travel shall not exceed ten cents (10¢) per mile. The council shall determine per diem, subsistence and mileage to be paid. Such allowance as may be fixed by the council shall be paid by the secretary-treasurer of the North Carolina State

Bar upon certified statements presented by each member. (1933, c. 210, s. 6; 1935, c. 34; 1953, c. 1310, s. 2; 1971, c. 13, s. 1.)

§ 84-21. Organization of council; publication of rules, regulations and bylaws.

Upon receiving notification of the election of a councilor for each judicial district, or, if such notification shall not have been received from all said districts, within 120 days after this Article shall have gone into effect, the clerk of the Supreme Court of North Carolina shall call a meeting of the councilors of whose election he shall have been notified, to be held in the City of Raleigh not less than 20 days nor more than 30 days after the date of said call; and at the meeting so held the councilors attending the same shall proceed to organize the council by electing officers, taking appropriate steps toward the adoption of rules and regulations, electing councilors for judicial districts which have failed to elect them, and taking such other action as they may deem to be in furtherance of this Article. The regular term of all officers shall be one year, but those first elected shall serve until January 1, 1935. The council shall be the judge of the election and qualifications of its own members. When the council shall have been fully organized and shall have adopted such rules, regulations and bylaws, not inconsistent with this Article, as it shall deem necessary or expedient for the discharge of its duties, the secretary-treasurer shall file with the clerk of the Supreme Court of North Carolina a certificate, to be called the "certificate of organization," showing the officers and members of the council, with the judicial districts which the members respectively represent, and their post-office addresses, and the rules, regulations and bylaws adopted by it; and thereupon the Chief Justice of the Supreme Court of North Carolina, or any judge thereof, if the court be then in vacation, shall examine the said certificate and, if of opinion that the requirements of this Article have been complied with, shall cause the said certificate to be spread upon the minutes of the court; but if of opinion that the requirements of this Article have not been complied with, shall return the said certificate to the secretary-treasurer with a statement showing in what respects the provisions of this Article have not been complied with; and the said certificate shall not be again presented to the Chief Justice of the Supreme Court or any judge thereof, until any such defects in the organization of the council shall have been corrected, at which time a new certificate of organization shall be presented and the same course taken as hereinabove provided, and so on until a correct certificate showing the proper organization of the council shall have been presented, and the organization of the council accordingly completed. Upon (a) the entry of an order upon the minutes of the court that the requirements of this Article have been complied with, or (b) if for any reason the Chief Justice or judge should not act thereon within 30 days, then, after the lapse of 30 days from the presentation to the Chief Justice or judge, as the case may be, of any certificate of organization hereinbefore required to be presented by the secretary-treasurer, without either the entry of an order or the return of said certificate with a statement showing the respects in which this Article has not been complied with, the organization of the council shall be deemed to be complete, and it shall be vested with the powers herein set forth; and the certificate of organization shall thereupon forthwith be spread upon the minutes of the court. A copy of the certificate of organization, as spread upon the minutes of the court, shall be published in the next ensuing volume of the North Carolina Reports. The rules and regulations set forth in the certificate of organization, and all other rules and regulations which may be adopted by the council under this Article, may be amended by the council from time to time in any manner not inconsistent with this Article. Copies of all such rules and regulations

adopted subsequently to the filing of the certificate of organization, and of all amendments so made by the council, shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by it upon its minutes, and published in the next ensuing number of the North Carolina Reports: Provided, that the court may decline to have so entered upon its minutes any of such rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article. (1933, c. 210, s. 7.)

CASE NOTES

Promulgation May Be Refused. — This section empowers the Chief Justice of the Supreme Court to determine whether rules of the Board of Law Examiners are in compliance with this Article, of which § 84-24 is a part, and to refuse them promulgation if they do not so comply. Keenan v. Board of Law Examrs., 317 F. Supp. 1350 (E.D.N.C. 1970).

Cited in In re Willis, 286 N.C. 207, 209 S.E.2d 457 (1974); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

§ 84-22. Officers and committees of the North Carolina State Bar.

The officers of the North Carolina State Bar and the Council shall consist of a president, president-elect, vice-president and an immediate past president, who shall be deemed members of the Council in all respects. The president, president-elect and vice-president need not be members of the State Bar Council at the time of their election. There shall be a secretary-treasurer who shall also have the title of executive director, but who shall not be a member of the State Bar Council. All officers shall be elected annually by the State Bar Council at an election to take place at the annual meeting of the North Carolina State Bar.

In addition to the committees and commissions as may be specifically established or authorized by law, the North Carolina State Bar may have committees, standing or special, as from time to time the Council of the North Carolina State Bar deems appropriate for the proper discharge of the duties and functions of the North Carolina State Bar. The Council of the North Carolina State Bar shall determine the number of members, composition, method of appointment or election, functions, powers and duties, structure, authority to act, and other matters relating to each committee. Any committee may, at the discretion of the appointing or electing authority, be composed of Council members or members of the North Carolina State Bar who are not members of the Council, or of lay persons, or of any combination. (1933, c. 210, s. 8; 1941, c. 344, ss. 4, 5; 1973, c. 1152, s. 3; 1979, c. 570, s. 5.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, rewrote this section.

§ 84-23. Powers of council.

Subject to the superior authority of the General Assembly to legislate thereon by general law, and except as herein otherwise limited, the Council is hereby vested, as an agency of the State, with the control of the discipline, disbarment and restoration of attorneys practicing law in this State. The Council shall have power to administer this Article; to formulate and adopt rules of professional ethics and conduct; to formulate and adopt rules and procedures for discipline, incapacity and disability hearings; to publish an official journal

concerning matters of interest to the legal profession; to acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The North Carolina State Bar Council is authorized and empowered in its discretion to utilize the services of the Purchase and Contract Division of the Department of Administration for the procurement of personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes; and to do all such things necessary in the furtherance of the purposes of this Article as are not prohibited by law. (1933, c. 210, s. 9; 1935, c. 74, s. 1; 1937, c. 51, s. 2; 1975, c. 582, s. 3; 1977, c. 841, s. 2.)

Legal Periodicals. — For article on rules, ethics and reform in connection with transferring North Carolina real estate, see 49 N.C.L. Rev. 593 (1971).

CASE NOTES

Setting aside Judgment of Disbarment. — In State v. Hollingsworth, 206 N.C. 739, 175 S.E. 99 (1934), construing C. S. § 205, it was held that the court was without authority to set aside a judgment of disbarment on motion, especially since the enactment of this and subsequent sections.

North Carolina Bar, Inc., Has Jurisdiction over Unethical Conduct of Counsel. — While the court has the inherent power to act whenever it is made to appear that the conduct of counsel in a cause pending in court is improper or unethical, questions of propriety and ethics are ordinarily for the consideration of the North Carolina Bar, Inc., which is now vested with jurisdiction over such matters. McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956).

Confession of Guilt. — Where an attorney has confessed in open court to four crimes, all involving moral turpitude, and he has been disbarred from practicing in the district court of the United States, disbarment must ultimately result regardless of this and the following sections. In re Brittain, 214 N.C. 95, 197 S.E. 705 (1938).

Cited in In re Suspension of Right to Practice Law of Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977); In re Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979).

§ 84-23.1. Prepaid legal services.

(a) This section is in addition to and not a limitation of the powers and responsibilities of the council set out in G.S. 84-23. To the extent that this section deals with the same powers and responsibilities it shall be taken to be in amplification of those powers and not in derogation thereof.

(b) The council has the responsibility and duty of discipline and regulation of the practice of law in this State. Plans providing for prepaid legal services must be submitted to the council and may not be implemented or operated without the prior and continuing approval by the council as being proper under the statutes, rules and regulations governing the practice of law in this State; provided, however, the council shall not approve any plan for prepaid legal services which in any way restricts the right of the client or person receiving prepaid legal services to select his own attorney from the actual members of the North Carolina State Bar, or a member of any other state bar in any other state where the claim or cause of action may arise.

(c) The council is authorized to initiate and cause the creation of a nonprofit corporation pursuant to Chapter 55A of the General Statutes, for the purpose of providing for prepayment for legal services. The corporation authorized by this section shall have the following powers:

(1) To provide for the collection of payments for the plan or plans it offers, the payment of legal fees in accordance with its approved plans, and the investment and safeguarding of funds held for such purposes.

(2) To contract with insurance companies or other companies for actuarial services, administrative and other services, use of facilities, underwriting and reinsurance.
(3) All other powers necessary and appropriate for the offering of plans for prepaid legal services.
(4) All other powers granted to nonprofit corporations by law or by virtue of their charters and bylaws.

The corporation may not directly employ an attorney to perform legal services for another person. It shall not be subject to regulation under Chapter 58 of the General Statutes or other provisions relating to insurance companies, but it shall be subject to regulation pursuant to subsection (b) of this section. Neither the existence of this authorization, nor the creation of such a corporation shall limit the authority of the council to approve other plans for prepaid legal services. The council may cause funds of the North Carolina State Bar to be contributed, advanced or loaned to, or used for the benefit of the corporation so created upon such terms as the council deems appropriate, and pursuant to such regulations as the council may promulgate to assure such funds are used for the purposes herein provided.

(d) Notwithstanding approval of the council pursuant to subsection (b), any plan for prepaid legal services other than pursuant to subsection (c) is subject to regulation under Chapter 58 of the General Statutes if offered by a company engaged in the insurance business or if the plan itself constitutes the offering of insurance.

(e) Notwithstanding any other provision of this section or any other statute or law, no plan providing for prepaid legal services shall be authorized to exist or function in the State of North Carolina which in any way restricts or denies the client or person receiving prepaid legal services the right to select an attorney of his own choice from the active membership of the North Carolina State Bar, or a member of any other state bar in any other state where the claim or cause of action may arise to represent said person or client. (1975, c. 707, s. 1.)

Editor's Note. — Session Laws 1975, c. 707, s. 2, contains a severability clause.

Legal Periodicals. — For article entitled, "Student Legal Services at the University of North Carolina at Chapel Hill," see 7 N.C. Cent. L.J. 286 (1976).

For article, "The Advent of Prepaid Legal Services in North Carolina," see 13 Wake Forest L. Rev. 271 (1977).

§ 84-24. Admission to practice.

The provisions of the law now obtaining with reference to admission to the practice of law, as amended, and the rules and regulations prescribed by the Supreme Court of North Carolina with reference thereto, shall continue in force until superseded, changed or modified by or under the provisions of this Article.

For the purpose of examining applicants and providing rules and regulations for admission to the Bar including the issuance of license therefor, there is hereby created the Board of Law Examiners, which shall consist of 11 members of the Bar, elected by the council of the North Carolina State Bar, who need not be members of the council. No teacher in any law school, however, shall be eligible. The members of the Board of Law Examiners elected from the Bar shall each hold office for a term of three years: Provided, that the members first elected shall hold office, two for one year, two for two years, and two for three years.

The Board of Law Examiners shall elect a member of said Board as chairman thereof, and the Board may employ an executive secretary and provide such

assistance as may be required to enable said Board to perform its duties promptly and properly. The chairman and any employees shall serve for such period as said Board may determine.

The examination shall be held in such manner and at such times as the Board of Law Examiners may determine.

The Board of Law Examiners shall have full power and authority to make or cause to be made such examinations and investigations as may be deemed by it necessary to satisfy it that the applicants for admission to the Bar possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law and to this end the Board of Law Examiners shall have the power of subpoena and to summons and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the inquiry and shall also have authority to employ and provide such assistance as may be required to enable it to perform its duties promptly and properly.

The Board of Law Examiners, subject to the approval of the council shall by majority vote, from time to time, make, alter and amend such rules and regulations for admission to the Bar as in their judgment shall promote the welfare of the State and the profession: Provided, that any change in the educational requirements for admission to the Bar shall not become effective within two years from the date of the adoption of such change.

All such rules and regulations, and modifications, alterations and amendments thereof, shall be recorded and promulgated as provided in G.S. 84-21 in relation to the certificate of organization and the rules and regulations of the council.

Whenever the council shall order the restoration of license to any person as authorized by G.S. 84-32, it shall be the duty of the Board of Law Examiners to issue a written license to such person, noting thereon that the same is issued in compliance with an order of the council of the North Carolina State Bar, whether the license to practice law was issued by the Board of Law Examiners or the Supreme Court in the first instance.

Appeals from the Board shall be had in accordance with rules or procedures as may be approved by the Supreme Court as may be submitted under G.S. 84-21 or as may be promulgated by the Supreme Court. (1933, c. 210, s. 10; c. 331; 1935, cc. 33, 61; 1941, c. 344, s. 6; 1947, c. 77; 1951, c. 991, s. 1; 1953, c. 1012; 1965, cc. 65, 725; 1973, c. 13; 1977, c. 841, s. 2.)

Cross References. — As to discipline and disbarment, see § 84-28. As to restoration of license to practice law, see § 84-32.

Legal Periodicals. — For note on "Admission to the Bar — 'Good Moral Character' — Constitutional Protections," see 45 N.C.L. Rev. 1008 (1967).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Constitutionality. — The "character and general fitness" requirement of this section and the "good moral character" requirement of Rule VIII of the Rules Governing Admission to the Practice of Law are constitutionally permissible standards. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

While a state cannot exclude a person from the practice of law for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment, a state can require high standards for admission to the bar, including good moral character and proficiency in its laws, so long as the qualifying standards have a rational connection with the applicant's fitness or capacity to practice law. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

The term "good moral character," although broad, has been so extensively used as a standard that its long usage and the case law surrounding that usage have given the term

well-defined contours which make it a constitutionally appropriate standard. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

The Board of Law Examiners is an "administrative agency," with both judicial and delegated legislative powers. Keenan v. Board of Law Exmrs., 317 F. Supp. 1350 (E.D.N.C. 1970).

This section establishes the Board of Law Examiners as an administrative agency of the State, and its findings of fact are conclusive on appeal if properly supported by the evidence. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

Rule-Making Power Delegated. — The North Carolina General Assembly, in this section, has delegated its rule-making power to the Board of Law Examiners and has determined that the Board shall also apply its own rules "to the particular case." Keenan v. Board of Law Exmrs., 317 F. Supp. 1350 (E.D.N.C. 1970).

In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

A person does not have a natural or constitutional right to practice law; it is a privilege or franchise to be earned by hard study and compliance with the qualifications for admission to practice law prescribed by law. By virtue of its police power a state is authorized to establish qualifications for admission to practice law in its jurisdiction. Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

Applicant Has Burden of Showing Compliance with Residence Requirement. — The burden of showing that he has the qualifications to comply with requirements of Rule Five of the Rules Governing Admission to Practice of Law in North Carolina, adopted under authority of this Article, and specifying the resident requirement, rests upon the applicant, and if the proof offered by him fails to satisfy the Board of Law Examiners that he has the qualifications required by the rule, it is their duty to deny his application to take the examination for admission. Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

The findings of fact made by the Board of Law Examiners supported by the evidence are conclusive upon a reviewing court, and are not within the scope of reviewing powers. Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

As long as there is evidence in the record which rationally justifies a finding that the applicant has failed to establish his moral fitness to practice law, this court cannot substitute its judgment for that of the Board of Law Examiners. In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1975).

Board's Duty to Resolve Factual Disputes. — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Under this section the board is the primary investigatory and fact-finding agency in the bar admissions process. When factual disputes are fairly brought before it, it must resolve them. No other agency exists to make such resolutions. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Detailing of Facts on Which Conclusion Is Based. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proving Specific Acts of Misconduct. — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Applicant's Showing of Good Moral Character. — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. If there are material factual disputes, the board must resolve them by making findings of fact. If the disputes arise out of charges initially made before the board, the board must determine whether the charges have been proved by a preponderance of the evidence before it can rely on them in concluding that an applicant has not shown his good moral character. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Cited in In re Willis, 286 N.C. 207, 209 S.E.2d 457 (1974).

§ 84-25. Fees of applicants.

All applicants before the Board of Law Examiners shall pay such fees as prescribed under the rules of said Board as may be promulgated under G.S. 84-21 and 84-24. (1935, c. 33, s. 1; 1955, c. 651, s. 3.)

§ 84-26. Pay of Board of Law Examiners.

Each member of the Board of Law Examiners shall receive the sum of fifty dollars ($50.00) for his services in connection with each examination and shall receive his actual expenses of travel and subsistence while engaged in duties assigned to him, provided that for transportation by the use of private automobile the expense of travel shall be the same as paid other boards and commissions by the State. (1935, c. 33, s. 2; 1937, c. 35; 1953, c. 1310, s. 3; 1971, c. 13, s. 2; 1973, c. 1368.)

§ 84-27: Repealed by Session Laws 1945, c. 782.

§ 84-28. Discipline and disbarment.

(a) Any attorney admitted to practice law in this State is subject to the disciplinary jurisdiction of the council of the North Carolina State Bar under such rules and procedures as the council shall promulgate as provided in G.S. 84-21.

(b) The following acts or omissions by a member of the North Carolina State Bar or any attorney admitted for limited practice under G.S. 84-4.1, individually or in concert with any other person or persons, shall constitute misconduct and shall be grounds for discipline whether the act or omission occurred in the course of an attorney-client relationship or otherwise:

(1) Conviction of, or a tender and acceptance of a plea of no contest to, a criminal offense showing professional unfitness;
(2) The violation of the Code of Professional Responsibility adopted and promulgated by the council of the North Carolina State Bar in effect at the time of the act;
(3) Knowing misrepresentation of any facts or circumstances surrounding any complaint, allegation or charge of misconduct; failure to answer any formal inquiry or complaint issued by or in the name of the North Carolina State Bar in any disciplinary matter; or contempt of the council or any committee of the North Carolina State Bar.

(c) Misconduct by any attorney shall be grounds for:
(1) Disbarment; or
(2) Suspension for a period not exceeding three years; or
(3) Public censure; or
(4) Private reprimand.

(d) Any attorney admitted to practice law in this State, who is convicted of or has tendered and has had accepted, a plea of no contest to, a criminal offense showing professional unfitness, may be suspended from the practice of law, but this suspension shall not take place pending appeal of the conviction.

(e) Any attorney admitted to practice law in this State who is disciplined in another jurisdiction shall be subject to the same discipline in this State: Provided, that the discipline imposed in the other jurisdiction does not exceed that provided for in subsection (c) above and that the attorney was not deprived of due process in the other jurisdiction.

(f) Upon application by the North Carolina State Bar, misconduct by an attorney admitted to practice in this State may be restrained or enjoined where the necessity for prompt action exists regardless of whether a disciplinary proceeding in the matter of such conduct is pending. Such application shall be filed in the Superior Court of Wake County and shall be governed by the procedure set forth in G.S. 1A-1, Rule 65.

(g) Any member of the North Carolina State Bar may be transferred to inactive status for mental incompetence or physical disability interfering with the attorney's ability to competently engage in the practice of law under such rules and procedures as the council shall promulgate as provided in G.S. 84-21.

(h) There shall be an appeal of right from any final order imposing reprimand, censure, suspension or disbarment upon an attorney, or involuntary transferring a member of the North Carolina State Bar to inactive status for mental incompetence or physical disability, to the appellate division. Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any such appeal shall be as provided by statute or court rule for appeals in civil cases. Any discipline imposed by such final order shall be stayed pending determination of the appeal.

(i) The North Carolina State Bar may invoke the process of the General Court of Justice to enforce the powers of the council or any committee to which the council delegates its authority.

(j) The North Carolina State Bar may apply to appropriate courts for orders necessary to protect the interests of clients of missing, disabled, incapacitated or deceased attorneys.

The senior regular resident judge of the superior court of any district wherein a member of the North Carolina State Bar resides or maintains an office shall have the authority and power to enter such orders as are necessary to protect the interests of such clients, including the authority to order the payment of counsel fees from the estate of the member to any attorney appointed to administer or conserve the law practice of the member. (1933, c. 210, s. 11; 1937, c. 51, s. 3; 1959, c. 1282, ss. 1, 2; 1961, c. 1075; 1969, c. 44, s. 61; 1975, c. 582, s. 5; 1979, c. 570, ss. 6, 7.)

Cross References. — As to issuance of written license upon restoration of license, see § 84-24. As to restoration of license, see § 84-32.

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, inserted "or a tender and acceptance of a plea of no contest to" in subdivision (b)(1), inserted "or has tendered and has had accepted, a plea of no contest to" in subsection (d), and substituted "this" for "such" preceding "suspension shall" in subsection (d).

Legal Periodicals. — For article on rules, ethics and reform in connection with transferring North Carolina real estate, see 49 N.C.L. Rev. 593 (1971).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Editor's Note. — Many of the cases cited under this section were decided under former statutes similar in subject matter to the present section.

Constitutionality. — Laws 1870-1, c. 216, s. 4, an early statute dealing with the same subject matter as this section, was constitutional. It did not take away any of the inherent rights which are absolutely essential in the administration of justice. Ex parte Schenck, 65 N.C. 353 (1871).

Rule-Making Power of Council of North Carolina State Bar. — The 1937 amendment to this section, providing that the council of the North Carolina State Bar should have power to formulate rules of procedure governing disbarment proceedings which shall conform as near as may be to the procedure provided by law for hearings before referees in compulsory references, relates to the formulation of rules of procedure incident to hearings before the council or the trial committee and not to procedure upon appeal to the superior court. In re Gilliland, 248 N.C. 517, 103 S.E.2d 807 (1958).

The object of the regulations is to protect the public from unethical conduct by one vested with an attorney's license. A well-educated lawyer, whose position and achievement bring trusting persons to his office in a search of guidance and protection has the duty of conducting himself with the highest degree of honor, integrity and ethics. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Disbarment Is to Protect Public. — An order disbarring an attorney upon his conviction of a felony is not entered as additional punishment, but as a protection to the public. State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938).

Civil Action. — Proceedings for disbarment are of a civil nature. In re Ebbs, 150 N.C. 44, 63 S.E. 190 (1908).

The proceedings under each method by which disciplinary action or disbarment may be imposed partake of the nature of civil actions. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

In North Carolina there are two methods by which disciplinary action or disbarment may be imposed upon attorneys — statutory and judicial. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

The statutory method by which disciplinary action or disbarment may be imposed provides for written complaint, notice to accused, opportunity to answer and be represented by counsel, hearing before a committee conducting proceedings in the nature of a reference, and trial by jury unless waived. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Inherent Powers of Court Not Abridged. — Nothing contained in the statutes concerning discipline or disbarment is to be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Summary Disbarment by Court in Criminal Prosecution. — Where an attorney is on trial, charged with a criminal offense involving moral turpitude and amounting to a felony, and pleads guilty, or is convicted, or pleads nolo contendere with agreement that he will surrender his license, the court conducting the criminal trial has authority to disbar him summarily without further proceedings, and on appeal the Supreme Court may do likewise upon motion of the Attorney General. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977), rev'd on other grounds, 296 N.C. 638, 252 S.E.2d 784 (1979).

Disbarment for Crime — Entry of Judgment of Conviction on Plea of Nolo Contendere. — Defendant's plea of nolo contendere in the Federal District Court to a charge of receiving and possessing chattels valued at less than $100 knowing them to have been stolen or embezzled does not entitle the State Bar to summary judgment authorizing disciplinary action against the defendant. North Carolina State Bar v. Hall, 293 N.C. 539, 238 S.E.2d 521 (1977).

Former Law a "Disabling Statute". — The act of 1871, upon which C. S., §§ 204 and 205, were based, failed to provide any power to take

the place of the power formerly invested in the courts, and so was a disabling statute. Kane v. Haywood, 66 N.C. 1 (1872); In re Ebbs, 150 N.C. 44, 63 S.E. 190 (1908). See § 84-36.

Attorney's Ethics, etc., Ordinarily for Consideration of State Bar. — By virtue of this section and §§ 84-29 to 84-32, questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina State Bar. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Disciplinary Proceedings Not Barred by Limitations. — Disciplinary proceedings are not barred by the general statute of limitations. Nor is a disciplinary proceeding barred because it is grounded on acts that also constitute a crime that cannot be prosecuted in a criminal action because of limitations. North Carolina State Bar v. Temple, 2 N.C. App. 91, 162 S.E.2d 649 (1968), appeal dismissed, 6 N.C. App. 437, 170 S.E.2d 131 (1969), cert. denied, 397 U.S. 1023, 90 S. Ct. 1263, 25 L. Ed. 2d 532, rehearing denied, 397 U.S. 1081, 90 S. Ct. 1520 (1970).

Council Is Not Limited to Any Particular Source for Information. — The duty of patrolling the conduct of licensed attorneys is placed on the council of the State Bar, and there are no requirements that it shall be limited to any particular source for its information or instigation of proceedings. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

And Complaint Need Not Be by Layman or Client. — It is not required that proceedings against an attorney for disbarment or suspension initiated by the council of the State Bar be based upon complaint of a layman or a client defrauded by the attorney. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Duty of Judge on Appeal from Council. — It is the duty of the superior court judge, on appeal from the council, to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases, use his own faculties in ascertaining the truth, and form his own judgment as to fact and law. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Power of Judge with Respect to Report of Council. — Since this section provides that the proceedings in the superior court shall be in accordance with the laws and rules relating to civil actions in which there has been a reference by consent, the judge of the superior court may affirm, amend, modify, set aside, make additional findings, and confirm in whole or in part, or disaffirm the report of the council. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Imposition of Greater Punishment on Appeal to Superior Court. — On appeal from disciplinary action taken by the State Bar, an attorney cannot complain that the punishment imposed by the superior court was greater than the punishment imposed by the council of the State Bar from which he had appealed. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Disbarment for Crime — Nature of Offense. — Under Laws 1870-1, c. 216, s. 4, upon which an action for disbarment was originally based, conviction of a "criminal offense" showing untrustworthiness was sufficient basis for disbarment; but by Laws 1907, c. 941, s. 1, conviction of a "felony" was necessary; construing these provisions together the court, in State ex rel. Solicitor v. Johnson, 171 N.C. 799, 88 S.E. 437 (1916), held that the two provisions were consistent and reconcilable (a view evidently adopted by the Revision Commission of 1920, as C. S., § 205 contained the language of both provisions), and further stated that the conviction of a criminal offense — the illegal sale of liquor — was sufficient grounds for disbarment as showing the attorney unfit for practice. See also State ex rel. McLean v. Johnson, 174 N.C. 345, 93 S.E. 847 (1917).

It having appeared to the court that the defendant was guilty of an infamous misdemeanor, converted to a felony by §§ 14-1, 14-3, the court by virtue of its inherent power was authorized to order his name stricken from the rolls of attorneys and his license to practice law in the State of North Carolina returned to the Supreme Court, which issued it. State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973).

Same — Conviction or Confession of Guilt. — The words "conviction" and "confession," as used in a former statute providing that no attorney should be disbarred for crime unless upon conviction or confession in open court must be construed to convey the idea that the party had been convicted by a jury or had in open court declined to take issue by the plea of not guilty, and confessed himself guilty. Kane v. Haywood, 66 N.C. 1 (1872).

So the admission of an attorney in an answer to a rule to show cause why he should not be attached for contempt for failure to pay money into court, not being voluntary, was not a confession in open court as contemplated by the statutes. Kane v. Haywood, 66 N.C. 1 (1872).

Same — Indictment. — By a proper construction of the former statute, the court was shorn of its power to disbar an attorney, except

in the single instance where he had been indicted for some criminal offense, showing him unfit to be trusted in the discharge of the duties of his profession, and upon such indictment had either been convicted or pleaded guilty. Kane v. Haywood, 66 N.C. 1 (1872).

Same — Conviction in Foreign State. — Laws 1870-1, c. 216, s. 4, and Laws 1907, c. 941, s. 1, did not confer upon the court the power to disbar an attorney because he had been "convicted" in the courts of another state or of the United States. In re Ebbs, 150 N.C. 44, 63 S.E. 190 (1908).

Same — Confession of a Felony. — A plea of guilty to an indictment charging defendant with willfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Commissioner of Revenue (now Secretary of Revenue), etc., was held a confession of a felony, and ground for disbarment if defendant was a practicing attorney, under former § 205 of the Consolidated Statutes. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

When Due Process Requires Notice and Opportunity to Be Heard. — Where the attorney pleads guilty or is convicted in another court, or the conduct complained of is not related to litigation pending before the court investigating attorney's alleged misconduct, the procedure, to meet the test of due process, must be initiated by a sworn written complaint, and the court should issue a rule or order advising the attorney to the specific charges, directing him to show cause why disciplinary action should not be taken, and granting a reasonable time for answering and preparation of defense, and attorney should be given full opportunity to be heard and permitted to have counsel for his defense. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977), rev'd on other grounds, 296 N.C. 638, 252 S.E.2d 784 (1979).

Committee to Investigate Facts. — Where issues of fact are raised the court may appoint a committee to investigate and make report. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977), rev'd on other grounds, 296 N.C. 638, 252 S.E.2d 784 (1979).

Trial by Jury. — Neither this section nor the rules and regulations of the North Carolina State Bar contain any provision sufficient to deprive a respondent in disbarment proceedings of the right expressly conferred by this section, upon appeal from the council of the North Carolina State Bar, to a trial by jury on the written evidence of the issues of fact arising on the pleadings. In re Gilliland, 248 N.C. 517, 103 S.E.2d 807 (1958).

State Has Right to Appeal. — Under the statutory method of disciplinary attorneys any party, including the attorney in question and the State Bar, may appeal from a decision of the disciplinary hearing commission. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

The State may seek review by the appellate division of proceedings disciplining attorneys under the judicial method, not as a matter of right, but by petition for writ of certiorari. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Detention of Money or Property. — Under this section the detention of money received in his professional capacity without bona fide claim thereto is ground for the disbarment of an attorney. In re Escoffery, 216 N.C. 19, 3 S.E.2d 425 (1939).

Inexperience in the legal profession cannot excuse detention of money collected for a client under circumstances which amount to embezzlement. Dishonesty and breach of trust may be committed by anyone, and no person needs a law license or experience in the practice of law to know that dishonesty and crookedness are wrong. North Carolina State Bar v. Frazier, 269 N.C. 625, 153 S.E.2d 367, cert. denied, 389 U.S. 826, 88 S. Ct. 69, 19 L. Ed. 2d 81 (1967).

Fine and imprisonment is not the appropriate remedy to be applied to an attorney who, by reason of moral delinquency or other cause, has shown himself to be an unworthy member of the profession. Kane v. Haywood, 66 N.C. 1 (1872).

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978).

§ 84-28.1. Disciplinary hearing commission.

(a) There shall be a disciplinary hearing commission of the North Carolina State Bar which shall consist of 15 members. Ten of these members shall be members of the North Carolina State Bar, and shall be appointed by the council. The other five shall be citizens of North Carolina not licensed to practice law in this or any other state, three of whom shall be appointed by the Governor, one by the Lieutenant Governor, and one by the Speaker of the House of Representatives. The council shall designate one of its appointees as chairman and another as vice-chairman. The chairman shall have actively

practiced law in the courts of the State for at least 10 years. When the commission is first selected, five members, including three appointed by the council, one appointed by the Governor and the one appointed by the Speaker of the House of Representatives, shall be appointed for terms of one year; five members, including three appointed by the council, one appointed by the Governor and the one appointed by the Lieutenant Governor, shall be appointed for terms of two years; and the remaining five members shall be appointed for terms of three years. All such initial terms shall commence July 1, 1975. Thereafter five members shall be appointed each year to three-year terms to fill the positions of the terms then expiring. The council, the Governor, the Lieutenant Governor and the Speaker of the House of Representatives, respectively, shall appoint members to fill the unexpired term when any vacancy is created by resignation, disqualification, disability or death. No member may serve more than a total of seven years or a one-year term and two consecutive three-year terms: Provided, that any member or former member who is designated chairman may serve one additional three-year term in that capacity. No member of the council may be appointed to the commission.

(b) The disciplinary hearing commission of the North Carolina State Bar, or any committee thereof, is authorized to hold hearings in discipline, incapacity and disability matters, to make findings of fact and conclusions of law after such hearings, and to enter orders necessary to carry out the duties delegated to it by the council.

(c) Members of the disciplinary hearing commission shall receive the same per diem and travel expenses as are authorized for members of State commissions under G.S. 138-5. (1975, c. 582, s. 6; 1979, c. 570, s. 8.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "seven years or a one-year term and two consecutive three-year terms" for "six years or two consecutive terms" in the next to last sentence of subsection (a).

Cited in North Carolina State Bar v. DuMont, 298 N.C. 564, 259 S.E.2d 280 (1979).

§ 84-28.2. Persons immune from suit.

Persons shall be immune from suit for all statements made without malice, and intended for transmittal to the North Carolina State Bar or any committee, officer, agent or employee thereof, or given in any investigation or proceedings, pertaining to alleged misconduct, incapacity or disability or to reinstatement of an attorney. The protection of this immunity does not exist, however, as to statements made to others not intended for such use. (1975, c. 582, s. 4.)

§ 84-29. Evidence and witnesses.

In any investigation of charges of professional misconduct, incapacity or disability the council and any committee thereof, and the disciplinary hearing commission, and any committee thereof, may administer oaths and affirmations and shall have the power to subpoena and examine witnesses under oath, and to compel their attendance, and the production of books, papers and other documents or writings deemed by it necessary or material to the inquiry. Each subpoena shall be issued under the hand of the secretary-treasurer or the president of the council or the chairman of the committee appointed to hear the charges, and shall have the force and effect of a summons or subpoena issued by a court of record, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or to testify or produce the books, papers, or other documents or writings required, shall be liable to punishment for contempt either by the council or its committee, but with the

right to appeal therefrom. Depositions may be taken in any investigations of professional misconduct as in civil proceedings, but the council or the committee hearing the case may, in its discretion, whenever it believes that the ends of substantial justice so require, direct that any witness within the State be brought before it. Witnesses giving testimony under a subpoena before the council or any committee thereof, or the disciplinary hearing commission or any committee thereof, or by deposition, shall be entitled to the same fees as in civil actions.

In cases heard before the council or any committee thereof or the disciplinary hearing commission or any committee thereof, if the party shall be convicted of the charges against him, he shall be taxed with the cost of the hearings: Provided, however, that such bill of costs shall not include any compensation to the members of the council or committee before whom the hearings are conducted. (1933, c. 210, s. 12; 1959, c. 1282, s. 2; 1975, c. 582, s. 7.)

Cross References. — See note under § 84-28.

§ 84-30. Rights of accused person.

Any person who shall stand charged with an offense cognizable by the council or any committee thereof or the disciplinary hearing commission or any committee thereof shall have the right to invoke and have exercised in his favor the powers of the council or any committee, in respect of compulsory process for witnesses and for the production of books, papers, and other writings and documents, and shall also have the right to be represented by counsel. (1933, c. 210, s. 13; 1959, c. 1282, s. 2; 1975, c. 582, s. 8.)

Cross References. — See note under § 84-28.

CASE NOTES

Deprivation of Right to Practice Is Judicial Act Requiring Due Process. — The granting of a license to engage in business or practice a profession is a right conferred by administrative act, but the deprivation of the right is a judicial act requiring due process. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962); In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977), rev'd on other grounds, 296 N.C. 638, 252 S.E.2d 784 (1979).

§ 84-31. Counsel; investigators; powers; compensation.

The council may appoint a member of the North Carolina State Bar to prosecute charges of misconduct, incapacity or disability in such hearings as may be held, including appeals, and may authorize such counsel to employ assistant counsel, investigators, and administrative assistants in such numbers as it deems necessary. Counsel and investigators engaged in discipline, incapacity and disability matters shall have the authority throughout the State to serve subpoenas or other process issued by the council or any committee thereof or the disciplinary hearing commission or any committee thereof, in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice. The council may allow counsel, assistant counsel, investigators and administrative assistants such compensation as it deems proper. (1933, c. 210, s. 14; 1969, c. 44, s. 62; 1975, c. 582, s. 9.)

§ 84-32. Records and judgments and their effect; restoration of licenses.

In cases heard by the disciplinary hearing commission or any committee thereof, a complete record of the proceedings and evidence shall be made and preserved in the office of the secretary-treasurer. Final judgments of suspension or disbarment shall be entered upon the judgment docket of the superior court in the district wherein the accused resides or practices law, and also upon the minutes of the Supreme Court of North Carolina; and such judgment shall be effective throughout the State.

Whenever an attorney desires to voluntarily surrender his license to the council and the council consents to accept the same, he shall make such request and surrender in writing directed to the council and the council shall enter an order containing the conditions of acceptance of said license, and a copy of such order shall be filed with the clerk of the Supreme Court and with the clerk of the superior court of the county of residence or prior residence of the licensee or the county wherein the attorney maintains an office for the practice of law; provided, however, that the council may refuse to accept surrender of license in any case.

Whenever any attorney has been deprived of his license, the council, in its discretion, may restore said license upon due notice being given and satisfactory evidence produced of proper reformation of the licentiate before restoration. The council may prescribe rules and procedures for the conduct of any hearing regarding restoration and may require the disciplinary hearing commission or a committee thereof to conduct such hearing. (1933, c. 210, s. 15; 1935, c. 74, s. 2; 1953, c. 1310, s. 4; 1959, c. 1282, s. 2; 1975, c. 582, s. 10.)

Cross References. — As to issuance of written license upon restoration of license to practice, see § 84-24.

CASE NOTES

Constitutionality. — This section, giving the State Bar Council the discretion to reinstate the license to practice law of a disbarred attorney is not an unconstitutional delegation of legislative power. In re Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 404 (1980).

The council did not err in the denial of petitioner's application for reinstatement of his license to practice law where there was evidence that petitioner had compromised four of the six civil judgments rendered against him but had failed to make restitution for two outstanding judgments against him in excess of $30,000, which he had been unable to compromise, and that petitioner also renounced funds which would have enabled him to help satisfy the judgments against him. Petitioner's willingness to satisfy only the judgments that could be compromised, while failing to satisfy those not the subject of compromise, is evidence of the lack of proper reformation required by the statute. In re Garrison, 44 N.C. App. 158, 260 S.E.2d 445 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 404 (1980).

§ 84-33. Annual and special meetings.

There shall be an annual meeting of the North Carolina State Bar, open to all members in good standing, to be held at such place and time after such notice (but not less than 30 days) as the council may determine, for the discussion of the affairs of the Bar and the administration of justice; and special meetings of the North Carolina State Bar may be called, on not less than 30 days' notice, by the council, or on the call, addressed to the council, of not less than twenty-five percent (25%) of the active members of the North Carolina State Bar; but at special meetings no subjects shall be dealt with other than

those specified in the notice. Notice of all meetings, whether annual or special, may be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar. The North Carolina State Bar shall not take any action in respect of any decision of the council or any committee thereof relating to admission, exclusion, discipline or punishment of any person or other action, save after notice in writing of the action of the council or committee proposed to be directed or overruled, which notice shall be given to the secretary-treasurer 30 days before the meeting, who shall give, by mail, at least 15 days' notice to the members of the North Carolina State Bar, and unless at the meeting two thirds of the members present and voting shall favor the motion to direct or overrule. There shall be no voting by proxy. (1933, c. 210, s. 16; 1969, c. 104.)

§ 84-34. Membership fees and list of members.

Every active member of the North Carolina State Bar shall, prior to the first day of July of each year, beginning with the year 1975, pay to the secretary-treasurer an annual membership fee of seventy-five dollars ($75.00), and every member shall notify the secretary-treasurer of his correct post-office address. All dues for prior years shall be as were set forth in the General Statutes then in effect. The said membership fee shall be regarded as a service charge for the maintenance of the several services prescribed in this Article, and shall be in addition to all fees now required in connection with admissions to practice, and in addition to all license taxes now or hereafter required by law. The said fee shall not be prorated: Provided, that no fee shall be required of an attorney licensed after this Article shall have gone into effect until the first day of July of the second calendar year (a "calendar year" for the purposes of this Article being treated as the period from January 1 to December 31) following that in which he shall have been licensed; but this proviso shall not apply to attorneys from other states admitted on certificate. The said fees shall be disbursed by the secretary-treasurer on the order of the council. The secretary-treasurer shall annually, at a time and in a law magazine or daily newspaper to be prescribed by the council, publish an account of the financial transaction of the council in a form to be prescribed by it. The secretary-treasurer shall compile and keep currently correct from the names and post-office addresses forwarded to him and from any other available sources of information a list of members of the North Carolina State Bar and furnish to the clerk of the superior court in each county, not later than the first day of October in each year, a list showing the name and address of each attorney for that county who has not complied with the provisions of this Article. The name of each of the active members who shall be in arrears in the payment of membership fees for one or more calendar years shall be furnished to the presiding judge at the next term of the superior court after the first day of October of each year, by the clerk of the superior court of each county wherein said member or members reside, and the court shall thereupon take such action as is necessary and proper. The names and addresses of such attorneys so certified shall be kept available to the public. The Secretary of Revenue is hereby directed to supply the secretary-treasurer, from his record of license tax payments, with any information for which the secretary-treasurer may call in order to enable him to comply with this requirement.

The said list submitted to several clerks of the superior court shall also be submitted to the council of the North Carolina State Bar at its October meeting of each year and it shall take such action thereon as is necessary and proper. (1933, c. 210, s. 17; 1939, c. 21, ss. 2, 3; 1953, c. 1310, s. 5; 1955, c. 651, s. 4; 1961, c. 760; 1971, c. 18; 1973, c. 476, s. 193; c. 1152, s. 4; 1977, c. 841, s. 2.)

Cross References. — As to who is an active member, see § 84-16.

§ 84-35. Saving as to North Carolina Bar Association.

Nothing in this Article contained shall be construed as affecting in any way the North Carolina Bar Association, or any local bar association. (1933, c. 210, s. 18.)

§ 84-36. Inherent powers of courts unaffected.

Nothing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys. (1937, c. 51, s. 4.)

CASE NOTES

In North Carolina there are two methods by which disciplinary action or disbarment may be imposed upon attorneys — statutory and judicial. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Powers of Court Distinguished from Powers Granted to State Bar. — This inherent power is co-equal and co-extensive with the statutory grant of powers to the North Carolina State Bar, and, while the interests of the two entities having disciplinary jurisdiction may, and often do, overlap, they are not always identical and as the interests sought to be protected by the court's inherent power are distinct from those of the North Carolina State Bar, the action of a court in disciplining or disqualifying an attorney practicing before it is not in derogation or to the exclusion of similar action by the Bar. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied, 296 N.C. 740, 254 S.E.2d 181 (1979).

The power of the court to regulate and discipline attorneys is an inherent one because it is an essential one for the court to possess in order for it to protect itself from fraud and impropriety and to serve the ends of the administration of justice which are, fundamentally, the raison d'etre for the existence and operation of the courts. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied, 296 N.C. 740, 254 S.E.2d 181 (1979).

The court's inherent power is not limited or bound by the technical precepts contained in the Code of Professional Responsibility as administered by the Bar. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied, 296 N.C. 740, 254 S.E.2d 181 (1979).

The Judicial Method Is Not Dependent upon Statutory Authority. — It arises because of a court's inherent authority to take disciplinary action against attorneys licensed before it; an authority which extends even to matters which are not pending in the particular court exercising the authority. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Basis of Court's Power. — A court's power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Statutory Method of Disbarment Not Exclusive. — C. S., §§ 204 and 205, restricting the power of courts to disbar attorneys, were repealed by Laws 1933, c. 210, s. 20, and the statutory method of disbarment provided by the act of 1933 is not exclusive, but on the contrary the act recognizes the inherent power of the courts, and the courts have jurisdiction to order the disbarment of an attorney upon his conviction of an infamous misdemeanor, converted to a felony by §§ 14-1 and 14-3. State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938). See State ex rel. McLean v. Johnson, 174 N.C. 345, 93 S.E. 847 (1917).

Due Process Required. — While it is incontrovertible that the courts have inherent authority to take disciplinary action against attorneys practicing therein, even in relation to matters not pending in the particular court exercising that authority, it is not after the manner of the courts, however, to deprive a lawyer, any more than anyone else, of his constitutional guaranties or to revoke his license without due process of law. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

No statute provides for a jury trial when the judicial method is employed to seek disciplinary action against an attorney practicing in this State. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

This State has never had a statute which expressly conferred upon an attorney the right to a trial by jury in a judicial disciplining or disbarment proceeding. Since no such right existed at common law, or by statute at the time our Constitution was adopted, and is not now provided for by statute, appellant's motion for a trial by jury was properly denied. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Due Process Procedures under Judicial Method. — Under the judicial method, the procedure, to meet the test of due process, must be initiated by a sworn written complaint, and the court should issue a rule or order advising the attorney of the specific charges, directing him to show cause why disciplinary action should not be taken, and granting a reasonable time for answering and preparation of defense, and attorney should be given full opportunity to be heard and permitted to have counsel for his defense; where issues of fact are raised the court may appoint a committee to investigate and make report. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, cert. denied, 282 N.C. 426, 192 S.E.2d 837 (1972).

Quoted in In re Palmer, 32 N.C. App. 449, 232 S.E.2d 497 (1977).

Stated in State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973).

§ 84-36.1. Clerks of court to certify orders.

The clerk of any court of this State in which a member of the North Carolina State Bar is convicted of any criminal offense, disciplined, found to be in contempt of the court or adjudged incompetent shall transmit a certified copy of the order or judgment to the secretary-treasurer of the North Carolina State Bar within 10 days of the entry of such judgment or order. (1975, c. 582, s. 11.)

§ 84-37. State Bar may investigate and enjoin unauthorized practice.

(a) The council or any committee appointed by it for that purpose may inquire into and investigate any charges or complaints of unauthorized or unlawful practice of law. The council or any committee of its members appointed for that purpose may inquire into and investigate any charges or complaints of unauthorized or unlawful practice of law. The council may bring or cause to be brought and maintain in the name of the North Carolina State Bar an action or actions, upon information or upon the complaint of any private person or of any bar association against any person, partnership, corporation or association and any employee, agent, director, or officer thereof who engages in rendering any legal service or makes it a practice or business to render legal services which are unauthorized or prohibited by law or statutes relative thereto. No bond for cost shall be required in such proceeding.

(b) In an action brought under this section the final judgment if in favor of the plaintiff shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit, that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of law. The provisions of statute or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(c) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unauthorized or unlawful practice of law are alleged to have been committed or in which there appear reasonable grounds that they will be committed or in the county where the defendants in such action reside.

(d) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for the examination of parties.

(e) This section shall not repeal or curtail any remedy now provided in cases of unauthorized or unlawful practice of law, and nothing contained herein shall be construed as disabling or abridging the inherent powers of the court in such matters. (1939, c. 281; 1979, c. 570, s. 9.)

Cross References. — As to the power of any district attorney of any of the superior courts to bring injunction or criminal proceedings, see § 84-7.

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "appointed by it" for "of its members appointed" in the first sentence of subsection (a).

Legal Periodicals. — For comment on this section, see 17 N.C.L. Rev. 342.

§ 84-38. Solicitation of retainer or contract for legal services prohibited; division of fees.

It shall be unlawful for any person, firm, corporation, or association or his or their agent, agents, or employees, acting on his or their behalf, to solicit or procure through solicitation either directly or indirectly, any legal business, whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney or any other person, firm, corporation, or association to perform or render any legal services, whether to be performed in this State or elsewhere.

It shall be unlawful for any person, firm, corporation, or association to divide with or receive from any attorney-at-law, or group of attorneys-at-law, whether practicing in this State or elsewhere, either before or after action is brought, any portion of any fee or compensation charged or received by such attorney-at-law, or any valuable consideration or reward, as an inducement for placing or in consideration of being placed in the hands of such attorney or attorneys-at-law, or in the hands of another person, firm, corporation or association, a claim or demand of any kind, for the purpose of collecting such claim or instituting an action thereon or of representing claimant in the pursuit of any civil remedy for the recovery thereof, or for the settlement or compromise thereof, whether such compromise, settlement, recovery, suit, claim, collection or demand shall be in this State or elsewhere. This paragraph shall not apply to agreements between attorneys to divide compensation received in cases or matters legitimately, lawfully and properly received by them.

Any person, firm, corporation or association of persons violating the provisions of this section shall be guilty of a misdemeanor and punished by fine or imprisonment or both in the discretion of the court.

The council of the North Carolina State Bar is hereby authorized and empowered to investigate and bring action against persons charged with violations of this section and the provisions as set forth in G.S. 84-37 shall apply. Nothing contained herein shall be construed to supersede the authority of district attorneys to seek injunctive relief or institute criminal proceedings in the same manner as provided for in G.S. 84-7. Nothing herein shall be construed as abridging the inherent powers of the courts to deal with such matters. (1947, c. 573; 1973, c. 47, s. 2.)

Legal Periodicals. — For discussion of the purposes of this section, see 25 N.C.L. Rev. 379.

Chapter 85.

Auctions and Auctioneers.

§§ 85-1 to 85-27: Repealed by Session Laws 1973, c. 552, s. 9.

Cross References. — For present provisions as to auctions and auctioneers, see Chapter 85B.

Chapter 85A.

Bail Bondsmen and Runners.

§§ 85A-1 to 85A-34: Recodified as §§ 85C-1 to 85C-41.

Editor's Note. — This Chapter was rewritten by Session Laws 1975, c. 619, s. 1, effective Oct. 1, 1975, and has been recodified as Chapter 85C.

Former § 85A-34 was amended by Session Laws 1975, c. 16, which made the Chapter applicable to Burke County, and by Session Laws 1975, c. 560, which made the Chapter applicable to Carteret, Craven, Forsyth, Pitt and Pamlico Counties.

Chapter 85B.

Auctions and Auctioneers.

Sec.
85B-1. Definitions.
85B-2. Activities governed by Chapter.
85B-3. Auctioneers Commission.
85B-4. Licenses required.
85B-5. Licensing of nonresidents.
85B-6. Fees; local governments not to charge fees or require licenses.
85B-7. Conduct of auction.
85B-8. Prohibited acts; suspension or revocation of license.
85B-9. Penalties and enforcement.

Repeal of Chapter. — This Chapter is repealed, effective July 1, 1983, by Session Laws 1977, c. 712, s. 4. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 85B-1. Definitions.

For the purposes of this Chapter the following definitions shall apply:

(1) "Auction" means the sale of goods or real estate by means of exchanges between an auctioneer and members of his audience, the exchanges consisting of a series of invitations for offers made by the auctioneer, offers by members of the audience, and the acceptance by the auctioneer of the highest or most favorable offer.

(2) "Auctioneer" means any person who conducts or offers his service to conduct auctions and includes apprentice auctioneers except as stricter standards are specified by this Chapter for apprentice auctioneers. (1973, c. 552, s. 1.)

§ 85B-2. Activities governed by Chapter.

This Chapter shall apply to all auctions held in this State except the following:

(1) Sales at auction conducted by the owner of all or any part of the goods being offered, or his attorney, unless the owner originally acquired the goods for the purpose of resale at auction;

(2) Sales at auction conducted by or under the direction of any public authority;

(3) Sales at auction pursuant to a judicial order or in the settlement of a decedent's estate;

(4) Any sale required by law to be at auction;

(5) Sale of livestock at a public livestock market authorized by the Commissioner of Agriculture;

(6) Leaf tobacco sales conducted in accordance with the provisions of Chapter 106 of the General Statutes;

(7) Sale at auction of automobiles conducted under the provisions of G.S. 20-77, or by a motor vehicle dealer licensed under the provisions of Article 12 of Chapter 20 of the General Statutes;

(8) Sale at auction of a particular brand of livestock conducted by an auctioneer who specializes in the sale of that brand when such sale is conducted under the auspices of a livestock trade association;

(9) Sales conducted by and on behalf of any charitable or religious organization if the person conducting the sale receives no compensation therefor;

(9a) Sales conducted by and on behalf of a civic club, not exceeding one sale per year;

(10) Sales conducted by a trustee pursuant to a power of sale contained in a deed of trust on real property;

(11) Sales of collateral, sales conducted to enforce carriers' or warehousemen's liens, bulk sales, sales of goods by a presenting bank following dishonor of a documentary draft, resales of rightfully rejected goods, resales of goods by an aggrieved seller, or other resales conducted pursuant to authority in Articles 2, 4, 6, 7 and 9 of Chapter 25 of the General Statutes (the Uniform Commercial Code). (1973, c. 552, s. 2; 1977, c. 1115.)

§ 85B-3. Auctioneers Commission.

(a) There shall be a five-member North Carolina Auctioneers Commission having the powers and responsibilities set out in this Chapter. The Governor shall appoint the members of the Commission, at least three of whom, and their successors, shall be from nominations submitted by the Auctioneers Association of North Carolina. The Auctioneers Association shall submit, within 45 days of when the vacancy occurs, at least three names for each position for which it is entitled to make a nomination. Of the initial five members of the Commission one shall be appointed for a one-year term, two shall be appointed for two-year terms and two for three-year terms; thereafter, each new member shall be appointed for a term of three years. Any vacancy shall be filled for the remainder of the unexpired term only. Each member shall continue in office until his successor is appointed and qualified.

(b) At least three of the first five members of the Commission shall be experienced auctioneers. Beginning July 1, 1975, at least three members of the Commission must be licensed auctioneers.

(c) The Commission shall employ a secretary-treasurer and such other employees as needed to carry out the duties of this Chapter. All employees shall serve at the pleasure of the Commission.

(d) Any action that may be taken by the Commission may be taken by vote of any three of its members.

(e) The members of the Commission shall elect from among themselves a chairman to serve a one-year term. No person shall serve more than two consecutive terms as chairman.

(f) The Commission shall receive and act upon applications for auctioneer licenses, issue and suspend and revoke licenses, adopt rules and regulations for auctioneers and auctions, and take such other actions as may be necessary to see that the provisions of this Chapter are carried out.

(g) Members of the Commission shall receive the compensation set for members of occupational licensing boards by G.S. 93B-5. (1973, c. 552, s. 3; 1975, c. 648, s. 1.)

§ 85B-4. Licenses required.

(a) No person shall sell, or offer his services to sell, goods or real estate at auction in this State unless he holds a currently valid auctioneer or apprentice auctioneer license.

(b) No person shall be licensed as an apprentice auctioneer or as an auctioneer if he:

(1) Is under 18 years of age;

(2) Is not a resident of North Carolina;

(3) Has within the preceding five years pleaded guilty to or been convicted of any felony; or

(4) Has had an auctioneer or apprentice auctioneer license revoked.

(c) Each applicant for an apprentice auctioneer license shall submit a written application in a form approved by the Commission and containing at least two statements by residents of North Carolina attesting to the applicant's good moral character.

(d) No person shall be licensed as an auctioneer unless he has held an apprentice auctioneer license and served as an apprentice auctioneer for the two preceding years, and has taken an examination approved by the Commission and performed on it to the satisfaction of the Commission. The examination shall test the applicant's understanding of the law relating to auctioneers and auctions, ethical practices for auctioneers, the mathematics applicable to the auctioneer business, and such other matters relating to auctions as the Commission considers appropriate. The examination shall be given at least twice each year in Raleigh, and at such other times and places as the Commission designates, but no person shall be allowed to take the examination within six months after having failed it a second time.

Any person who has been in the auctioneer business in this State for at least two years prior to the effective date of this act, and who makes proper application to the Commission within one year after July 1, 1973, may be licensed as an auctioneer without holding an apprentice license and serving as an apprentice of two years, and without taking the examination required by this subsection. Any person who has successfully completed the equivalent of at least 80 hours of classroom instruction in a course in auctioneering at an institution approved by the Commission may be licensed as an auctioneer without holding an apprentice license and serving as an apprentice for two years, but must take the examination required by this subsection and perform on it to the satisfaction of the Commission.

Each applicant for an auctioneer license shall submit a written application in a form approved by the Commission. If the applicant has been previously licensed as an apprentice auctioneer, the application shall contain an evaluation by the applicant's supervisor of his performance as an apprentice auctioneer. If the applicant is exempted from apprenticeship because he has completed the equivalent of at least 80 hours of classroom instruction in auctioneering, the application shall contain a transcript of his course work in auctioneering. Each application shall be accompanied by statements of at least two residents of North Carolina attesting to the applicant's good moral character. The Commission may require verification of any information included in an application for an auctioneer license.

(e) Each license issued under this Chapter shall be valid from July 1 of the year issued, or from the date issued, whichever is later, to June 30 of the succeeding year and may be renewed for one year at a time, except an apprentice auctioneer license may not be renewed for more than three times. No examination shall be required for renewal of an auctioneer license if the application for renewal is made within 90 days of the expiration of the previous license.

(f) No person shall be issued an auctioneer license until he has filed with the Commission an approved bond with the applicant as principal, payable to the State of North Carolina, in the amount of five thousand dollars ($5,000). No person shall be issued an apprentice auctioneer license until he has filed with the Commission an approved bond with the applicant as principal, payable to the State of North Carolina, in the amount of one thousand dollars ($1,000). In

each case, the bond shall have as surety a surety company authorized to do business in this State. The bond shall be conditioned for the faithful performance of all contracts relating to sale at auction, and shall be made available for the benefit of any person contracting with the named principal for the holding of sale at auction for damages suffered by reason of the misconduct of the principal in failing to hold or holding the sale. Claim shall be made to the Commission on its form and payment must be made by the surety company on order of the Commission.

(g) A sole proprietorship, partnership, or corporation which in the regular course of business promotes auctions, employs auctioneers to conduct auctions in its facilities, or uses or allows the use of its facilities for auctions, must be licensed as an auctioneer business even though no owner or officer of that business acts as an auctioneer. To be licensed as an auctioneer business the sole proprietorship, partnership or corporation must file an approved bond as required for a licensed auctioneer by subsection (f) and must pay the proper fees as set out in G.S. 85B-6, but is not otherwise required to meet qualifications for an auctioneer license. Licensed auctioneer businesses shall be covered by the provisions of G.S. 85B-8.

(h) The Commission shall publish at least once a year a list of names and addresses of all persons, partnerships and corporations holding valid apprentice auctioneer or auctioneer licenses or designated as licensed auctioneer partnerships or corporations. (1973, c. 552, s. 4; c. 1195, ss. 1, 2; 1975, c. 648, ss. 2-4.)

§ 85B-5. Licensing of nonresidents.

Any person who holds a valid auctioneer license in another state may apply for and be granted a North Carolina license if the state in which he is licensed provides similar recognition to a license granted by this State. An applicant under this section shall not be required to take the examination required under G.S. 85B-4 but shall pay the appropriate fee under G.S. 85B-6 and shall file with the Commission an irrevocable consent that service on the secretary of the Commission shall be sufficient service of process for actions against the applicant by a resident of this State arising out of his auctioneering activities.

An applicant under this section shall not be required to file the bond required under G.S. 85B-4 if he is currently bonded as an auctioneer or apprentice auctioneer in his home state. Any license issued under this section shall be marked to indicate that its holder is a nonresident.

An auctioneer who is a resident of Virginia or South Carolina and who has conducted at least five auctions in this State in the preceding two years may be licensed under this section notwithstanding the fact that his state does not have an auctioneering licensing requirement. This exception to the requirement of holding a license in the auctioneer's home state shall be inapplicable if and when an auctioneer licensing law becomes effective in the applicant's home state. (1973, c. 552, s. 5.)

§ 85B-6. Fees; local governments not to charge fees or require licenses.

The Commission shall collect and remit to the State Treasurer fees in an amount not to exceed the following: fifty dollars ($50.00) for application for apprentice auctioneer license; twenty-five dollars ($25.00) for apprentice auctioneer license for one year; twenty-five dollars ($25.00) for application for auctioneer license and for examination; one hundred dollars ($100.00) for auctioneer license for one year; seventy-five dollars ($75.00) for designation as licensed auctioneer business.

No local government or agency of local government may charge any auctioneer fees or require any auctioneer licenses in addition to those set out in this Chapter. (1973, c. 552, s. 6; c. 1195, s. 3; 1975, c. 648, s. 5; 1977, 2nd Sess., c. 1219, s. 43.7.)

§ 85B-7. Conduct of auction.

(a) No person shall conduct an auction in this State without first having a written agreement with the owner of any property to be sold. The agreement must contain the terms and conditions upon which the auctioneer received the goods for sale. The auctioneer shall provide the owner with one copy of the agreement and shall keep at least one copy for his own records for two years from the date of the agreement. A written agreement shall not be required for a sale at auction if the sale is made at an auction house or similar place where members of the public are generally offered the opportunity to present goods for sale, there has been no prior negotiation between the owner and the auctioneer, and the goods are not sold for more than five hundred dollars ($500.00).

(b) Each auctioneer shall maintain a record book and enter in it, upon receipt of goods for auction and before their sale, the name and address of the person who employed him to sell the goods at auction and the name and address of the owner of the goods to be sold. It shall not be necessary to enter in the record book any record of sales made at an auction house or similar place where members of the public are generally offered the opportunity to present goods for sale, there has been no prior negotiation between the owner and the auctioneer, and the goods are not sold for more than five hundred dollars ($500.00). The record book shall be open for inspection by the Commission or its designated agent at reasonable times.

(c) Each auctioneer shall have his license available at each auction he conducts. (1973, c. 552, s. 7.)

§ 85B-8. Prohibited acts; suspension or revocation of license.

(a) The following shall be grounds for suspension or revocation of an auctioneer or apprentice auctioneer license:

(1) Any violation of this Chapter or any violation of a rule or regulation duly adopted by the Commission;

(2) A continued and flagrant course of misrepresentation or making false promises, either by the auctioneer or by someone acting in his behalf and with his consent;

(3) Any failure to account for or to pay over within a reasonable time, not to exceed 30 days, money belonging to another which has come into the auctioneer's possession through an auction sale;

(4) Any misleading or untruthful advertising;

(5) Any act of conduct in connection with a sales transaction which demonstrates bad faith or dishonesty;

(6) Knowingly using false bidders, cappers or pullers, or making a material false statement for license;

(7) Commingling the money or property of a client with his own or failing to maintain and deposit in a trust or escrow account in an insured bank or savings and loan association located in North Carolina money received for another person through sale at auction.

(b) to (d) Repealed by Session Laws 1973, c. 1195, s. 5.

(e) The Commission may upon its own motion or upon the complaint in writing of any person, provided the complaint and any evidence presented with

it establishes a prima facie case, hold a hearing and investigate the actions of any auctioneer or apprentice auctioneer or any person who holds himself out as an auctioneer or apprentice auctioneer, and shall have the power to suspend or revoke any license issued under the provisions of this Chapter. In all proceedings for the suspension or revocation of licenses, the provisions of Chapter 150A of the General Statutes shall be applicable. (1973, c. 552, s. 8; c. 1195, ss. 4, 5; c. 1331, s. 3; 1975, c. 648, s. 6.)

§ 85B-9. Penalties and enforcement.

(a) Any person, corporation or association of persons violating the provisions of G.S. 85B-4(a) shall be guilty of a misdemeanor and shall be punished by fine, or imprisonment, or both, in the discretion of the court.

(b) The Commission may in its own name seek injunctive relief in the General Court of Justice to restrain any violation or anticipated violation of the provisions of G.S. 85B-4(a).

(c) The Commission shall be entitled to the services of the Attorney General of North Carolina in enforcing the provisions of this Chapter or may employ an attorney to assist and represent it in enforcement of specific matters. (1973, c. 1195, s. 6; 1975, c. 648, s. 7.)

Chapter 85C.

Bail Bondsmen and Runners.

Sec.

85C-1. Definitions.
85C-2. Commissioner of Insurance to administer Chapter; rules and regulations; employees; evidence of Commissioner's actions.
85C-3. Defects not to invalidate undertakings; liability not affected by agreement or lack of qualifications.
85C-4. Qualifications of sureties on bail.
85C-5. Surrender of defendant by surety; when premium need not be returned.
85C-6. Procedure for surrender; exoneration of obligors; refund of deposit.
85C-7. Arrest of defendant for purpose of surrender.
85C-8. Forfeiture of bail.
85C-9. Bail bondsmen and runners to be qualified and licensed; only individuals to be licensed; license applications generally.
85C-10. Expiration of licenses.
85C-11. Qualification for professional bondsman and runners.
85C-12. License fees.
85C-13. Annual financial statement of professional bondsmen.
85C-14. Contents of application for runner's license; endorsement by bail bondsman.
85C-15. Examination; fees.
85C-16. Renewal of licenses; fees.
85C-17. Grounds for denial, suspension, revocation or refusal to renew licenses.
85C-18. Notice and hearing before refusal, suspension, revocation, etc., of license.
85C-19. Appeal from denial, suspension, revocation or refusal to renew license.
85C-20. Prohibited practices.
85C-21. Receipts for collateral.
85C-22. Persons prohibited from becoming surety or runners.
85C-23. Bonds not to be signed in blank; authority to countersign only given to licensed employee.
85C-24. Insurers to annually report surety bondsmen; notices of appointments and terminations; information confidential.
85C-25. Bail bondsman to give notice of discontinuance of business; cancellation of license.
85C-26. Persons eligible as runners; bail bondsmen to annually report runners; notices of appointments and terminations; information confidential.
85C-27. Substituting bail by sureties for deposit.
85C-28. Deposit for defendant admitted to bail authorizes release and cancellation of undertaking.
85C-29. Registration of licenses and power of appointments by insurers.
85C-30. Financial responsibility of professional bondsmen.
85C-31. Securities held in trust by Commissioner; authority to dispose of same.
85C-32. Bondsman to furnish power of attorney with securities.
85C-33. Security deposit to be maintained.
85C-34. Monthly report required.
85C-35. Examinations.
85C-36. Limit on principal amount of bond to be written by professional bondsman.
85C-37. Disposition of fees.
85C-38. Penalties for violations.
85C-39. Duplication of regulation forbidden.
85C-40. Conflicting laws.
85C-41. Application of Chapter.

Editor's Note. — This Chapter is Chapter 85A as rewritten by Session Laws 1975, c. 619, s. 1, effective Oct. 1, 1975, and recodified. Where appropriate, the historical citations to the sections of the former Chapter have been added to the corresponding sections of the new Chapter.

Repeal of Chapter. — This Chapter is repealed effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or

continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 85C-1. Definitions.

The following words when used in this Chapter shall have the following meanings:

(1) "Accommodation bondsman" is a natural person who has reached the age of 18 years and is a bona fide resident of this State and who, aside from love and affection and release of the person concerned, receives no consideration for action as surety and who endorses the bail bond after providing satisfactory evidences of ownership, value and marketability of real or personal property to the extent necessary to reasonably satisfy the official taking bond that such real or personal property will in all respects be sufficient to assure that the full principal sum of the bond will be realized in the event of breach of the conditions thereof. "Consideration" as used in this subdivision does not include the legal rights of a surety against a principal by reason of breach of the conditions of a bail bond nor does it include collateral furnished to and securing the surety so long as the value of the surety's rights in the collateral do not exceed the principal's liability to the surety by reason of a breach in the conditions of said bail bond.

(2) "Bail bond" shall mean an undertaking by the principal to appear in court as required upon penalty of forfeiting bail to the State in a stated amount; and may include an unsecured appearance bond, a premium-secured appearance bond, an appearance bond secured by a cash deposit of the full amount of the bond, an appearance bond secured by a mortgage pursuant to G.S. 109-25, and an appearance bond secured by at least one surety.

(3) "Bail bondsman" shall mean a surety bondsman, professional bondsman or an accommodation bondsman as hereinafter defined.

(4) "Commissioner" shall mean the Commissioner of Insurance.

(5) "Insurer" shall mean any domestic, foreign, or alien surety company which has qualified generally to transact surety business and specifically to transact bail bond business in this State.

(6) "Obligor" shall mean a principal or a surety on a bail bond.

(7) "Principal" shall mean a defendant or witness obligated to appear in court as required upon penalty of forfeiting bail under a bail bond.

(8) "Professional bondsman" shall mean any person who is approved and licensed by the Commissioner and who pledges cash or approved securities with the Commissioner as security for bail bonds written in connection with a judicial proceeding and receives or is promised money or other things of value therefor.

(9) "Runner" shall mean a person employed by a bail bondsman for the purpose of assisting the bail bondsman in presenting the defendant in court when required, or to assist in apprehension and surrender of defendant to the court, or keeping defendant under necessary surveillance, or to execute bonds on behalf of the licensed bondsman when the power of attorney has been duly recorded. "Runner" does not include, however, a duly licensed attorney-at-law or a law-enforcement officer assisting a bondsman.

(10) "Surety" shall mean one who, with the principal, is liable for the amount of the bail bond upon forfeiture of bail.

(11) "Surety bondsman" shall mean any person who is approved by and licensed by the Commissioner as an insurance agent pursuant to the provisions of Chapter 58 of the General Statutes of North Carolina and appointed by an insurer by power of attorney to execute or countersign bail bonds for the insurer in connection with judicial proceedings and receives or is promised money or other things of value therefor. (1963, c. 1225, s. 1; 1975, c. 619, s. 1.)

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

§ 85C-2. Commissioner of Insurance to administer Chapter; rules and regulations; employees; evidence of Commissioner's actions.

(a) The Commissioner shall have full power and authority to administer the provisions of this Chapter, which regulates bail bondsmen and runners and to that end to adopt and promulgate rules and regulations to enforce the purposes and provisions of this Chapter. Subject to the provisions of the State Personnel Act, the Commissioner may employ and discharge such employees, examiners, investigators and such other assistants as shall be deemed necessary, and he shall prescribe their duties.

(b) Any written instrument purporting to be a copy of any action, proceeding, or finding of fact by the Commissioner, or any record of the Commissioner authenticated under the head of the Commissioner by the seal of his office shall be accepted by all the courts of this State as prima facie evidence of the contents thereof. (1963, c. 1225, s. 2; 1975, c. 619, s. 1.)

§ 85C-3. Defects not to invalidate undertakings; liability not affected by agreement or lack of qualifications.

No undertaking shall be invalid, nor shall any person be discharged from his undertaking, nor a forfeiture thereof be stayed, nor shall judgment thereon be stayed, set aside or reversed, the collection of any such judgment be barred or defeated by reason of any defect of form, omission or recital or of condition, failure to note or record the default of any principal or surety, or because of any other irregularity, or because the undertaking was entered into on Sunday or other holiday, if it appears from the tenor of the undertaking before what magistrate or at what court the principal was bound to appear, and that the official before whom it was entered into was legally authorized to take it and the amount of bail is stated.

The liability of a person on an undertaking shall not be affected by reason of the lack of any qualifications, sufficiency or competency provided in the criminal procedure law, or by reason of any other agreement whether or not the agreement is expressed in the undertaking, or because the defendant has not joined in the undertaking. (1963, c. 1225, s. 3; 1975, c. 619, s. 1.)

§ 85C-4. Qualifications of sureties on bail.

Each and every surety for the release of a person on bail shall be qualified as:

(1) An insurer and represented by a surety bondsman or bondsmen; or

(2) A professional bondsman; or

(3) An accommodation bondsman. (1963, c. 1225, s. 4; 1971, c. 1231, s. 1; 1975, c. 619, s. 1.)

§ 85C-5. Surrender of defendant by surety; when premium need not be returned.

At any time before there has been a breach of the undertaking in any type of bail or fine and cash bond the surety may surrender the defendant to the official to whose custody the defendant was committed at the time bail was taken, or to the official into whose custody the defendant would have been given had he been committed; in such case the full premium shall be returned. The defendant may be surrendered without the return of premium for the bond if he has been guilty of nonpayment of premium, changing address without notifying his bondsman, concealing himself, leaving the jurisdiction of the court without the permission of his bondsman or violating his obligation to the court. (1963, c. 1225, s. 5; 1975, c. 619, s. 1.)

§ 85C-6. Procedure for surrender; exoneration of obligors; refund of deposit.

The person desiring to make a surrender of the defendant shall procure a certified copy of the undertakings and deliver them together with the defendant to the official in whose custody the defendant was at the time bail was taken, or to the official into whose custody he would have been given had he been committed, who shall detain the defendant in his custody thereon, as upon a commitment, and by a certificate in writing acknowledge the surrender.

Upon the presentation of certified copy of the undertakings and the certificate of the official, the court before which the defendant has been held to answer, or the court in which the preliminary examination, warrant, indictment, information or appeal as the case may be, is pending, shall upon notice of three days given by the person making the surrender to the prosecuting officer of the court having jurisdiction of the offense, together with a copy of the undertakings and certificate, order that the obligors be exonerated from liability of their undertakings, and, if money or bonds have been deposited as bail, that such money or bonds be refunded. (1963, c. 1225, s. 6; 1975, c. 619, s. 1.)

§ 85C-7. Arrest of defendant for purpose of surrender.

For the purpose of surrendering the defendant, the surety may arrest him before the forfeiture of the undertaking, or by his written authority endorsed on a certified copy of the undertaking, may request any judicial officer to order arrest of the defendant. (1963, c. 1225, s. 7; 1975, c. 619, s. 1.)

§ 85C-8. Forfeiture of bail.

(a) The procedure for forfeiture of bail shall be that provided in Article 26 of Chapter 15A of the General Statutes and all provisions of that Article shall continue in full force and effect.

(b) At any time before execution is issued on a judgment of forfeiture against a principal or his surety, the court may direct that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment. (1963, c. 1225, s. 8; 1975, c. 619, s. 1.)

§ 85C-9. Bail bondsmen and runners to be qualified and licensed; only individuals to be licensed; license applications generally.

No person shall act in the capacity of a bail bondsman or runner or perform any of the functions, duties, or powers prescribed for bail bondsmen or runners under the provisions of this Chapter unless that person shall be qualified and (except as regards an accommodation bondsman) licensed in accordance with the provisions of this Chapter. No license shall be issued to a professional bondsman or runner except as provided in this Chapter and none shall be issued except to an individual natural person.

The applicant shall apply for license or renewal thereof on forms prepared and supplied by the Commissioner and the Commissioner may propound any reasonable interrogatories to an applicant for a license under this Chapter or on any renewal thereof, relating to his qualifications, residence, prospective place of business, and any other matters which, in the opinion of the Commissioner, are deemed necessary in order to protect the public and ascertain the qualifications of the applicant. The Commissioner may also conduct any reasonable inquiry or investigation he sees fit, relative to the determination of the applicant's fitness to be licensed or to continue to be licensed.

The failure of the applicant to secure approval of the Commissioner shall not preclude him from applying as many times as he desires, but no application shall be considered by the Commissioner within one year subsequent to the date upon which the Commissioner denied the last application. (1963, c. 1225, s. 9; 1975, c. 619, s. 1.)

§ 85C-10. Expiration of licenses.

All licenses issued pursuant to the provisions of this Chapter shall expire annually on June 30 unless revoked or suspended prior thereto by the Commissioner, or upon notice served upon the Commissioner that the employer of any runner has canceled the licensee's authority to act for such employer. (1963, c. 1225, s. 10; 1975, c. 619, s. 1.)

§ 85C-11. Qualification for professional bondsmen and runners.

Before license can issue to an applicant permitting him to act as a professional bondsman or runner, he must furnish the Commissioner a complete set of his fingerprints and a recent passport size full-face photograph of himself. The applicant's fingerprints shall be certified by an authorized law-enforcement officer.

Every applicant for license as a professional bondsman or runner before being issued such license shall satisfy the Commissioner that he:

(1) Is 18 years of age or over;
(2) Is a resident of this State;
(3) Is a person of good moral character and has not been convicted of a felony or any crime involving moral turpitude;
(4) Has knowledge, training, or experience of sufficient duration and extent to reasonably satisfy the Commissioner that he possesses the competence necessary to fulfill the responsibilities of a licensee. (1963, c. 1225, s. 11; 1971, c. 1231, s. 1; 1975, c. 619, s. 1.)

Legal Periodicals. — For note on equal protection and residence requirements, see 49 N.C.L. Rev. 753 (1971).

§ 85C-12. License fees.

A license fee of thirty dollars ($30.00) shall be paid to the Commissioner with each application for license as a professional bondsman and a license fee of ten dollars ($10.00) shall be paid to the Commissioner with each application for license as a runner. (1963, c. 1225, s. 12; 1975, c. 619, s. 1.)

§ 85C-13. Annual financial statement of professional bondsmen.

In addition to the other requirements of this Chapter, an applicant for a professional bondsman's license shall furnish annually a financial statement under oath in such detail and form as the Commissioner may require and any such statement shall be subject to the same examination as is prescribed by law for domestic insurance companies. (1963, c. 1225, s. 13; 1975, c. 619, s. 1.)

§ 85C-14. Contents of application for runner's license; endorsement by bail bondsman.

In addition to the other requirements of this Chapter, an applicant for a license to be a runner must affirmatively show:

(1) That the applicant will be employed by only one bail bondsman who will supervise the work of the applicant and be responsible for the runner's conduct in the bail bond business; and

(2) That the application is endorsed by the appointing bail bondsman who shall obligate himself therein to supervise the runner's activities. (1963, c. 1225, s. 14; 1975, c. 619, s. 1.)

§ 85C-15. Examination; fees.

Except as hereinafter provided, an applicant for license to be a professional bondsman or runner shall be required to appear in person and take a written examination prepared by the Commissioner testing his ability and qualifications. Each applicant shall become eligible for examination 30 days after the date the application is received by the Commissioner. Examinations shall be held at such time and place as designated by the Commissioner, and the applicant shall be given notice of such time and place not less than 15 days prior to taking the examination. The fee for such examination shall be fifteen dollars ($15.00) for professional bondsmen and ten dollars ($10.00) for runners. The failure of an applicant to pass an examination shall not preclude him from taking subsequent examinations; provided, however, that at least one year must intervene between examinations.

No person shall be required to submit to examination to obtain license as a professional bondsman if he is now licensed by the Commissioner of Insurance or the Secretary of Revenue and is performing the functions of a bondsman on the taking effect of this Chapter, and no person shall be required to submit to examination to obtain license as a runner if he is performing the functions of a runner on the taking effect of this Chapter. (1963, c. 1225, s. 15; 1975, c. 619, s. 1.)

§ 85C-16. Renewal of licenses; fees.

A renewal license shall be issued by the Commissioner to a licensee who has continuously maintained his license in effect without further examination upon the payment of a renewal fee of ten dollars ($10.00) in case of runners and thirty dollars ($30.00) in case of professional bondsmen, but such licensees

shall in all other respects be required to comply with and be subject to the provisions of this Chapter. After the receipt of such licensee's application for renewal, the current license shall continue in effect until the renewal license is issued or denied for cause. (1963, c. 1225, s. 16; 1975, c. 619, s. 1.)

§ 85C-17. Grounds for denial, suspension, revocation or refusal to renew licenses.

(a) The Commissioner may deny, suspend, or revoke or refuse to renew any license issued under this Chapter for any of the following causes:

(1) For any cause sufficient to deny, suspend, or revoke license under any other provision of this Chapter.

(2) Violation of any laws of this State relating to bail in the course of dealings under the license issued him by the Commissioner.

(3) Material misstatement, misrepresentation or fraud in obtaining the license.

(4) Misappropriation, conversion or unlawful withholding of moneys belonging to insurers or others and received in the conduct of business under the license.

(5) Fraudulent or dishonest practices in the conduct of business under the license.

(6) Conviction of a felony regardless of the time such conviction occurred and regardless of whether such conviction resulted from conduct in or related to the bail bond business.

(7) Failure to comply with or violation of the provisions of this Chapter or of any order, rule or regulation of the Commissioner.

(8) When in the judgment of the Commissioner, the licensee has in the conduct of his affairs under the license, demonstrated incompetency or untrustworthiness or that he is no longer in good faith carrying on the bail bond business or that he is guilty of rebating, or offering to rebate, or offering to divide the premiums received for the bond.

(9) For failing to pay any judgment or decree rendered on any forfeited undertaking in any court of competent jurisdiction.

(10) For charging or receiving, as premium or compensation for the making of any deposit or bail bond, any sum in excess of that permitted by this Chapter.

(11) For requiring, as a condition of his executing a bail bond, that the principal agree to engage the services of a specified attorney.

(b) The Commissioner, in lieu of revoking or suspending a license in accordance with the provisions of this Chapter, may, in any one proceeding, by order, require the licensee to pay to the school fund in the county of his residence a civil penalty in the sum of two hundred fifty dollars ($250.00) for each offense. Upon failure of such licensee to pay penalty within 20 days after the mailing of such order, postage prepaid, registered and addressed to the last known place of business of such licensee, unless such order is stayed by an order of the court of competent jurisdiction, the Commissioner may revoke the license of such licensee or may suspend the same for such period as he may determine. (1963, c. 1225, s. 17; 1975, c. 619, s. 1.)

§ 85C-18. Notice and hearing before refusal, suspension, revocation, etc., of license.

No license shall be refused, suspended, revoked, or renewal refused except on reasonable notice and opportunity to be heard afforded the person licensed or renewal thereof. (1963, c. 1225, s. 18; 1975, c. 619, s. 1.)

§ 85C-19. Appeal from denial, suspension, revocation or refusal to renew license.

Any applicant for license as bail bondsman or runner whose application has been denied or whose license shall have been suspended or revoked, or renewal thereof denied, shall have the right of appeal from such final order of the Commissioner thereon pursuant to the provisions of G.S. 58-9.3. (1963, c. 1225, s. 19; 1975, c. 619, s. 1.)

§ 85C-20. Prohibited practices.

No bail bondsman or runner shall:

Pay a fee or rebate or give or promise anything of value, directly or indirectly, to a jailer, law-enforcement officer, committing magistrate, or any other person who has power to arrest or hold in custody, or to any public official or public employee in order to secure a settlement, compromise, remission or reduction of the amount of any bail bond or the forfeiture thereof, including the payment to law-enforcement officers, directly or indirectly, for the arrest or apprehension of a principal or principals who have caused or will cause a forfeiture.

Pay a fee or rebate or give anything of value to an attorney in bail bond matters, except in defense of any action on a bond.

Pay a fee or rebate or give or promise anything of value to the principal or anyone in his behalf.

Participate in the capacity of an attorney at a trial or hearing of one on whose bond he is surety, nor suggest or advise the employment of, or name for employment any particular attorney to represent his principal.

Accept anything of value from a principal except the premium, which shall not exceed fifteen percent (15%) of the face amount of the bond, provided that the bondsman shall be permitted to accept collateral security or other indemnity from the principal which shall be returned upon final termination of liability on the bond. Such collateral security or other indemnity required by the bondsman must be reasonable in relation to the amount of the bond.

Solicit business in any of the courts or on the premises of any of the courts of this State, in the office of any magistrate and in or about any place where prisoners are confined. Loitering in or about a magistrate's office or any place where prisoners are confined shall be prima facie evidence of soliciting.

Advise or assist the principal for the purpose of forfeiting bond. (1963, c. 1225, s. 20; 1975, c. 619, s. 1.)

§ 85C-21. Receipts for collateral.

When a bail bondsman accepts collateral he shall give a written receipt for same, and this receipt shall give in detail a full description of the collateral received. (1963, c. 1225, s. 21; 1975, c. 619, s. 1.)

§ 85C-22. Persons prohibited from becoming surety or runners.

No sheriff, deputy sheriff, other law-enforcement officer, judicial official, attorney, parole officer, probation officer, jailer, assistant jailer, employee of the General Court of Justice, [or] other public employee assigned to duties relating to the administration of criminal justice, may in any case become surety on a bail bond for any person. In addition, no person covered by this section may act as agent for any bonding company or professional bondsman. No such person may have an interest, directly or indirectly, in the financial

affairs of any firm or corporation whose principal business is acting as bondsmen. Provided, however, nothing herein shall prohibit any person above designated from being surety upon the bond of his or her spouse, parent, brother, sister, child or descendant. (1963, c. 1225, s. 22; 1973, c. 108, s. 39; 1975, c. 619, s. 1.)

§ 85C-23. Bonds not to be signed in blank; authority to countersign only given to licensed employee.

A bail bondsman shall not sign nor countersign in blank bail bonds, nor shall he give a power of attorney to, or otherwise authorize, anyone to countersign his name to bonds unless the person so authorized is a licensed bondsman or runner directly employed by the bondsman giving such power of attorney. Copies of all such powers of attorney and revocations of such powers of attorney must be filed immediately with the Commissioner and the clerk of superior court of any county in the State where said bondsman giving the power of attorney is currently writing or is obligated on bail bonds. (1963, c. 1225, s. 23; 1975, c. 619, s. 1.)

§ 85C-24. Insurers to annually report surety bondsmen; notices of appointments and terminations; information confidential.

Every insurer shall annually prior to July 1, furnish the Commissioner a list of all surety bondsmen appointed by it to write bail bonds on its behalf. Every such insurer who subsequently appoints a surety bondsman in the State shall give notice thereof to the Commissioner. All such appointments shall be subject to the issuance of the proper insurance agent's license to the appointee.

An insurer terminating the appointment of a surety bondsman shall file written notice thereof with the Commissioner, together with a statement that it has given or mailed notice to the surety bondsman and to the clerk of superior court of any county in the State wherein such insurer has been obligated on bail bonds through said agent within the past three years. Such notice filed with the Commissioner shall state the reasons, if any, for such termination. Information so furnished the Commissioner shall be privileged and shall not be used as evidence in or basis for any action against the insurer or any of its representatives. (1963, c. 1225, s. 24; 1975, c. 619, s. 1.)

§ 85C-25. Bail bondsman to give notice of discontinuance of business; cancellation of license.

Any bail bondsman who discontinues writing bail bonds during the period for which he is licensed shall notify the clerks of the superior court with whom he is registered and return his license to the Commissioner for cancellation within 30 days after such discontinuance. (1963, c. 1225, s. 25; 1975, c. 619, s. 1.)

§ 85C-26. Persons eligible as runners; bail bondsmen to annually report runners; notices of appointments and terminations; information confidential.

Every person duly licensed as a bail bondsman may appoint as runner any person who has been issued runner's license. Each bail bondsman must, on or

before July 1 of each year, furnish to the Commissioner a list of all runners appointed by him. Each such bail bondsman who shall, subsequent to the filing of this list, appoint additional persons as runners shall file written notice with the Commissioner of such appointment.

A bail bondsman terminating the appointment of a runner shall file written notice thereof with the Commissioner, together with a statement that he has given or mailed notice to the runner. Such notice filed with the Commissioner shall state the reasons, if any, for such termination. Information so furnished the Commissioner shall be privileged and shall not be used as evidence in any action against the bail bondsman. (1963, c. 1225, s. 26; 1975, c. 619, s. 1.)

§ 85C-27. Substituting bail by sureties for deposit.

If money or bonds have been deposited, bail by sureties may be substituted therefor at any time before a breach of the undertaking, and the official taking the new bail shall make an order that the money or bonds be refunded to the person depositing the same and they shall be refunded accordingly, and the original undertakings shall be canceled. (1963, c. 1225, s. 27; 1975, c. 619, s. 1.)

§ 85C-28. Deposit for defendant admitted to bail authorizes release and cancellation of undertaking.

When the defendant has been admitted to bail, he, or another in his behalf, may deposit with an official authorized to take bail, a sum of money, or nonregistered bonds of the United States, or of the State, or of any county, city or town within the State, equal in market value to the amount of such bail, together with his personal undertaking, and an undertaking of such other person, if the money or bonds are deposited by another. Upon delivery to the official in whose custody the defendant is of a certificate of such deposit, he shall be discharged from custody in the cause.

When bail other than a deposit of money or bonds has been given, the defendant or the surety may, at any time before a breach of the undertaking, deposit the sum mentioned in the undertaking, and upon such deposit being made, accompanied by a new undertaking, the original undertaking shall be canceled. (1963, c. 1225, s. 28; 1975, c. 619, s. 1.)

§ 85C-29. Registration of licenses and power of appointments by insurers.

No professional bail bondsman shall become a surety on an undertaking unless he has registered his current license in the office of the clerk of superior court in the county in which he resides and a certified copy of the same with the clerk of superior court in any other county in which he shall write bail bonds.

A surety bondsman shall also annually register a certified copy of his current power of appointment with the clerk of superior court wherein he resides and in any other county wherein he shall write bail bonds on behalf of an insurer. (1963, c. 1225, s. 31; 1975, c. 619, s. 1.)

§ 85C-30. Financial responsibility of professional bondsmen.

Each professional bondsman acting as surety on bail bonds in this State shall maintain a deposit of securities with and satisfactory to the Commissioner of a fair market value of at least one eighth the amount of all bonds or undertakings written in this State on which he is absolutely or conditionally liable as of the first day of the current month. The amount of this deposit must be reconciled with the bondsman's liabilities as of the first day of the month on or before the fifteenth day of said month and the value of said deposit shall in no event be less than five thousand dollars ($5,000). (1963, c. 1225, s. 29; 1975, c. 619, s. 1.)

§ 85C-31. Securities held in trust by Commissioner; authority to dispose of same.

The securities deposited by a professional bondsman with the Commissioner shall be held in trust for the sole protection and benefit of the holder of bail bonds executed by or on behalf of the undersigned bondsman in this State. A pro rata portion of the securities shall be returned to the bondsman when the Commissioner is satisfied that the deposit of securities is in excess of the amount required to be maintained with him by said bondsman and all the securities shall be returned if the Commissioner is satisfied that the bondsman has satisfied, or satisfactory arrangements have been made to satisfy, the obligations of the bondsman on all his bail bonds written in the State. The Commissioner may sell or transfer any and all of said securities or utilize the proceeds thereof for the purpose of satisfying the liabilities of the professional bondsman on bail bonds given in this State on which he is liable. (1975, c. 619, s. 1.)

§ 85C-32. Bondsman to furnish power of attorney with securities.

With the securities deposited with the Commissioner, the professional bondsman shall at the same time deliver to the Commissioner of Insurance a power of attorney, on a form supplied by the Commissioner, executed and acknowledged by the professional bondsman authorizing the sale or transfer of said securities or any part thereof. The power of attorney shall read as follows:

POWER OF ATTORNEY

AUTHORIZING THE COMMISSIONER OF INSURANCE TO SELL, OR TRANSFER SECURITIES DEPOSITED BY PROFESSIONAL BONDSMEN IN NORTH CAROLINA.

KNOW ALL MEN BY THESE PRESENTS, That . . . . . ., a professional bondsman, located in the County of . . . . . ., in the State of . . . . . ., has authorized and appointed for himself, his successors, heirs and assigns, the Commissioner of Insurance of the State of North Carolina, in the name and in behalf of said professional bondsman, his true and lawful attorney to sell or transfer any securities deposited or that may be deposited, by said professional bondsman with said Commissioner, under the laws and regulations requiring a deposit of securities to be made by professional bondsmen doing business in the State of North Carolina, insofar as the sale or transfer is deemed necessary by the Commissioner of Insurance to pay

any liability arising under a bond which purports to be given by the undersigned bondsman in any county in this State and execution has been issued against said bondsman pursuant to a judgment on the bond and the same has not been satisfied. The securities so deposited are to be held in trust by the Commissioner for the sole protection and benefit of the holder of bail bonds executed by, or on behalf of, the undersigned bondsman. IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this . . . . . day of . . . . . ., 19 . . . ..

. . . . . .

Professional Bondsman

Before me, a Notary Public in and for the State of . . . . . personally appeared . . . . . ., a professional bondsman who acknowledged that he executed the foregoing power of attorney.

WITNESS my hand and Notarial Seal, this . . . . . day of . . . . . ., 19 . . . ..

. . . . . .

Notary Public

My Commission Expires: . . . . . .

(1975, c. 619, s. 1.)

§ 85C-33. Security deposit to be maintained.

Any professional bondsman, whose security deposits with the Commissioner are, for any reason, reduced in value below the requirements of this Chapter, shall immediately upon receipt of a notice of deficiency from the Commissioner of Insurance deposit such additional securities as are necessary to comply with the law. No professional bondsman shall sign, endorse, execute or become surety on any additional bail bonds, or pledge or deposit any cash, check, or other security of any nature in lieu of a bail bond in any county in North Carolina until such time as he has made such additional deposit of securities as shall be required by the notice of deficiency. (1975, c. 619, s. 1.)

§ 85C-34. Monthly report required.

Each professional bail bondsman shall file with the Commissioner of Insurance a written report in form prescribed by the Commissioner regarding all bail bonds on which he is liable as of the first day of each month showing (i) each individual bonded, (ii) the date such bond was given, (iii) the principal sum of the bond, (iv) the State or local official to whom given, and (v) the fee charged for the bonding service in each instance. Such report shall be filed on or before the fifteenth day of each month. Within the same time, a copy of this written report must also be filed with the clerk of superior court in any county in which he is obligated on bail bonds. (1975, c. 619, s. 1.)

§ 85C-35. Examinations.

Whenever the Commissioner deems it prudent he shall visit and examine or cause to be visited and examined by some competent person appointed by him for that purpose any professional bail bondsman subject to the provisions of this Chapter. For this purpose the Commissioner or person making the examination shall have free access to all books and papers of the bondsman that relate to his business and to the books and papers kept by any of his agents or runners. (1975, c. 619, s. 1.)

§ 85C-36. Limit on principal amount of bond to be written by professional bondsman.

No professional bondsman shall act as surety on any bail bond whose principal sum is in excess of one fourth of the value of the securities deposited with the Commissioner at that time. (1975, c. 619, s. 1.)

§ 85C-37. Disposition of fees.

Fees collected by the Commissioner pursuant to this Chapter shall be paid into the general fund of the State. (1963, c. 1225, s. 32; 1975, c. 619, s. 1.)

§ 85C-38. Penalties for violations.

Any person, firm, association or corporation violating any of the provisions of this Chapter shall upon conviction for each offense be fined not more than five hundred dollars ($500.00) or imprisoned for not more than six months, or both. (1963, c. 1225, s. 33; 1975, c. 619, s. 1.)

§ 85C-39. Duplication of regulation forbidden.

No county, city or town in this State shall license or levy a license tax on bail bondsmen nor require such bondsmen to deposit collateral security as a condition for continuing to write bail bonds. (1975, c. 619, s. 1.)

§ 85C-40. Conflicting laws.

Section 41.1 of Chapter 105 of the General Statutes of North Carolina and all laws and clauses of laws in conflict with the provisions of the Chapter are hereby repealed. Provided, however, that in the event of any conflict between the provisions of this Chapter and those of Chapter 15A of the General Statutes of North Carolina, the provisions of Chapter 15A shall control and continue in full force and effect. (1975, c. 619, s. 2.)

Editor's Note. — Section 105-41.1 was repealed by Session Laws 1975, c. 619. For present provisions as to license fees for professional bondsmen and runners, see §§ 85C-12, 85C-16.

§ 85C-41. Application of Chapter.

This Chapter shall not apply to Robeson County or New Hanover County. (1975, c. 619, s. 3.)

Chapter 86.
Barbers.

§§ 86-1 to 86-25: Recodified as §§ 86A-1 to 86A-26.

Editor's Note. — This Chapter was rewritten by Session Laws 1979, c. 695, and has been recodified as Chapter 86A.

Chapter 86A.

Barbers.

Sec.
86A-1. Necessity for certificate of registration and shop or school permit.
86A-2. What constitutes practice of barbering.
86A-3. Qualifications for certificate as a registered barber.
86A-4. State Board of Barber Examiners; appointment and qualifications; term of office; removal.
86A-5. Powers and duties of the Board.
86A-6. Office; seal; officers and executive secretary; bond; funds.
86A-7. Salary and expenses; employees; audits; annual reports to the Governor.
86A-8. Application for examinations; payment of fee.
86A-9. Board to conduct examinations not less than four times each year.
86A-10. Issuance of certificates of registration.
86A-11. Temporary permits.
86A-12. Reciprocity.
86A-13. Barbershop and barber school permits.
86A-14. Persons exempt from the provisions of this Chapter.
86A-15. Sanitary rules and regulations; inspections.
86A-16. Certificates to be displayed.
86A-17. Renewal or restoration of certificate.
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86A-20. Misdemeanors.
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86A-23. Instructors.
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86A-25. Fees collectible by Board.
86A-26. Barbering among members of same family.

Repeal of Chapter. — This Chapter is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 86A-1. Necessity for certificate of registration and shop or school permit.

No person or combination of persons shall, either directly or indirectly, practice or attempt to practice barbering in the State of North Carolina without first obtaining a certificate of registration either as a registered apprentice or as a registered barber issued pursuant to provisions of this Chapter by the State Board of Barber Examiners. No person or combination of persons, or corporation, shall operate, manage or attempt to operate or manage a barber school, barbershop, or any other place where barber services are rendered, after July 1, 1945, without first obtaining a shop permit, or school permit, issued by the State Board of Barber Examiners, pursuant to the provisions of this Chapter. (1929, c. 119, s. 1; 1941, c. 375, s. 1; 1945, c. 830, s. 1; 1979, c. 695, s. 1.)

Editor's Note. — This Chapter is former Chapter 86, as rewritten by Session Laws 1979, c. 695, and recodified. Where appropriate, historical citations to sections in the former Chapter have been added to corresponding sections in the Chapter as rewritten.

Legal Periodicals. — For comment on the 1941 amendment, see 19 N.C.L. Rev. 447.

CASE NOTES

Editor's Note. — The cases cited under the various sections below were decided under this Chapter as it existed prior to its revision and recodification by Session Laws 1979, c. 695.

Constitutionality. — This Chapter, known as the "Barber's Act," relates to the public health and is constitutional as a valid exercise of the police power of the State. State v. Lockey, 198 N.C. 551, 152 S.E. 693 (1930).

Validity of Chapter Is No Longer Open to Attack. — The validity of this Chapter, providing for the licensing of barbers and the control and regulation of the trade, having been judicially determined, it may not be attacked in a subsequent suit. Motley v. State Bd. of Barber Exmrs., 228 N.C. 337, 45 S.E.2d 550, 175 A.L.R. 253 (1947).

Application. — The provisions of this Chapter apply to proprietor barbers, as in this case the owner and operator of a one-chair barbershop. State v. Lockey, 198 N.C. 551, 152 S.E. 693 (1930).

Cited in James v. Denny, 214 N.C. 470, 199 S.E. 617 (1938).

§ 86A-2. What constitutes practice of barbering.

Any one or combination of the following practices constitutes the practice of barbering in the purview of this Chapter:

(1) Shaving or trimming the beard, or cutting the hair;

(2) Dyeing the hair or applying hair tonics, permanent waving or marcelling the hair;

(3) Giving facial or scalp massages, or treatments with oils, creams, lotions or other preparations either by hand or mechanical appliances. (1929, c. 119, s. 2; 1941, c. 375, s. 2; 1979, c. 695, s. 1.)

§ 86A-3. Qualifications for certificate as a registered barber.

A certificate of registration as a registered barber shall be issued by the Board to any person who meets the following qualifications:

(1) Has attended an approved barber school for at least 1528 hours;

(2) Has completed a 12-month apprenticeship under the supervision of a licensed barber, as provided in G.S. 86A-24; and

(3) Has passed an examination conducted and approved by the Board to determine the fitness of the applicant to practice barbering, such examination to test the applicant on knowledge of barbering, sanitary rules and regulations, and knowledge of the diseases of the face, skin and scalp, the purpose being to avoid the aggravation and spread of disease in the practice of barbering. (1929, c. 119, ss. 3, 4, 11; 1941, c. 375, s. 3; 1961, c. 577, s. 1; 1979, c. 695, s. 1.)

§ 86A-4. State Board of Barber Examiners; appointment and qualifications; term of office; removal.

The State Board of Barber Examiners is established to consist of three experienced barbers appointed by the Governor for four-year staggered terms. The Governor may remove any member for good cause shown and appoint members to fill unexpired terms. (1929, c. 119, s. 6; 1979, c. 695, s. 1.)

Editor's Note. — Session Laws 1979, c. 695, s. 2, provides: "Schedule. — Persons serving on the State Board of Barber Examiners on the date of ratification of this act shall continue to serve until the expiration of their respective current terms. Upon the expiration of each term, and thereafter, successors shall be appointed for terms of four years."

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 86A-5. Powers and duties of the Board.

The Board has the following powers and duties:

(1) To see that inspections of barbershops and schools are conducted to determine compliance with sanitary regulations. The Board may appoint inspectors as necessary;

(2) To adopt sanitary regulations concerning barber schools and shops and procedural rules in accordance with the guidelines established in G.S. 86A-15;

(3) To review the barber licensing laws of other states and to determine which are "substantially similar" to the laws of North Carolina for reciprocity purposes;

(4) To conduct examinations of applicants for certificate of registration as registered barber, registered apprentice and barber school instructor;

(5) Each Board member shall submit periodic reports to the Board concerning his activities in carrying out duties as a Board member. (1929, c. 119, ss. 10, 12, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 5, 7; 1945, c. 830, s. 8; 1947, c. 1024; 1961, c. 577, ss. 2, 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1.)

§ 86A-6. Office; seal; officers and executive secretary; bond; funds.

The Board shall maintain a suitable office in Raleigh, and shall adopt and use a common seal for the authentication of its orders and records. The Board shall elect its own officers, and in addition, may elect or appoint a full-time executive secretary who shall not be a member of the Board, and whose salary shall be fixed by the Governor with the approval of the Advisory Budget Commission. The executive secretary, before entering upon the duties of the office, shall execute to the State of North Carolina a satisfactory bond with a duly licensed bonding company in this State as surety, or other acceptable surety, such bond to be in the penal sum of not less than ten thousand dollars ($10,000) and conditioned upon the faithful performance of the duties of the office and the true and correct accounting of all funds received by him. The executive secretary shall turn over to the State Treasurer to be credited to the State Board of Barber Examiners all funds collected or received by him under this Chapter, the funds to be held and expended under the supervision of the Director of the Budget, exclusively for the enforcement and administration of the provisions of this Chapter. Nothing herein shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from fees collected under the provisions of this Chapter and received by the State Treasurer pursuant to the provisions of this section. (1929, c. 119, ss. 7, 14; 1937, c. 138, s. 4; 1941, c. 375, s. 4; 1943, c. 53, s. 1; 1945, c. 830, ss. 2, 4; 1951, c. 821, s. 1; 1957, c. 813, ss. 1, 3; 1965, c. 513; 1971, c. 826, ss. 1, 2; 1973, c. 1398; 1979, c. 695, s. 1.)

§ 86A-7. Salary and expenses; employees; audits; annual reports to the Governor.

(a) Each member of the Board of Barber Examiners shall be reimbursed for his actual expenses and shall receive compensation and travel allowance according to G.S. 93B-5 for the distance traveled in performance of his duties. The expenses, compensation and all other salaries and expenses in connection with the administration of this Chapter, shall be paid upon warrant drawn on the State Treasurer, solely from the funds derived from fees collected and received under this Chapter.

(b) The Board shall employ such agents, assistants and attorneys as it deems necessary.

(c) Each member of the Board of Barber Examiners, and each of its agents and assistants who collect any moneys or fees in the discharge of their duties, shall execute to the State of North Carolina a bond in the sum of one thousand dollars ($1,000) conditioned upon the faithful performance of the duties of office, and the true accounting for all funds collected.

(d) A complete audit and examination of the receipts and disbursements of the State Board of Barber Examiners shall be made annually by the State Auditor.

(e) The Board shall report annually to the Governor, a full statement of its receipts and expenditures, and also a full statement of its work during the year, together with such recommendations as it may deem expedient. (1929, c. 119, s. 8; 1943, c. 53, s. 2; 1945, c. 830, s. 3; 1957, c. 813, s. 2; 1979, c. 695, s. 1.)

§ 86A-8. Application for examinations; payment of fee.

Each applicant for an examination shall:

(1) Make application to the Board on forms prepared and furnished by the Board, and the application shall contain proof under applicant's oath of the particular qualifications of the applicant. All applications for examination must be filed with the Board at least 30 days prior to the actual taking of such examination by applicants;

(2) Pay to the Board the required fee. (1929, c. 119, s. 9; 1979, c. 695, s. 1.)

§ 86A-9. Board to conduct examinations not less than four times each year.

The Board shall conduct examinations of applicants for certificates of registration to practice as registered barbers and registered apprentices, not less than four times each year, at such times and places as will prove most convenient and as the Board may determine. (1929, c. 119, s. 10; 1979, c. 695, s. 1.)

§ 86A-10. Issuance of certificates of registration.

Whenever the provisions of this Chapter have been complied with, the Board shall issue, or have issued, a certificate of registration as a registered barber or as a registered apprentice, as the case may be. (1929, c. 119, s. 11; 1979, c. 695, s. 1.)

§ 86A-11. Temporary permits.

(a) The Board may grant a temporary permit to work to a graduate of a barber school in North Carolina provided application for examination has been filed and fee paid. The permit is valid only until the date of the next succeeding Board examination of applicants for barber license except in cases of undue hardship as the Board may determine, unless it is revoked or suspended earlier by the Board. The permittee may operate only under the supervision of a licensed barber.

(b) The Board may grant a temporary permit to work to one whose license has been expired for more than five years in North Carolina provided application for examination to restore has been filed and fee paid. The permit is valid only until the date of the next succeeding Board examination of applicants for barber licenses except in cases of undue hardship as the Board may determine, unless it is revoked or suspended earlier by the Board.

(c) The Board may grant a temporary permit to persons licensed in another state who come to North Carolina for the purpose of teaching or demonstrating barber skills. The Board shall also inspect and approve the area where the demonstration is to be given if it is not an already approved shop or school. This permit shall be limited to the specific days of demonstration and shall be of no validity before or after.

(d) The Board may grant a temporary permit to work to persons licensed in another state and seeking permanent licensure in North Carolina provided application for examination has been filed and fee paid. The permit is valid until the next succeeding board examination of applicants for reciprocity licenses, except in cases of undue hardship as the Board may determine, unless it is revoked or suspended earlier by the Board. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024; 1961, c. 577, s. 2; 1979, c. 695, s. 1.)

§ 86A-12. Reciprocity.

(a) The Board may issue a barber's license to one who is licensed by another state and has practiced barbering for three years next preceding his or her application and who has paid the required fee and demonstrated a knowledge of barbering skills, and the sanitary regulations in North Carolina by practical, written or oral examination as determined by the Board, at a time to be set by the Board.

(b) The Board may issue a barber's license to one who has graduated from an approved barber school in another state or who has been licensed in another state and has practiced for less than three years if the Board determines that the requirements of that state are substantially similar to those in North Carolina, the applicant's license is in good standing and the applicant demonstrates a knowledge of barbering skills and of the sanitary regulations of North Carolina, by practical, written or oral examination as determined by the Board, at a time to be set by the Board. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024; 1961, c. 577, s. 2; 1979, c. 695, s. 1.)

§ 86A-13. Barbershop and barber school permits.

Any person, firm or corporation, before establishing or opening a barbershop or barber school not heretofore licensed by the State or the Board shall make application to the Board on forms to be furnished by the Board, for a permit to operate a barbershop or barber school, and the shop or school of the applicant shall be inspected and approved by the State Board of Barber Examiners or an agent designated for that purpose by the Board, before the barbershop or barber school may open for business. It is unlawful to open a new or reopened barbershop or barber school until that shop or school has been inspected and determined by the Board to be in compliance with the requirements of G.S. 86A-15 in the case of shops and G.S. 86A-15 and 86A-22 in the case of schools. Upon compliance by the applicant with all requirements set forth in G.S. 86A-15, and the payment of the prescribed fee the Board shall issue to the applicant the permit applied for. (1929, c. 119, ss. 1, 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, ss. 1, 7; 1945, c. 830, ss. 1, 8; 1961, c. 577, ss. 3, 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1.)

§ 86A-14. Persons exempt from the provisions of this Chapter.

The following persons are exempt from the provisions of this Chapter while engaged in the proper discharge of their duties:

(1) Persons authorized under the laws of the State to practice medicine and surgery, and those working under their supervision;
(2) Commissioned medical or surgical officers of the U.S. Army or other components of the U.S. armed forces, and those working under their supervision;
(3) Registered nurses and licensed practical nurses and those working under their supervision;
(4) Licensed embalmers and funeral directors and those working under their supervision;
(5) Persons licensed by the State Board of Cosmetic Art Examiners. (1929, c. 119, s. 15; 1937, c. 138, s. 2; 1941, c. 375, s. 6; 1979, c. 695, s. 1.)

§ 86A-15. Sanitary rules and regulations; inspections.

(a) Each barber and each owner or manager of a barbershop, barber school or college, or any other place where barber service is rendered, shall comply with the following sanitary rules and regulations:

(1) Proper quarters. —
  a. Every barbershop, or other place where barber service is rendered, shall be located in buildings or rooms of such construction that they may be easily cleaned, well lighted, well ventilated and kept in an orderly and sanitary condition.
  b. Each area where barber service is rendered shall be separated by a substantial partition or wall from areas used for other purposes.
  c. Walls, floor and fixtures where barber service is rendered are to be kept sanitary.
  d. Running water, hot and cold, shall be provided, and lavatories shall be located at a convenient place in each barbershop so that each barber may wash his hands after each haircut. Tanks and lavatories shall be of such construction that they may be easily cleaned. The lavatory must have a drain pipe to drain all waste water out of the building.

(2) Equipment and instruments. —
  a. Each person serving as a barber shall, immediately before using razors, tweezers, combs, contact cup or pad, sterilize the instruments by immersing them in a solution of fifty percent (50%) alcohol, five percent (5%) carbolic acid, twenty percent (20%) formaldehyde, or ten percent (10%) lysol or other product or solution that the Board may approve. Every owner or manager of a barbershop shall supply a separate container for the use of each barber, adequate to provide for a sufficient supply of the above solutions.
  b. Each barber shall maintain combs and hair brushes in a clean and sanitary condition at all times and shall thoroughly clean mug and lather brush before each separate use.
  c. The headrest of every barber chair shall be protected with clean paper or clean laundered towel.
  d. Every person serving as a barber shall use a clean towel for each patron. All clean towels shall be placed in closed cabinets until used. Receptacles composed of material that can be washed and cleansed shall be provided to receive used towels, and all used towels must be placed in receptacles until laundered. Towels shall not be placed in a sterilizer or tank or rinsed in the barbershop. All wet and used towels shall be removed from the workstand or lavatory after serving each patron.
  e. Whenever a hair cloth is used in cutting the hair, shampooing, etc., a newly laundered towel or paper neckstrap shall be placed

around the patron's neck so as to prevent the hair cloth from touching the skin. Hair cloths shall be replaced when soiled.

(3) Barbers. —

a. Every person serving as a barber shall thoroughly cleanse his hands immediately before serving each patron.

b. Each person working as a barber shall be clean both as to person and dress.

c. No barber shall serve any person who has an infectious or communicable disease, and no barber shall undertake to treat any patron's infectious or contagious disease. Each barber practicing the profession in North Carolina shall furnish the Board of Barber Examiners a satisfactory health certificate at such time as the Board may deem necessary.

(4) Any person, other than a registered barber, shall before undertaking to give shampoos in a barbershop furnish the Board with a health certificate on a form provided by the Board.

(5) The owner or manager of a barbershop or any other place where barber service is rendered shall post a copy of these rules and regulations in a conspicuous place in the shop or other place where the services are rendered.

(b) All barbershops, barber schools and colleges, and any other place where barber service is rendered, shall be open for inspection at all times during business hours to any members of the Board of Barber Examiners or its agents or assistants. A copy of the sanitary rules and regulations set out in this section shall be furnished by the Board to the owner or manager of each barbershop or barber school, or any other place where barber service is rendered in the State, and that copy shall be posted in a conspicuous place in each barbershop or barber school. The Board shall have the right to make additional rules and regulations governing barbers and barbershops and barber schools for the proper administration and enforcement of this section, but no such additional rules or regulations shall be in effect until those rules and regulations have been furnished to each barbershop within the State. (1929, c. 119, s. 16; 1931, c. 32; 1933, c. 95, s. 2; 1941, c. 375, s. 7; 1961, c. 577, s. 3; 1979, c. 695, s. 1.)

§ 86A-16. Certificates to be displayed.

Every holder of a certificate of registration as a registered barber, registered apprentice, shop permit, school permit or instructor's certificate shall display it in a conspicuous place adjacent to or near his work chair. (1929, c. 119, s. 17; 1979, c. 695, s. 1.)

§ 86A-17. Renewal or restoration of certificate.

(a) Every registered barber who continues in practice shall annually, on or before May 31 of each year, renew his certificate of registration and furnish such health certificate as the Board may require and pay the required fee. Every certificate of registration shall expire on the 31st day of May in each year.

(b) A registered barber whose certificate of registration has expired may have his certificate restored immediately upon paying the required registration fee and furnishing a health certificate if required by the Board; provided, however, a registered barber whose certificate has expired for a period of five years shall be required to take the examination prescribed by the State Board of Barber Examiners and otherwise comply with the provisions of this Chapter before engaging in the practice of barbering.

(c) All persons serving in the United States armed forces and any person whose certificate of registration as a registered barber was in force one year

prior to entering service may, without taking the required examination, renew his certificate within 90 days after receiving an honorable discharge, by paying the current annual license fee and furnishing the State Board of Barber Examiners with a satisfactory health certificate if required by the Board. (1929, c. 119, s. 18; 1937, c. 138, s. 5; 1945, c. 830, s. 5; 1973, c. 605; 1979, c. 695, s. 1.)

Editor's Note. — Session Laws 1979, c. 695, s. 3, provides: "The renewal deadline for licenses, specified in G.S. 86-17 [G.S. 86A-17], shall become effective January 1, 1980; for renewals in 1979 the deadline shall remain at June 30, 1979. All other provisions of this act are effective upon ratification."

§ 86A-18. Disqualifications for certificate.

The Board may either refuse to issue or to renew, or may suspend or revoke any certificate of registration or barbershop permit or barber school permit for any one or combination of the following causes:

(1) Conviction of the certificate holder of a felony, proved by certified copy of the record of the court conviction;
(2) Gross malpractice or gross incompetence;
(3) Continued practice by a person knowingly having an infectious or contagious disease after being warned in writing by the Board to cease practice;
(4) Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit forming drugs;
(5) The commission of any of the offenses described in subdivisions (3), (5), and (7) of G.S. 86A-20;
(6) The violation of any one or more of the sanitary rules and regulations established by statute or rule or regulation of the Board, provided that the Board has previously given two written warnings to the individual committing the violation;
(7) The violation of the rules and regulations pertaining to barber schools, provided that the Board has previously given two written warnings to the school. (1929, c. 119, s. 19; 1941, c. 375, s. 8; 1945, c. 830, s. 6; 1961, c. 477, s. 4; 1979, c. 695, s. 1.)

Editor's Note. — Subdivision (7) of § 86A-20, referred to in subdivision (5) of this section, does not exist.

§ 86A-19. Refusal, revocation or suspension of certificates or permits.

The Board may neither refuse to issue nor refuse to renew, or suspend or revoke any certificate of registration, barbershop permit, or barber school permit, for any of these causes except in accordance with the provisions of Chapter 150A of the General Statutes. (1929, c. 119, s. 20; 1939, c. 218, s. 1; 1945, c. 830, s. 7; 1953, c. 1041, s. 2; 1973, c. 1331, s. 3; 1979, c. 695, s. 1.)

§ 86A-20. Misdemeanors.

Each of the following acts constitutes a misdemeanor, punishable upon conviction by a fine of not less than ten dollars ($10.00), nor more than fifty dollars ($50.00), imprisonment for 30 days in jail, or both fine and imprisonment:

(1) Violation of any of the provisions of G.S. 86A-1;
(2) Obtaining or attempting to obtain a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations;

(3) Practicing or attempting to practice by fraudulent misrepresentations;
(4) Willful failure to display a certificate of registration as required by G.S. 86A-16;
(5) Practicing or attempting to practice barbering during the period of suspension or revocation of any certificate of registration granted under this Chapter. Each day's operation during a period of suspension or revocation shall be deemed a separate offense;
(6) Permitting any person in one's employ, supervision or control to practice as a barber unless that person holds a certificate as a registered barber or registered apprentice. (1929, c. 119, s. 21; 1933, c. 95, s. 1; 1937, c. 138, s. 6; 1941, c. 375, ss. 9, 10; 1951, c. 821, s. 2; 1971, c. 819; 1979, c. 695, s. 1.)

§ 86A-21. Board to keep record of proceedings; data on registrants.

The Board shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension, and revocation of certificates of registration. This record shall contain the name, place of business and residence of each registered barber and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection at all reasonable times. (1929, c. 119, s. 22; 1979, c. 695, s. 1.)

§ 86A-22. Licensing and regulating barber schools and colleges.

The North Carolina State Board of Barber Examiners may approve barber schools or colleges in the State, and may prescribe rules and regulations for their operation. No barber school or college shall be approved by the Board unless the school or college meets all of the following requirements:
(1) Each school shall provide a course of instruction of at least 1528 hours.
(2) Each school shall have at least two instructors to properly instruct the number of students. Each instructor must hold a valid instructor's certificate issued by the Board.
(3) An application for a student's permit and a doctor's certificate, on forms prescribed by the Board, must be filed with the Board before the student enters school. No student may enroll without having obtained a student's permit.
(4) Each student enrolled shall be given a complete course of instruction on the following subjects: hair cutting; shaving; shampooing, and the application of creams and lotions; care and preparation of tools and implements; scientific massaging and manipulating the muscles of the scalp, face, and neck; sanitation and hygiene; shedding and regrowth of hair; elementary chemistry relating to sterilization and antiseptics; instruction on common skin and scalp diseases to the extent that they may be recognized; pharmacology as it relates to preparations commonly used in barbershops; instruction in the use of electrical appliances and the effects of the use of these on the human skin; structure of the skin and hair; nerve points of the face; the application of hair dyes and bleaches; permanent waving; marcelling or hair pressing; frosting and streaking; and the statutes and regulations relating to the practice of barbering in North Carolina.
(5) Each school shall file an up-to-date list of its students with the Board at least once a month. If a student withdraws or transfers, the school shall file a report with the Board stating the courses and hours completed by the withdrawing or transferring student. The school shall

also file with the Board a list of students who have completed the amount of work necessary to meet the licensing requirements.

(6) Each school shall comply with the sanitary requirements of G.S. 86A-15. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1.)

§ 86A-23. Instructors.

(a) The Board shall issue an instructor's certificate to any currently registered barber who has passed an instructor's examination given by the Board. This examination shall cover the subjects listed in G.S. 86A-22(3) [86A-22(4)] and any other subjects which the Board deems necessary for the teaching of sanitary barbering.

(b) A person desiring to take an instructor's examination must make application to the Board for examination on forms to be furnished by the Board and pay the instructor's examination fee. Each person who passes the instructor's examination shall be issued a certificate of registration as a registered instructor by paying the issuance fee and the instructor's certificate shall be renewable as of the 31st day of May of each year. Any person whose instructor's certificate has expired for a period of three years or more shall be required to take and pass the instructor's examination before the certificate can be renewed. (1945, c. 830, s. 8; 1961, c. 577, s. 5; 1973, c. 1331, s. 3; 1979, c. 695, s. 1.)

§ 86A-24. Apprenticeship.

(a) An apprentice license may be renewed annually on the payment of the prescribed fee. The certificate of registration of an apprentice is valid only so long as the apprentice works under the supervision of a registered barber. No registered apprentice shall operate a barbershop.

(b) It is the responsibility of a supervising licensed registered barber to properly supervise his apprentices.

(c) On the completion of at least one year's apprenticeship, evidenced by the affidavit of the supervising registered licensed barber or barbers, the apprentice shall be allowed to take the examination prescribed by the Board. On the passage of that examination, he shall be issued a license as a registered barber, pursuant to G.S. 89-10 [86A-10]. No registered apprentice may practice for a period of more than three years without passing the required examination to receive a certificate as a registered barber. (1929, c. 119, ss. 4, 5; 1941, c. 375, s. 3; 1975, c. 68, ss. 1, 2; 1979, c. 695, s. 1.)

§ 86A-25. Fees collectible by Board.

The State Board of Barber Examiners shall charge and collect the following fees:

Certificate of registration or renewal as a barber	$15.00
Certificate of registration or renewal as an apprentice barber	15.00
Barbershop permit or renewal	18.00
Examination to become a registered barber	35.00
Examination to become a registered apprentice barber	35.00
Restoration of an expired certificate of a registered apprentice, registered barber or barbershop permit	20.00 plus lapsed fees up to 5 years
Examination to become a barber school instructor	75.00
Student permit	8.00
Issuance of any duplicate copy of a license, certificate or permit	5.00
Barber school permit	50.00

Barber school instructor certificate or renewal 25.00
Inspection of newly established barbershop 50.00
Inspection of newly established barber school 100.00
(1929, c. 119, s. 14; 1937, c. 138, s. 4; 1945, c. 830, ss. 4, 8; 1951, c. 821, s. 1; 1957, c. 813, s. 3; 1961, c. 577, s. 5; 1965, c. 513; 1971, c. 826, ss. 1, 2; 1973, c. 1331, s. 3; c. 1398; 1979, c. 695, s. 1.)

CASE NOTES

Purpose of Fees — Constitutionality. — The fees prescribed are for the expenses of enforcing the Chapter, which is necessary to the public health and welfare. They are not imposed for revenue, and the payment of the barber's license tax under the Revenue Act does not affect the obligation to pay the fees prescribed by this Chapter, and assessment of the fees thereunder is constitutional. State v. Lockey, 198 N.C. 551, 152 S.E. 693 (1930).

§ 86A-26. Barbering among members of same family.

This Chapter shall not prohibit a member of a family from practicing barbering on a member of his or her family. (1941, c. 375, s. 12; 1979, c. 695, s. 1.)

Chapter 87.

Contractors.

Article 1.

General Contractors.

Sec.

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Article 1.

General Contractors.

§ 87-1. "General contractor" defined; exemptions.

For the purpose of this Article, a "general contractor" is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more and anyone who shall bid upon or engage in constructing any undertakings or improvements above mentioned in the State of North Carolina costing thirty thousand dollars ($30,000) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina.

This section shall not apply to persons or firms or corporations furnishing or erecting industrial equipment, power plant equipment, radial brick chimneys, and monuments. (1925, c. 318, s. 1; 1931, c. 62, s. 1; 1937, c. 429, s. 1; 1949, c. 936; 1953, c. 810; 1971, c. 246, s. 1; 1975, c. 279, s. 1.)

CASE NOTES

The purpose of this Article is to protect the public from incompetent builders. Bryan Bldrs. Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968); Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969); Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970); Holland v. Walden, 11 N.C. App. 281, 181 S.E.2d 197, cert. denied, 279 N.C. 349, 182 S.E.2d 581 (1971).

The importance of deterring unlicensed persons from engaging in the construction business outweighs any harshness between the parties and precludes consideration for unjust enrichment. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

The applicability of this Article is determined by the cost of the undertaking and not by the amount of any separate progress payment required by the contract. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

A contractor is a general contractor if the cost of the undertaking exceeds the statutory limit. The cost of the undertaking is determinative. Fulton v. Rice, 12 N.C. App. 669, 184 S.E.2d 421 (1971).

Where one contracts with a landowner to undertake the construction of a house for the landowner at an agreed price of $30,000 or more, he is a "general contractor" and subject to the provisions of the licensing statute. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

Cost of Undertaking Is Contract Price. — In determining whether a contractor who undertakes to build a house is a "general contractor" the term "cost of undertaking" is construed as the contractor's contract price, not the total cost of the building. Fulton v. Rice, 12 N.C. App. 669, 184 S.E.2d 421 (1971).

It is the cost of the undertaking by the purported contractor that controls. The contract price, or cost of the contractor's undertaking is not always the same as the total cost of the building. The owner's total cost of the building is not determinative of the contractor's status. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

Customer May Not Waive Requirements of Statute. — The general contractors licensing statute does not authorize a person with whom an unlicensed contractor deals to waive the requirements of the statute, nor does it grant the unlicensed contractor immunity merely because he advises the customer that he is acting in violation of the statute. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

"Improvement". — The term "improvement" as used in this section connotes the performance of construction work and presupposes the prior existence of some structure to be improved. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

As used with reference to land, the word "improvement" in this section presupposes the prior existence of the land itself. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

"Building" and "Structure". — The words "building" and "structure" in this section are synonymous. They agree in meaning but differ slightly in application. "Structure" retains more frequently than the other the sense of something constructed, often in a particular way. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

The words "building" and "structure" are strictly construed in context with the remainder of this section, and they do not embrace parts or segments of a building or structure. They exclude any meaning the legislature could have conveyed simply by adding the words "or any part thereof" following the word "structure." Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

A building is defined as "an edifice . . . a structure"; and a structure is defined as "that which is built or constructed; an edifice or building of any kind." Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

Advising Customer of Violation Does Not Immunize Contractor. — The general contractors licensing statute does not grant the unlicensed contractor immunity merely because he advises the customer that he is acting in violation of the statute. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

Unlicensed Person May Not Recover for Owner's Breach of Contract. — When, in disregard of this Article, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in this section, he may not recover for the owner's breach of that contract. Bryan Bldrs. Supply v. Midyette, 274 N.C. 264, 162 S.E.2d 507 (1968); Vogel v. Reed Supply Co., 277 N.C, 119, 177 S.E.2d 273 (1970).

When, in disregard of this protective statute, an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in the statute, he may not recover for the owner's breach of that contract. This is true even though the statute does not expressly forbid such suits. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

When an unlicensed person contracts with an owner to erect a building costing more than the minimum sum specified in this section, he may not recover for the owner's breach of the contract, nor may he recover the value of the work and services furnished under the contract on the theory of quantum meruit or unjust enrichment. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

A general contractor within the meaning of this section who has no license or who constructs a project the value of which exceeds the amount of his license may not recover for the owner's breach of the contract, or for the value of the work and services furnished or materials supplied under the contract on the theory of unjust enrichment. Helms v. Dawkins, 32 N.C. App. 453, 232 S.E.2d 710 (1977).

To deny any unlicensed person the right to recover damages for breach of the contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose of protecting the public from incompetent contractors. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

By contracting with defendants and undertaking to construct a house for them at the agreed price of $67,500, plaintiff became a "general contractor" and engaged in the business of general contracting in this State within the definition contained in this section, thereby

becoming subject to the licensing provisions of § 87-10 and unless substantially complying with those provisions, may not recover against defendants either on contract or upon quantum meruit. Holland v. Walden, 11 N.C. App. 281, 181 S.E.2d 197, cert. denied, 279 N.C. 349, 182 S.E.2d 581 (1971).

But May Assert Claim against Owner for Breach of Contract Defensively. — The general contractor may assert any claim he has against the owner for breach of the contract defensively as a setoff to any claim asserted against him by the owner for any breach of the contract by the owner. Helms v. Dawkins, 32 N.C. App. 453, 232 S.E.2d 710 (1977).

Subcontractors Not Required to Be Licensed. — The legislature, by the use of the words "building," "improvement," and "structure," in this section, did not intend to require subcontractors who undertake to furnish labor and materials in excess of $20,000 (now $30,000) to construct integral parts of a large building complex to be licensed as general contractors. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

It would serve no public policy intended by this Chapter to hold a subcontractor to be a general contractor within the purview of this section. If the legislature had intended to include subcontractors in the class required to be licensed, it would have specifically so provided. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

Licensing statutes have no application to rights and liabilities of contractors and subcontractors inter se where the public interest is not involved. Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

OPINIONS OF ATTORNEY GENERAL

General Contractor's License Required to Install Roofing in Certain Circumstances. — See opinion of Attorney General to Mr. James M. Wells, Jr., State Licensing Board for Contractors, 41 N.C.A.G. 414 (1971).

Cited in Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119 (1978).

§ 87-2. Licensing Board; organization.

There is created the State Licensing Board for General Contractors consisting of seven members which include five general contractors and two public members appointed by the Governor for staggered five-year terms. One member shall have as the larger part of his business the construction of highways; one member shall have as the larger part of his business the construction of public utilities; one member shall have as the larger part of his business the construction of buildings; one member shall be either a highway, utility, or building contractor; one member shall have as a larger part of his business the construction of residences; and two members shall be public members who have no ties with the construction industry and who shall represent the interests of the public at large. Members shall serve until the expiration of their respective terms and until their successors are appointed and qualified. Vacancies occurring during a term shall be filled by appointment of the Governor for the remainder of the unexpired term. The Governor may remove any member of the Board for misconduct, incompetency, or neglect of duty. No Board member shall serve more than two complete consecutive terms. (1925, c. 318, s. 2; 1979, c. 713, s. 1.)

Effect of Amendments. — The 1979 amendment rewrote this section.

Session Laws 1979, c. 713, s. 5, provides: "Schedule. — Members of the Board who are serving on the date of ratification of this act [May 30, 1979] shall continue to serve for the remainder of the terms for which they were appointed. Upon ratification of this act, the Governor shall appoint one public member for an initial term expiring December 31, 1981, and one public member for an initial term expiring December 31, 1983. As the terms of current members and the two new members expire, their successors shall be appointed for terms of five years."

§ 87-3. Members of Board to take oath.

Each member of the Board shall, before entering upon the discharge of the duties of his office, take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said Board and to uphold the Constitution of North Carolina and the Constitution of the United States. (1925, c. 318, s. 3.)

§ 87-4. First meeting of Board; officers; secretary-treasurer and assistants.

The said Board shall, within 30 days after its appointment by the Governor, meet in the City of Raleigh, at a time and place to be designated by the Governor, and organize by electing a chairman, a vice-chairman, and a secretary-treasurer, each to serve for one year. Said Board shall have power to make such bylaws, rules and regulations as it shall deem best, provided the same are not in conflict with the laws of North Carolina. The secretary-treasurer shall give bond in such sum as the Board shall determine, with such security as shall be approved by the Board, said bond to be conditioned for the faithful performance of the duties of his office and for the faithful accounting of all moneys and other property as shall come into his hands. The secretary-treasurer need not be a member of the Board, and the Board is hereby authorized to employ a full-time secretary-treasurer, and such other assistants and make such other expenditures as may be necessary to the proper carrying out of the provisions of this Article. Payment of compensation and reimbursement of expenses of board members shall be governed by G.S. 93B-5. (1925, c. 318, s. 4; 1941, c. 257, s. 4; 1947, c. 611; 1951, c. 453; 1979, c. 713, s. 6.)

Effect of Amendments. — The 1979 amendment added the last sentence.

§ 87-5. Seal of Board.

The Board shall adopt a seal for its own use. The seal shall have the words "North Carolina Licensing Board for General Contractors" and the secretary shall have charge, care and custody thereof. (1925, c. 318, s. 5; 1979, c. 713, s. 7.)

Effect of Amendments. — The 1979 amendment substituted "North Carolina Licensing Board for General Contractors" for "Licensing Board for Contractors, State of North Carolina" in the second sentence.

§ 87-6. Meetings; notice; quorum.

The Board shall meet twice each year, once in April and once in October, for the purpose of transacting such business as may properly come before it. At the April meeting in each year the Board shall elect officers. Special meetings may be held at such times as the Board may provide in the bylaws it shall adopt. Due notice of each meeting and the time and place thereof shall be given to each member in such manner as the bylaws may provide. Five members of the Board shall constitute a quorum. (1925, c. 318, s. 6; 1979, c. 713, s. 8.)

Effect of Amendments. — The 1979 amendment substituted "Five" for "Three" at the beginning of the last sentence.

§ 87-7. Records of Board; disposition of funds.

The secretary-treasurer shall keep a record of the proceedings of the said Board and shall receive and account for all moneys derived from the operation of this Article. Any funds remaining in the hands of the secretary-treasurer to the credit of the Board after the expenses of the Board for the current year have been paid shall be paid over to the Greater University of North Carolina for the use of the School of Engineering through the North Carolina Engineering Foundation. The Board has the right, however, to retain at least ten percent (10%) of the total expense it incurs for a year's operation to meet any emergency that may arise. As an expense of the Board, said Board is authorized to expend such funds as it deems necessary to provide retirement and disability compensation for its employees. (1925, c. 318, s. 7; 1953, c. 805, s. 1; 1959, c. 1184.)

§ 87-8. Records; roster of licensed contractors.

The secretary-treasurer shall keep a record of the proceedings of the Board and a register of all applicants for license showing for each the date of application, name, qualifications, place of business, place of residence, and whether license was granted or refused. The books and register of this Board shall be prima facie evidence of all matters recorded therein. A roster showing the names and places of business and of residence of all licensed general contractors shall be prepared by the secretary of the Board during the month of January of each year; such roster shall be printed by the Board out of funds of said Board as provided in G.S. 87-7. On or before the first day of March of each year the Board shall submit to the Governor a report of its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of the receipts and expenditures of the Board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of licensed general contractors. (1925, c. 318, s. 8; 1937, c. 429, s. 2.)

CASE NOTES

One of the obvious purposes of requiring annual renewal of licenses is to enable the Licensing Board to maintain and publish the roster of currently licensed contractors as required by this section. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

§ 87-9. Compliance with Federal Highway Act, etc.; contracts financed by federal road funds.

Nothing in this Article shall operate to prevent the Department of Transportation from complying with any act of Congress and any rules and regulations promulgated pursuant thereto for carrying out the provisions of the Federal Highway Act, or shall apply to any person, firm or corporation proposing to submit a bid or enter into contract for any work to be financed in whole or in part with federal aid road funds in such manner as will conflict with any act of Congress or any such rules and regulations promulgated pursuant thereto. (1939, c. 230; 1971, c. 246, s. 2; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

§ 87-10. Application for license; examination; certificate; renewal.

Anyone hereafter desiring to be licensed as a general contractor in this State shall make and file with the Board, 30 days prior to any regular or special meeting thereof, a written application on such form as may then be by the Board prescribed for examination by the Board, which application shall be accompanied by the sum of eighty dollars ($80.00) if the application is for an unlimited license, or sixty dollars ($60.00) if the application is for an intermediate license, or forty dollars ($40.00) if the application is for a limited license; the holder of an unlimited license shall be entitled to engage in the business of general contracting in North Carolina unlimited as to the value of any single project, the holder of an intermediate license shall be entitled to engage in the practice of general contracting in North Carolina but shall not be entitled to engage therein with respect to any single project of a value in excess of four hundred twenty-five thousand dollars ($425,000), the holder of a limited license shall be entitled to engage in the practice of general contracting in North Carolina but the holder shall not be entitled to engage therein with respect to any single project of a value in excess of one hundred twenty-five thousand dollars ($125,000) and the license certificate shall be classified as hereinafter set forth. Before being entitled to an examination an applicant must show to the satisfaction of the Board from the application and proofs furnished that the applicant is possessed of a good character and is otherwise qualified as to competency, ability and integrity, and that the applicant has not committed or done any act, which, if committed or done by any licensed contractor would be grounds under the provisions hereinafter set forth for the suspension or revocation of contractor's license, or that the applicant has not committed or done any act involving dishonesty, fraud, or deceit, or that the applicant has never been refused a license as a general contractor nor had such license revoked, either in this State or in another state, for reasons that should preclude the granting of the license applied for, and that the applicant has never been convicted of a felony: Provided, no applicant shall be refused the right to an examination, except in accordance with the provisions of Chapter 150A of the General Statutes.

The Board shall conduct an examination, either oral or written, of all applicants for license to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of contracting, under the classification contained in the application, and to ascertain the qualifications of the applicant in reading plans and specifications, knowledge of estimating costs, construction, ethics and other similar matters pertaining to the contracting business and knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction and liens. If the results of the examination of the applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, as provided in said certificate, which may be limited into five classifications as the common use of the terms are known — that is,

(1) Building contractor, which shall include private, public, commercial, industrial and residential buildings of all types;

(1a) Residential contractor, which shall include any general contractor constructing only residences which are required to conform to the North Carolina Uniform Residential Building Code (Vol 1-B);

(2) Highway contractor;

(3) Public utilities contractors, which shall include those whose operations are the performance of construction work on the following subclassifications of facilities:

a. Water and sewer mains and water service lines and house and building sewer lines as defined in the North Carolina State Building Code, and water storage tanks, lift stations, pumping stations, and appurtenances to water storage tanks, lift stations and pumping stations;
b. Water and wastewater treatment facilities and appurtenances thereto;
c. Electrical power transmission facilities, and primary and secondary distribution facilities ahead of the point of delivery of electric service to the customer;
d. Public communication distribution facilities; and
e. Natural gas and other petroleum products distribution facilities; provided the General Contractors Licensing Board may issue license to a public utilities contractor limited to any of the above subclassifications for which the general contractor qualifies, and

(4) Specialty contractor, which shall include those whose operations as such are the performance of construction work requiring special skill and involving the use of specialized building trades or crafts, but which shall not include any operations now or hereafter under the jurisdiction, for the issuance of license, by any board or commission pursuant to the laws of the State of North Carolina.

Public utilities contractors constructing water service lines and house and building sewer lines as provided in (3)a above shall terminate said lines at a valve, box, meter, or manhole or cleanout at which the facilities from the building may be connected.

If an applicant is an individual, examination may be taken by his personal appearance for examination, or by the appearance for examination of one or more of his responsible managing employees, and if a copartnership or corporation, or any other combination or organization, by the examination of one or more of the responsible managing officers or members of the personnel of the applicant, and if the person so examined shall cease to be connected with the applicant, then in such event the license shall remain in full force and effect for a period of 30 days thereafter, and then be canceled, but the applicant shall then be entitled to a reexamination, all pursuant to the rules to be promulgated by the Board: Provided, that the holder of such license shall not bid on or undertake any additional contracts from the time such examined employee shall cease to be connected with the applicant until said applicant's license is reinstated as provided in this Article.

Anyone failing to pass this examination may be reexamined at any regular meeting of the Board without additional fee. Certificate of license shall expire on the thirty-first day of December following the issuance or renewal and shall become invalid on that day unless renewed, subject to the approval of the Board. Renewals may be effected any time during the month of January without reexamination, by the payment of a fee to the secretary of the Board of sixty dollars ($60.00) for unlimited license, forty dollars ($40.00) for intermediate license and twenty dollars ($20.00) for limited license. (1925, c. 318, s. 9; 1931, c. 62, s. 2; 1937, c. 328; c. 429, s. 3; 1941, c. 257, s. 1; 1953, c. 805, s. 2; c. 1041, s. 3; 1971, c. 246, s. 3; 1973, c. 1036, ss. 1, 2; c. 1331, s. 3; 1975, c. 279, ss. 2, 3; 1979, c. 713, s. 2.)

Effect of Amendments. — The 1979 amendment, in the second paragraph, substituted "five" for "four" in the second sentence, rewrote subdivision (1), which formerly read "Building contractor," and added subdivision (1a).

CASE NOTES

One of the obvious purposes of requiring annual renewal of licenses is to enable the Licensing Board to maintain and publish the roster of currently licensed contractors as required by § 87-8. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

The purpose of this section is to protect the public from incompetent builders by forbidding them to maintain an action on their contracts, thereby discouraging them from undertaking projects beyond their capabilities. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

Annual license renewal should be considered an important, and not merely a perfunctory, requirement in order to accomplish the protective public purpose of the statute. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

Nature and Purpose of Annual Renewal Fees. — The annual renewal fees required by this section are in no way related to the license taxes required to be paid by contractors by the North Carolina Revenue Act. The renewal fees required by this section are not part of the State's revenues, but provide the funds by which the North Carolina State Licensing Board for Contractors is enabled to carry out the public purposes for which it was created. Therefore the payment of these fees bears a direct and substantial relationship to the accomplishment of the public purposes of § 87-1 et seq. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

Substantial Compliance. — Where a contractor does not have a valid license at the time of entering into a contract, he has not substantially complied with the licensing statute. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

Having at one time held a valid contractor's license plaintiff should not be held to have substantially complied with the requirements of this Article. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

By contracting with defendants and undertaking to construct a house for them at the agreed price of $67,500, plaintiff became a "general contractor" and engaged in the business of general contracting in this State within the definition contained in § 87-1, thereby becoming subject to the licensing provisions of this section and, unless substantially complying with these provisions, may not recover against defendants either on contract or upon quantum meruit. Holland v. Walden, 11 N.C. App. 281, 181 S.E.2d 197, cert. denied, 279 N.C. 349, 182 S.E.2d 581 (1971).

Unlicensed Party May Not Maintain Action. — Where the party who acted as a general contractor was unlicensed not only at the time the contract was entered into but at all times thereafter while undertaking to perform under it, the unlicensed contractor could not maintain his actions against the defendant. Holland v. Walden, 11 N.C. App. 281, 181 S.E.2d 197, cert. denied, 279 N.C. 349, 182 S.E.2d 581 (1971).

An unlicensed contractor cannot affirmatively enforce his contract; neither can he recover in quantum meruit, because this would achieve the result forbidden at law. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

With Certain Exception. — Where the plaintiff held a valid license for 88% of the construction time, during which the major portion of the construction work was performed, and had already been paid for the work performed while unlicensed, she could maintain her action on the contract. Holland v. Walden, 11 N.C. App. 281, 181 S.E.2d 197, cert. denied, 279 N.C. 349, 182 S.E.2d 581 (1971).

Plaintiff may recover at least upon a quantum meruit for work done on the contract up to the time that changes, made at the request of defendants, resulted in the project having a value in excess of the limitations of plaintiff's license. Holland v. Walden, 11 N.C. App. 281, 181 S.E.2d 197, cert. denied, 279 N.C. 349, 182 S.E.2d 581 (1971).

But May Enforce Contract Defensively. — Although an unlicensed contractor cannot affirmatively enforce his contract, a general contractor can enforce his contract defensively, as a set-off to the claims asserted against him, though the set-off cannot exceed his adversary's claims. This exception limits the penalty paid by the unlicensed builder to the amount he actually expended on the contract and no more. Hickory Furn. Mart, Inc. v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).

§ 87-11. Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing thereon; reissuance of certificate.

(a) The Board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license, or gross negligence, incompetency or misconduct in the practice of his profession, or willful violation of any provisions of this Article. Any person may prefer charges of such fraud, deceit, negligence or misconduct against any general contractor licensed hereunder; such charges shall be in writing and sworn to by the complainant and submitted to the Board. Such charges, unless dismissed without hearing by the Board as unfounded or trivial, shall be heard and determined by the Board in accordance with the provisions of Chapter 150A of the General Statutes.

(b) The Board shall adopt and publish guidelines, consistent with the provisions of this Article, governing the suspension and revocation of licenses.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter.

(d) The Board may reissue a license to any person, firm or corporation whose license has been revoked: Provided, three or more members of the Board vote in favor of such reissuance for reasons the Board may deem sufficient.

The Board shall immediately notify the Secretary of State of its findings in the case of the revocation of a license or of the reissuance of a revoked license.

A certificate of license to replace any certificate lost, destroyed or mutilated may be issued subject to the rules and regulations of the Board. (1925, c. 318, s. 10; 1937, c. 429, s. 4; 1953, c. 1041, s. 4; 1973, c. 1331, s. 3; 1979, c. 713, s. 3.)

Effect of Amendments. — The 1979 amendment designated the provisions of the former first paragraph as present subsection (a), designated the former second, third, and fourth paragraphs as present subsection (d), and added subsections (b) and (c).

§ 87-12. Certificate evidence of license.

The issuance of a certificate of license or limited license by this Board shall be evidence that the person, firm, or corporation named therein is entitled to all the rights and privileges of a licensed or limited licensed general contractor while said license remains unrevoked or unexpired. A licensed general contractor holding a license which qualifies him for work as described in G.S. 87-10 shall be authorized to perform the said work without any additional occupational license, notwithstanding the provisions of any other occupational licensing statute. A license issued by any other occupational licensing board having jurisdiction over any work described in G.S. 87-10 shall qualify such licensee to perform the work for which the license qualifies him without obtaining the license from the General Contractors Licensing Board. Nothing contained herein shall operate to relieve any general contractor from the necessity of compliance with other provisions of the law requiring building permits and construction in accordance with appropriate provisions of the North Carolina State Building Code. (1925, c. 318, s. 11; 1937, c. 429, s. 5; 1975, c. 279, s. 4.)

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.

Any person, firm or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in G.S. 87-1, without having first complied with the provisions hereof, or who shall attempt to practice general contracting in this State, except as provided for in this Article, and any person, firm, or corporation presenting or attempting to file as his own the licensed certificate of another or who shall give false or forged evidence of any kind to the Board or to any member thereof in maintaining a certificate of license or who falsely shall impersonate another or who shall use an expired or revoked certificate of license, and any architect or engineer who receives or considers a bid from anyone not properly licensed under this Article, shall be deemed guilty of a misdemeanor and shall for each such offense of which he is convicted be punished by a fine of not less than five hundred dollars ($500.00) or imprisonment of three months, or both fine and imprisonment in the discretion of the court. And the Board may, in its discretion, use its funds to defray the expense, legal or otherwise, in the prosecution of any violations of this Article. (1925, c. 318, s. 12; 1931, c. 62, s. 3; 1937, c. 429, s. 6.)

CASE NOTES

This section makes it a misdemeanor to use an expired license. Ar-Con Constr. Co. v. Anderson, 5 N.C. App. 12, 168 S.E.2d 18 (1969).

Section Strictly Construed. — Since this section imposes criminal penalties for its violation, it must be strictly construed and its scope may not be extended by implication beyond the meaning of its language so as to include offenses not clearly described. Fulton v. Rice, 12 N.C. App. 669, 184 S.E.2d 421 (1971).

Since this section restricts the practice of an otherwise lawful occupation to a special class of persons, it must be construed so as not to extend it to activities and transactions not intended by the legislature to be included. Fulton v. Rice, 12 N.C. App. 669, 184 S.E.2d 421 (1971).

Quoted in Vogel v. Reed Supply Co., 277 N.C. 119, 177 S.E.2d 273 (1970).

§ 87-13.1. Board may seek injunctive relief.

Whenever it appears to the Board that any person, firm or corporation is violating any of the provisions of this Article or of the rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation. (1979, c. 713, s. 4.)

§ 87-14. Regulations as to issue of building permits.

Any person, firm or corporation, upon making application to the building inspector or such other authority of any incorporated city, town or county in North Carolina charged with the duty of issuing building or other permits for the construction of any building, highway, sewer, grading or any improvement or structure where the cost thereof is to be thirty thousand dollars ($30,000) or more, shall, before he be entitled to the issuance of such permit, furnish satisfactory proof to such inspector or authority that he is duly licensed under the terms of this Article to carry out or superintend the same, and that he has paid the license tax required by the Revenue Act of the State of North Carolina

then in force so as to be qualified to bid upon or contract for the work for which the permit has been applied; and it shall be unlawful for such building inspector or other authority to issue or allow the issuance of such building permit unless and until the applicant has furnished evidence that he is either exempt from the provisions of this Article or is duly licensed under this Article to carry out or superintend the work for which permit has been applied; and further, that the applicant has paid the license tax required by the State Revenue Act then in force so as to be qualified to bid upon or contract for the work covered by the permit; and such building inspector, or other such authority, violating the terms of this section shall be guilty of a misdemeanor and subject to a fine of not more than fifty dollars ($50.00). (1925, c. 318, s. 13; 1931, c. 62, s. 4; 1937, c. 429, s. 7; 1949, c. 934; 1953, c. 809; 1969, c. 1063, s. 6; 1971, c. 246, s. 4.)

§ 87-15. Copy of Article included in specifications; bid not considered unless contractor licensed.

All architects and engineers preparing plans and specifications for work to be contracted in the State of North Carolina shall include in their invitations to bidders and in their specifications a copy of this Article or such portions thereof as are deemed necessary to convey to the invited bidder, whether he be a resident or nonresident of this State and whether a license has been issued to him or not, the information that it will be necessary for him to show evidence of a license before his bid is considered. (1925, c. 318, s. 14; 1937, c. 429, s. 8; 1941, c. 257, s. 2.)

§ 87-15.1. Reciprocity of licensing.

To the extent that other states which provide for the licensing of general contractors provide for similar action, the Board in its discretion may grant licenses of the same or equivalent classification to general contractors licensed by other states, without written examination upon satisfactory proof furnished to the Board that the qualifications of such applicants are equal to the qualifications of holders of similar licenses in North Carolina and upon payment of the required fee. (1971, c. 246, s. 5.)

§ 87-15.2. Public awareness program.

The Board shall establish and implement a public awareness program to inform the general public of the purpose and function of the Board. (1979, c. 713, s. 4.)

Article 2.

Plumbing and Heating Contractors.

§ 87-16. Board of Examiners; appointment; term of office.

There is created the State Board of Examiners of Plumbing and Heating Contractors consisting of seven members appointed by the Governor: one member from a school of engineering of the Greater University of North Carolina, one member who is a plumbing inspector from a city in North Carolina, one licensed air conditioning contractor, one licensed plumbing contractor, one licensed heating contractor, and two persons who have no ties with the construction industry to represent the interests of the public at large. Members

serve for terms of seven years, with the term of one member expiring each year. No member appointed after June 7, 1979, shall serve more than one complete consecutive term. Vacancies occurring during a term are filled by appointment of the Governor for the remainder of the unexpired term. (1931, c. 52, s. 1; 1939, c. 224, s. 1; 1971, c. 768, s. 1; 1973, c. 476, s. 128; 1979, c. 834, s. 1.)

Local Modification. — Anson: 1939, c. 308; Burke: 1939, c. 397; Carteret: 1935, c. 338; Durham: 1939, c. 381; Moore, New Hanover and Stanly: 1935, c. 338; Surry: 1939, c. 297; Wake: 1939, c. 381; towns of Albemarle, Atlantic Beach and Beaufort: 1935, c. 338; town of Elkin: 1939, c. 297; towns of Morehead City, Pinehurst and Southern Pines: 1935, c. 338.

Effect of Amendments. — The 1979 amendment rewrote this section.

Session Laws 1979, c. 834, s. 12, provides: "Schedule. — Members serving on the Board on July 1, 1979, shall continue to serve for the remainder of the terms for which they were appointed. When the term of the member from the Commission for Health Services and the term of the member from the School of Public Health of the University of North Carolina expire, the Governor shall appoint a public member as their respective successors."

CASE NOTES

Cited in Muse v. Morrison, 234 N.C. 195, 66 S.E.2d 783 (1951).

§ 87-17. Removal, qualifications and compensation of members; allowance for expenses.

The Governor may remove any member of the Board for misconduct, incompetency or neglect of duty. Each member of the Board shall be a resident of this State at the time of his appointment. Each member of the Board shall receive for attending sessions of the Board or of its committees the amount of per diem, and for the time spent in necessary traveling in carrying out the provisions of this Article, and in addition to the per diem compensation, each member shall be reimbursed by the Board from funds in its hands for necessary traveling expenses and for such expenses incurred in carrying out the provisions hereof as shall be approved by a majority of the members of the Board. Payment of compensation and reimbursement of expenses of Board members shall be governed by G.S. 93B-5. (1931, c. 52, s. 2; 1969, c. 445, s. 8; 1979, c. 834, ss. 2, 3.)

Effect of Amendments. — The 1979 amendment deleted "a citizen of the United States and" preceding "a resident of" in the second sentence, deleted "provided by G.S. 138-5" following "per diem" in the third sentence, and added the last sentence.

§ 87-18. Organization meeting; officers; seal; rules; employment of personnel.

The Board shall within 30 days after its appointment meet in the City of Raleigh and organize, and shall elect a chairman and secretary and treasurer, each to serve for one year. Thereafter said officers shall be elected annually. The secretary and treasurer shall give bond approved by the Board for the faithful performance of his duties, in such sum as the Board may, from time to time determine. The Board shall have a common seal, shall formulate rules to govern its actions, and is hereby authorized to employ such personnel as it may deem necessary to carry out the provisions of this Article. (1931, c. 52, s. 3; 1939, c. 224, s. 2; 1953, c. 254, s. 1.)

§ 87-19. Regular and special meetings; quorum.

The Board after holding its first meeting as hereinbefore provided, shall thereafter hold at least two regular meetings each year. Special meetings may be held at such times and places as the bylaws and/or rules of the Board provide; or as may be required in carrying out the provisions hereof. A quorum of the Board shall consist of not less than three members. (1931, c. 52, s. 4.)

§ 87-20. Record of proceedings and register of applicants; reports.

The Board shall keep a record of its proceedings and a register of all applicants for examination, showing the date of each application, the name, age and other qualifications, place of business and residence of each applicant. The books and records of the Board shall be prima facie evidence of the correctness of the contents thereof. On or before the first day of March of each year the Board shall submit to the Governor a report of its activities for the preceding year, and file with the Secretary of State a copy of such report, together with a statement of receipts and expenditures of the Board attested by the chairman and secretary. (1931, c. 52, s. 5.)

§ 87-21. Definitions; contractors licensed by Board; examination; posting license, etc.

(a) Definitions. — For the purpose of this Article:

(1) The word "plumbing" is hereby defined to be the system of pipes, fixtures, apparatus and appurtenances, installed upon the premises, or in a building, to supply water thereto and to convey sewage or other waste therefrom.

(2) The phrase "heating, group number one" shall be deemed and held to be the heating system of a building, which requires the use of high or low pressure steam, vapor or hot water, including all piping, ducts, and mechanical equipment appurtenant thereto, within, adjacent to or connected with a building, for comfort heating.

(3) The phrase "heating, group number two" means an air conditioning system which consists of an assemblage of interacting components producing conditioned air for comfort cooling by the lowering of temperature, and having a mechanical refrigeration capacity in excess of fifteen tons, and which circulates air.

(4) The phrase "heating, group number three" shall be deemed and held to be a direct heating system of a building which produces heat to raise the temperature of the space within the building for the purpose of comfort in which electric heating elements or products of combustion exchange heat either directly with the building supply air or indirectly through a heat exchanger and using an air distribution system of ducts.

(5) Any person, firm or corporation, who for a valuable consideration, installs, alters or restores, or offers to install, alter or restore, either plumbing, heating group number one, or heating group number two, or heating group number three, or any combination thereof, as defined in this Article, shall be deemed and held to be engaged in the business of plumbing or heating contracting.

(6) The word "contractor" is hereby defined to be a person, firm or corporation engaged in the business of plumbing or heating contracting.

(7) The word "heating" shall be deemed and held to mean heating group number one, heating group number two, heating group number three, or any combination thereof.

(8) The obtaining of a license, as required by this Article, shall not of itself authorize the practice of another profession or trade for which a State qualification license is required.

(9) The word "Board" means the State Board of Examiners of Plumbing and Heating Contractors.

(b) Classes of Licenses; Eligibility and Examination of Applicant; Necessity for License. — In order to protect the public health, comfort and safety, the Board shall establish two classes of licenses: Class I covering all structures and systems to which this Article applies, and Class II covering plumbing and heating systems in single-family detached residential dwellings. The Board shall prescribe the standard of competence and efficiency to be required of an applicant for license of each class, and shall give an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating costs, fundamentals of installation and design, fire hazards and related subjects as these subjects pertain to either plumbing or heating; and as a result of the examination, the Board shall issue a certificate of license of the appropriate class in plumbing or heating, and a license shall be obtained, in accordance with the provisions of this Article, before any person, firm or corporation shall engage in, or offer to engage in, the business of either plumbing or heating contracting, or any combination thereof. It is the purpose and intent of this section that the Board shall provide an examination for plumbing, heating group number one, or heating group number two, or heating group number three, and it is authorized to issue a certificate of license limited to either plumbing or heating group number one, or heating group number two, or heating group number three, or any combination thereof. Each application for examination shall be accompanied by a check, post-office money order, or cash, in the amount of the annual license fee required by this Article. Regular examinations shall be given in the months of April and October of each year, and additional examinations may be given at such other times as the Board may deem wise and necessary. Any person may demand in writing a special examination, and upon payment by the applicant of the cost of holding such examination and the deposit of the amount of the annual license fee, the Board in its discretion will fix a time and place for such examination. Upon satisfactory proof of the applicant's inability to write and upon demand of an applicant for a Class II plumbing or heating license six weeks prior to an examination, the Board shall conduct the examination of that applicant orally, and shall not require that applicant to take a written examination as to examination inquiries answered other than by preparation of diagrams. Signed statements from two reliable citizens resident in the home county of the applicant shall constitute satisfactory proof of an applicant's inability to write. A person who fails to pass any examination shall not be reexamined until the next regular examination.

(c) To Whom Article Applies. — The provisions of this Article shall apply to all persons, firms, or corporations who engage in, or attempt to engage in, the business of plumbing or heating contracting, or any combination thereof as defined in this Article. The provisions of this Article shall not apply to those who make minor repairs or minor replacements to an already installed system of plumbing or heating.

(d) Repealed by Session Laws 1979, c. 834, s. 7.

(e) Posting License; License Number on Contracts, etc. — The current license issued in accordance with the provisions of this Article shall be posted in the business location of the licensee, and its number shall appear on all proposals or contracts and requests for permits issued by municipalities.

(f) Repealed by Session Laws 1971, c. 768, s. 4. (1931, c. 52, s. 6; 1939, c. 224, s. 3; 1951, c. 953, ss. 1, 2; 1953, c. 254, s. 2; 1967, c. 770, ss. 1-6; 1971, c. 768, ss. 2-4; 1973, c. 1204; 1979, c. 834, ss. 4-7.)

Effect of Amendments. — The 1979 amendment rewrote subdivision (a)(3), added subdivision (a)(9), rewrote the first two sentences of subsection (b), added the present seventh and eighth sentences of subsection (b), and deleted subsection (d), which provided that certain applicants would be granted licenses without examination.

CASE NOTES

Validity of Classification of Subjects of Taxation. — If the classification of the subjects of taxation, provided for in this section, is not arbitrary and unjust it cannot be regarded in law as a breach of the rule of uniformity. Classification by population is not in itself arbitrary, unreasonable, or unjust. Roach v. City of Durham, 204 N.C. 587, 169 S.E. 149 (1933).

A journeyman plumber, duly licensed under the ordinances of a municipality, who furnishes no materials, supplies or fixtures, but merely attaches or replaces fixtures, and does not install plumbing systems or make substantial alterations thereof, is not engaged in carrying on the business of plumbing and heating contracting within this section, since plumbing is defined in the act in terms of the "plumbing system" and the act refers to plumbing and heating "contractors," and even granting that the definition in the act is ambiguous and is susceptible to a construction which would include journeyman plumbers, the court could not adopt such construction, since the statute must be given that construction which is favorable to defendant and tends least to interfere with personal liberty. State v. Mitchell, 217 N.C. 244, 7 S.E.2d 567 (1940).

OPINIONS OF ATTORNEY GENERAL

Applicability of Licensing Requirements to Property Owners. — The licensing requirements of Article 2, Chapter 87 for Plumbing Contractors are not applicable to a property owner who installs pipe from an existing well to a mobile home connection point and sewage lines from a mobile home connection point to an existing septic tank facility. Opinion of Attorney General to Honorable W.G. Smith, 45 N.C.A.G. 176 (1975).

§ 87-22. License fee based on population; expiration and renewal; penalty.

All persons, firms, or corporations engaged in the business of either plumbing or heating contracting, or both, in cities or towns of 10,000 inhabitants or more shall pay an annual license fee of fifty dollars ($50.00), and in cities or towns of less than 10,000 inhabitants an annual license fee of twenty-five dollars ($25.00). In the event the Board refuses to license an applicant, the license fee deposited shall be returned by the Board to the applicant. All licenses shall expire on the last day of December in each year following their issuance or renewal. It shall be the duty of the secretary and treasurer to cause to be mailed to every licensee registered hereunder notice to his last known address of the amount of fee required for renewal of license, such notice to be mailed at least one month in advance of the expiration of said license. In the event of failure on the part of any person, firm or corporation to renew the license certificate annually and pay the fee therefor during the month of January in each year, the Board shall increase said license fee ten per centum (10%) for each month or fraction of a month that payment is delayed; provided that the penalty for nonpayment shall not exceed the amount of the annual fee, and provided further that the Board requires reexamination upon failure of a licensee to renew license within three years after expiration. The Board may adopt regulations requiring attendance at programs of continuing education as a condition of license renewal. (1931, c. 52, s. 7; 1939, c. 224, s. 4; 1971, c. 768, s. 5; 1979, c. 834, s. 8.)

Effect of Amendments. — The 1979 amendment substituted "the Board requires reexamination upon failure of a licensee to renew license within three years after expiration" for "no penalty will be imposed if one half of the annual license fee is paid in January and the remaining one half in June of each year" in the next to last sentence, and added the last sentence.

§ 87-22.1. Examination fees; funds disbursed upon warrant of chairman and secretary-treasurer.

The Board shall charge an examination fee of ten dollars ($10.00) for each regular examination provided, and such funds collected shall be disbursed upon warrant of the chairman and secretary-treasurer, to partially defray general expenses of the Board. Such examination fee shall be retained by the Board irrespective of whether or not the applicant is granted a license. (1959, c. 865, s. 2.)

§ 87-23. Revocation or suspension of license for cause.

(a) The Board shall have power to revoke or suspend the license of any plumbing or heating contractor, or both, who is guilty of any fraud or deceit in obtaining a license, or who fails to comply with any provision or requirement of this Article, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of either a plumbing or heating contractor, or both, as defined in this Article. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this Article, against any plumbing or heating contractor, or both, who is licensed under the provisions of this Article. All of such charges shall be in writing and verified by the complainant, and such charges shall be heard and determined by the Board in accordance with the provisions of Chapter 150A of the General Statutes.

(b) The Board shall adopt and publish guidelines, consistent with the provisions of this Chapter, governing the suspension and revocation of licenses.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. (1931, c. 52, s. 8; 1939, c. 224, s. 5; 1953, c. 1041, s. 5; 1973, c. 1331, s. 3; 1979, c. 834, s. 9.)

Effect of Amendments. — The 1979 amendment designated the former provisions of the section as present subsection (a) and added subsections (b) and (c).

CASE NOTES

Purpose of Law. — The manifest purpose of the law is to promote the health, comfort, and safety of the people by regulating plumbing and heating in public and private buildings. Roach v. City of Durham, 204 N.C. 587, 169 S.E. 149 (1933).

§ 87-24. Reissuance of revoked licenses; replacing lost or destroyed license.

The Board may in its discretion reissue license to any person, firm or corporation whose license may have been revoked: Provided, three or more members of the Board vote in favor of such reissuance for reasons deemed sufficient by the Board. A new certificate of registration to replace any license which may be lost or destroyed may be issued subject to the rules and regulations of the Board. (1931, c. 52, s. 9.)

§ 87-25. Violations made misdemeanor; employees of licensees excepted.

Any person, firm or corporation who shall engage in or offer to engage in, or carry on the business of either plumbing or heating contracting, or both, as defined in G.S. 87-21, without first having been licensed to engage in such business, or businesses, as required by the provisions of this Article; or any person, firm or corporation holding a limited heating license under the provisions of this Article who shall practice or offer to practice or carry on any type of heating contracting not authorized by said limited license; or any person, firm or corporation who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a license, or who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, or who shall violate any of the provisions of this Article, shall be guilty of a misdemeanor and upon conviction fined not less than one hundred dollars ($100.00) or imprisoned for not more than three months, or both, in the discretion of the court. Employees, while working under the supervision and jurisdiction of a person, firm or corporation licensed in accordance with the provisions of the Article, shall not be construed to have engaged in the business of either plumbing or heating contracting, or both. (1931, c. 52, s. 10; 1939, c. 224, s. 6.)

CASE NOTES

Acts Not Constituting Contracting. — A journeyman plumber, contracting and agreeing with various persons to perform labor required to install certain plumbing at a stipulated lump sum price, and who does not maintain a fixed place of business or sell or contract to furnish materials, supplies or fixtures of any kind, and who fails to obtain a license from the State Board of Examiners of Plumbing and Heating Contractors, is not guilty of a misdemeanor under the provisions of this section, since his occupation does not constitute carrying on the "business of plumbing and heating contracting" within the meaning of the penal provisions of the statute. State v. Ingle, 214 N.C. 276, 199 S.E. 10 (1938).

§ 87-25.1. Board may seek injunctive relief.

Whenever it appears to the Board that any person, firm or corporation is violating any of the provisions of this Article or of the rules and regulations of the Board promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation. The venue for actions brought under this subsection shall be the superior court of any county in which such acts are alleged to have been committed or in the county where the defendants in such action reside. (1979, c. 834, s. 11.)

§ 87-26. Corporations; partnerships; persons doing business under trade name.

(a) A license may be issued in the name of a corporation, provided, one or more officers, or full time employee or employees, or both, empowered to act for the corporation, are licensed in accordance with the provisions of this Article; and provided such officers or employee or employees shall execute contracts to the extent of their license qualifications in the name of the said corporation and exercise general supervision over the work done thereunder.

(b) A license may be issued in the name of a partnership provided one or more general partners, or full time employee or employees empowered to act for the partnership, are licensed in accordance with the provisions of this Article, and provided such general partners or employee or employees shall execute contracts to the extent of their license qualifications in the name of the said partnership, and exercise general supervision over the work done thereunder.

(c) A license may be issued in an assumed or designated trade name, provided the owner of the business conducted thereunder, or full time employee or employees empowered to act for the owner, are licensed in accordance with the provisions of this Article; and such owner or employee or employees shall execute contracts to the extent of their license qualifications, in the said trade name, and exercise general supervision over the work done thereunder.

(d) A certificate of license may be issued in accordance with the provisions of this Article upon payment of the annual license fee by such corporation, partnership, or owner of the business conducted under an assumed or designated trade name, as the case may be, and the names and qualifications of individual licensee or licensees connected therewith shall be indicated on the aforesaid license.

(e) It shall be necessary that persons licensed in accordance with the provisions of this section shall exercise general supervision over contracts to completion. (1931, c. 52, s. 12; 1939, c. 224, s. 8; 1957, c. 815; 1967, c. 770, s. 7.)

§ 87-27. License fees payable in advance; application of.

All license fees shall be paid in advance to the secretary and treasurer of the Board and by him held as a fund for the use of the Board. The compensation and expenses of the members of the Board as herein provided, the salaries of its employees, the costs of continuing educational programs for licensees and applicants, and all expenses incurred in the discharge of its duties under this Article shall be paid out of such fund, upon the warrant of the chairman and secretary and treasurer. (1931, c. 52, s. 13; 1933, c. 57; 1939, c. 224, s. 9; 1953, c. 254, s. 3; 1959, c. 865, s. 1; 1979, c. 834, s. 10.)

Effect of Amendments. — The 1979 amendment inserted "the costs of continuing educational programs for licensees and applicants" in the second sentence.

CASE NOTES

It is obvious that the pervading intent of this section is to provide for the maintenance of the Board and not to impose a tax as a part of the general revenue of the State and thereby exclude the operation of the police power. It is true that the act does not in express words authorize the exercise of this power, but in our opinion it appears by implication that the exercise of such power was intended. Roach v. City of Durham, 204 N.C. 587, 169 S.E. 149 (1933).

Cited in Muse v. Morrison, 234 N.C. 195, 66 S.E.2d 783 (1951).

§ 87-27.1. Public awareness program.

The Board shall establish and implement a public awareness program to inform the general public of the purpose and function of the Board. (1979, c. 834, s. 11.)

Article 3.

Tile Contractors.

§§ 87-28 to 87-38: Repealed by Session Laws 1977, c. 143.

Editor's Note. — This Article was also repealed, effective July 1, 1979, by Session Laws 1977, c. 712, s. 2.

Article 4.

Electrical Contractors.

§ 87-39. Board of Examiners; appointment; terms; chairman; meetings; quorum; principal office; compensation; oath.

The State Board of Examiners of Electrical Contractors shall continue as the State agency responsible for the licensing of persons engaging in electrical contracting within this State, and shall consist of one member from the North Carolina Department of Insurance to be designated by the Commissioner of Insurance; one member who is a representative of the North Carolina Association of Electrical Contractors to be designated by the governing body of that organization; and five members to be appointed by the Governor: one from the faculty of The Greater University of North Carolina who teaches or does research in the field of electrical engineering, one who is serving as a chief electrical inspector of a municipality or county in North Carolina, one who has satisfied the requirements for a license classified under G.S. 87-43.3 and who represents a sole proprietorship, partnership or corporation located in North Carolina which is actively engaged in the business of electrical contracting, and two who have no ties with the construction industry and who represent the interest of the public at large. The Governor shall appoint the two public members as soon as practicable after July 1, 1979, for terms of seven years. The terms of the successors to all members shall be seven years and until their successors are designated or appointed and are qualified. A vacancy occurring during a term shall be filled for the remainder of the unexpired term by the authority which designated or appointed the seat being vacated. No member appointed after June 8, 1979, shall serve more than one complete consecutive term.

The Board shall hold regular meetings quarterly and may hold meetings on call of the chairman. The chairman shall be required to call a special meeting upon written request by two members of the Board. The Board shall, at the first meeting following appointment of the new member in each year, meet and elect from its membership a chairman and vice-chairman, each to serve for one year. Four members of the Board shall constitute a quorum. The principal office of the Board shall be at such place as shall be designated by a majority of the members thereof. Payment of compensation and reimbursement of expenses of Board members shall be governed by G.S. 93B-5. Before entering upon the performance of his duties hereunder, each member of the Board shall take and file with the Secretary of State an oath in writing to properly perform the duties of his office as a member of said Board, and to uphold the Constitution of North Carolina and the Constitution of the United States. (1937, c. 87, s. 1; 1969, c. 669, s. 1; 1979, c. 904, ss. 1-3.)

Effect of Amendments. — The 1979 amendment rewrote the first paragraph, substituted "Four" for "Three" in the fourth sentence of the second paragraph, and in the second paragraph rewrote the sixth sentence, which formerly read: "Each member of the Board shall receive as compensation for his services the sum of ten dollars ($10.00) for each day actually devoted to the performance of his duties under this Article, and in addition shall be reimbursed for all necessary expenses incurred in the performance of his duties under this Article."

§ 87-40. Secretary-treasurer.

The State Board of Examiners of Electrical Contractors shall at its first meeting following appointment of the new member in each year appoint a secretary-treasurer for a period of one year. The secretary-treasurer need not be a member of the Board, and the Board is authorized to employ a full-time secretary-treasurer and such other assistants and to make such other expenditures as may be necessary to the proper performance of the duties of the Board under this Article. The compensation and the duties of the secretary-treasurer shall be fixed by the Board, and the secretary-treasurer shall give bond in such sum and form as the Board shall require for the faithful performance of his duties. The secretary-treasurer shall keep a record of the proceedings of said Board and shall receive and account for all moneys derived from the operations of the Board under this Article. (1937, c. 87, ss. 2, 3; 1969, c. 669, s. 1.)

§ 87-41. Seal of Board.

The Board shall adopt a seal for its own use, and the secretary-treasurer shall have charge and custody thereof. The seal shall have inscribed thereon the words "Board of Examiners of Electrical Contractors, State of North Carolina." (1937, c. 87, s. 3; 1969, c. 669, s. 1.)

§ 87-42. Duties and powers of Board.

In order to protect the life, health and property of the public, the State Board of Examiners of Electrical Contractors shall provide for the examination of all applicants for a license as an electrical contractor. The Board shall receive all applications for licenses to be issued under this Article, shall examine all applicants to determine that each shall be qualified and shall also discharge those duties enumerated in G.S. 87-47. Individual applicants must be at least 21 years of age, and shall be required to demonstrate to the satisfaction of the Board evidence of good character and adequate technical and practical knowledge concerning the safe and proper installation of electrical work and equipment. The examination to be given for this purpose shall include, but not be limited to, the appropriate provisions of the National Electrical Code and the North Carolina State Building Code, the analysis of electrical plans and specifications, estimating of electrical installations, and the fundamentals of installation of electrical work and equipment. The Board shall prescribe the standards of knowledge, experience and proficiency to be required of licensees, which may vary for the various classifications of licenses. The Board shall have power to make rules and regulations necessary to the performance of its duties and for the effective implementation of the provisions of this Article. The Board shall issue licenses to all applicants meeting the requirements of the Board upon the receipt of the fees herein prescribed. The Board shall keep minutes of all its proceedings, and shall keep an accurate record of receipts and disbursements which shall be audited at the close of each fiscal year by a certified public accountant and filed with the State of North Carolina in accordance with Chapter 93B of the General Statutes. (1937, c. 87, s. 4; 1969, c. 669, s. 1.)

§ 87-43. Electrical contracting defined; licenses.

Electrical contracting shall be defined as engaging or offering to engage in the business of installing, maintaining, altering or repairing any electric work, wiring, devices, appliances or equipment. No person, firm or corporation shall engage, or offer to engage, in the business of electrical contracting within the State of North Carolina without having received a license from the State Board of Examiners of Electrical Contractors in compliance with the provisions of this Article. In each separate place of business operated by an electrical contractor at least one person must be regularly on active duty who has passed the examination required by this Article and who has the specific duty and authority to supervise and direct all electrical wiring or electrical installation work done or made by such separate place of business. Every person, firm or corporation engaging in the business of electrical contracting shall display a current certificate of license in his principal place of business and in each branch place of business which he operates. Licenses issued hereunder shall be signed by the chairman and the secretary-treasurer of the Board, under the seal of the Board. A registry of all licenses issued to electrical contractors shall be kept by the secretary-treasurer of the Board, and said registry shall be open for public inspection during ordinary business hours. (1937, c. 87, s. 5; 1951, c. 650, ss. 1-2½; 1953, c. 595; 1961, c. 1165; 1969, c. 669, s. 1.)

§ 87-43.1. Exceptions.

The provisions of this Article shall not apply:

(1) To the installation, construction or maintenance of facilities for providing electric service to the public ahead of the point of delivery of electric service to the customer;

(2) To the installation, construction, maintenance, or repair of telephone, telegraph, or signal systems, by public utilities, or their corporate affiliates, when said work pertains to the services furnished by said public utilities;

(3) To any person in the course of his work as a bona fide employee of a licensee of this Board;

(4) To the installation, construction or maintenance of electrical equipment and wiring for temporary use by contractors in connection with the work of construction;

(5) To the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by persons, firms or corporations, upon their own property when such property is not intended at the time for rent, lease, sale or gift, who regularly employ one or more electricians or mechanics for the purpose of installing, maintaining, altering or repairing of electrical wiring, devices or equipment used for the conducting of the business of said persons, firms or corporations;

(5a) To any person who is himself and for himself installing, maintaining, altering or repairing electric work, wiring, devices, appliances or equipment upon his own property when such property is not intended at the time for rent, lease, or sale;

(6) To the installation, construction, maintenance or repair of electrical wiring, devices, appliances or equipment by State institutions and private educational institutions which maintain a private electrical department;

(7) To the replacement of lamps and fuses and to the installation and servicing of cord-connected appliances and equipment connected by means of attachment plug-in devices to suitable receptacles which have been permanently installed or to the servicing of appliances

connected to a permanently installed junction box. This exception does not apply to permanently installed receptacles or to the installation of the junction box. (1937, c. 87, s. 5; 1951, c. 650, ss. 1-2½; 1953, c. 595; 1961, c. 1165; 1969, c. 669, s. 1; 1979, c. 904, ss. 4-7.)

Effect of Amendments. — The 1979 amendment substituted "person in the course of his work as a bona fide employee of" for "mechanic employed by" in subdivision (3), inserted "when such property is not intended at the time for rent, lease, sale or gift" in subdivision (5), added subdivision (5a), inserted "cord-connected" and added "or to the servicing of appliances connected to a permanently installed junction box" in the first sentence of subdivision (7), and added the second sentence of subdivision (7).

§ 87-43.2. Corporate or partnership practice of electrical contracting.

A corporation or partnership shall be eligible to be licensed as an electrical contractor, and to have such license renewed, provided:

(1) At least one person who has qualified under the provisions of this Article shall be regularly employed by the applicant at each separate place of business, such person to have the specific duty and authority to provide direct supervision of all installation, maintenance, alteration or repair of any electrical wiring, devices, appliances or equipment done in the name of the licensee;

(2) An application is filed with the Board which contains a statement of ownership, states the names and official positions of employees currently qualified under this Article, and provides such other information as the Board may reasonably require;

(3) The applicant, through an authorized officer or owner, shall agree in writing that the corporation or partnership will report to the Board within five days any additions to or loss of the employment of qualified individuals as described in subdivisions (1) and (2) above;

(4) A license issued to a corporation or partnership shall indicate the names and classifications of qualified individuals as described in subdivisions (1) and (2) above;

(5) A license issued to a corporation or partnership shall be canceled if at any time no person who has qualified under the provisions of this Article shall be regularly employed by the corporation or partnership as provided by subdivision (1) above; provided, that work begun prior to such cancellation may be completed under such conditions as the Board shall direct; provided further that no work for which a license is required under this Article shall be bid for, contracted for or initiated subsequent to such cancellation until said license is reinstated by the Board. (1937, c. 87, s. 5; 1951, c. 650, ss. 1-2½; 1953, c. 595; 1961, c. 1165; 1969, c. 669, s. 1.)

§ 87-43.3. Classification of licenses.

An electrical contractor's license shall be issued in one of the following classifications: *Limited,* under which a licensee shall be permitted to engage in a single electrical contracting project of a value not in excess of ten thousand dollars ($10,000) and on which the equipment or installation in the contract is rated at not more than 600 volts; *Intermediate,* under which a licensee shall be permitted to engage in a single electrical contracting project of a value not in excess of fifty thousand dollars ($50,000); *Unlimited,* under which a licensee shall be permitted to engage in any electrical contracting project regardless of value; and such other special *Restricted* classification as the Board may estab-

lish from time to time to provide for the licensing of persons, firms or corporations wishing to engage in special restricted electrical contracting, under which license a licensee shall be permitted to engage only in a specific phase of electrical contracting of a special, limited nature; and for the licensing of persons, firms or corporations wishing to engage in electrical contracting work as an incidental part of their primary business, which is a lawful business other than electrical contracting, under which license a licensee shall be permitted to engage only in a specific phase of electrical contracting of a special, limited nature directly in connection with said primary business. The Board may establish appropriate standards for each classification, such standards not to be inconsistent with the provisions of G.S. 87-42. (1969, c. 669, s. 1; 1973, c. 1228, s. 1; 1975, c. 29.)

§ 87-43.4. Residential dwelling license.

There is hereby created a separate license for electrical contractors which shall permit an electrical contractor to engage in electrical contracting projects pertaining to single-family detached residential dwellings. The Board shall establish appropriate standards for this new license. The standards of knowledge, experience and proficiency shall be those appropriate for that license. (1973, c. 1343.)

§ 87-44. Fees; license term.

The Board shall collect a fee from each applicant before granting or renewing a license under the provisions of this Article; the annual license fee for the limited classification shall not be in excess of thirty dollars ($30.00) for each principal and each branch place of business; the annual license fee for the intermediate classification shall not be in excess of seventy-five dollars ($75.00) for each principal and each branch place of business; the annual license fee for the unlimited classification shall not be in excess of one hundred fifty dollars ($150.00) for each principal and each branch place of business; and the annual license fee for the special restricted classifications and for the single-family detached residential dwelling license shall not be in excess of thirty dollars ($30.00) for each principal and each branch place of business.

Each license issued under the provisions of this Article shall expire on June 30 following the date of its issuance, and shall be renewed by the Board upon receipt and evaluation of a renewal application from a licensee and the payment of the required fee. The application shall be upon a form provided by the Board and shall furnish such information as the Board may require. Renewal applications and fees shall be due 30 days prior to the license expiration date; applications received after this time may, in the discretion of the Board, be subject to a penalty not exceeding ten percent (10%) of the license fee. No license issued in accordance with the provisions of this Article shall be assignable or transferable.

The Board may collect fees from applicants for examinations in amounts not exceeding the maximum annual license fees for the respective license classifications prescribed in this Article, except the fee for a specially arranged examination shall not exceed two hundred dollars ($200.00). (1937, c. 87, ss. 6, 7, 10; 1953, c. 1041, s. 7; 1969, c. 669, s. 1; 1973, c. 1228, s. 2; 1979, c. 904, ss. 8-10.)

Effect of Amendments. — The 1979 amendment, in the first paragraph, substituted "thirty dollars ($30.00)" for "twenty dollars ($20.00)," "seventy-five dollars ($75.00)" for "fifty dollars ($50.00)," and "one hundred fifty dollars ($150.00)" for "one hundred dollars ($100.00)," inserted "and for the single-family detached residential dwelling license" and substituted "thirty dollars ($30.00)" for "twenty dollars ($20.00)." The amendment also added the third paragraph.

§ 87-45. Funds.

The fees collected for examinations and licenses under this Article shall be used for the expenses of the State Board of Examiners of Electrical Contractors in carrying out the provisions of this Article. No expenses of the Board or compensation of any member or employee of the Board shall be payable out of the treasury of the State of North Carolina; and neither the Board nor any member or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the State of North Carolina. Any funds remaining in the hands of the secretary-treasurer to the credit of the Board after all expenses of the Board for the current fiscal year have been fully provided for shall be paid over to the North Carolina Engineering Foundation, Inc., for the benefit of the electrical engineering department of the Greater University of North Carolina. Provided, however, the Board shall have the right to maintain an amount, the cumulative total of which shall not exceed twenty percent (20%) of gross receipts for the previous fiscal year of its operation as a maximum contingency or emergency fund. (1937, c. 87, ss. 3, 7; 1969, c. 669, s. 1.)

§ 87-46. Responsibility of licensee; nonliability of Board.

Nothing in this Article shall relieve the holder or holders of licenses issued under the provisions hereof from complying with the building or electrical codes or statutes or ordinances of the State of North Carolina, or of any county or municipality thereof now in force or hereafter enacted. Nothing in this Article shall be construed as relieving the holder of any license issued hereunder from responsibility or liability for negligent acts on the part of such holder in connection with electrical contracting work; nor shall the State Board of Examiners of Electrical Contractors be accountable in damages, or otherwise for the negligent act or acts of any holder of such license. (1937, c. 87, s. 12; 1969, c. 669, s. 1.)

§ 87-47. Jurisdiction of Board over licensees.

(a) In the interest of protecting the public, the Board shall have jurisdiction to hear and determine on its own motion or upon written complaint, all complaints, allegations of charges of malpractice, unethical conduct, fraud, deceit, gross negligence, gross incompetence or gross misconduct in the practice of electrical contracting, or fraud or deceit in obtaining a license under this Article, made against any licensee under this Article; and the Board may administer to licensees any one or more of the following penalties: (i) reprimand; (ii) suspension from practice for a period not to exceed twelve months; (iii) revocation of license; and (iv) probationary revocation of license upon conditions set by the Board as the case shall in their judgment warrant with revocation of license upon failure to comply.

The Board shall, in accordance with Chapter 150A of the General Statutes, formulate rules of procedure governing the hearings of charges against licensees. Any person may prefer charges against any licensee, and such charges must be sworn to by the complainant and submitted in writing to the Board. Charges shall be heard and determined by the Board, and may be dismissed without notice to the accused licensee if unfounded or trivial. In conducting hearings of charges against licensees, the Board may remove the same to any county in which the offense, or any part thereof, was committed if in the opinion of the Board the ends of justice or the convenience of witnesses require such removal.

(b) The Board shall adopt and publish rules, consistent with the provisions of this Article, governing the suspension and revocation of licenses.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings by the Board, and the disposition of the matter.

(d) The Board may reissue a license to any person, firm or corporation after having revoked such license, provided; that one year has elapsed from revocation until reissuance, and the vote of the Board is by a majority of its members.

The Board shall immediately notify the Secretary of State and the electrical inspectors within the licensee's county of residence upon the revocation of a license or the reissuance of a license which had been revoked. (1969, c. 669, s. 1; 1973, c. 1331, s. 3; 1979, c. 904, s. 11.)

Effect of Amendments. — The 1979 amendment designated the former first two paragraphs as present subsection (a), designated the former last two paragraphs as present subsection (d), and added subsections (b) and (c).

§ 87-48. Penalty for violation of Article; powers of Board to enjoin violation.

(a) Any person, firm or corporation who shall violate any of the provisions of this Article, or who shall engage or undertake to engage in the business of installing, maintaining, altering or repairing within the State of North Carolina any electric wiring, devices, appliances or equipment without first having obtained a license under the provisions of this Article, shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars ($25.00) or more than fifty dollars ($50.00) for each offense. Conviction of a violation of this Article on the part of a holder of a license issued hereunder shall automatically have the effect of suspending such license until such time as it shall have been reinstated by the State Board of Examiners of Electrical Contractors.

(b) Whenever it shall appear to the State Board of Examiners of Electrical Contractors that any person, firm or corporation has violated, threatens to violate, or is violating any provisions of this Article, the Board may apply to the courts of the State for a restraining order and injunction to restrain such practices. If upon such application the court finds that any provision of this Article is being violated, or a violation thereof is threatened, the court shall issue an order restraining and enjoining such violations, and such relief may be granted regardless of whether criminal prosecution is instituted under the provisions of this Article. The venue for actions brought under this subsection shall be the superior court of any county in which such acts are alleged to have been committed or in the county where the defendants in such action reside. (1937, c. 87, s. 13; 1969, c. 669, s. 1; 1979, c. 904, s. 14.)

Effect of Amendments. — The 1979 amendment added the last sentence of subsection (b).

§ 87-49. No examination required of licensed contractors.

Any person, firm or corporation licensed in this State as a Class II electrical contractor on the effective date of this Article shall be entitled to be licensed, without examination, in the limited classification upon payment of the required fee and may be licensed in the intermediate or in the unlimited classification without written examination upon satisfactory proof to the Board

that such applicant is in fact qualified for such classification. Any person, firm or corporation licensed in this State as a Class I electrical contractor on the effective date of this Article shall be entitled to be licensed without examination in the limited, intermediate or unlimited classification upon payment of the required fee. Provided, that any person who has been once duly licensed by the Board, whose license has expired solely because of failure to apply for renewal, may apply and have a license issued under the provisions of this section if within a period of 12 months preceding such issuance the applicant shall have been primarily actively engaged as an electrical contractor or in an occupation which in the judgment of the Board is similar or equivalent to that of an electrical contractor. (1969, c. 669, s. 1.)

§ 87-50. Reciprocity.

To the extent that other states which provide for the licensing of electrical contractors provide for similar action, the Board may grant licenses of the same or equivalent classification to electrical contractors licensed by other states without written examination upon satisfactory proof furnished to the Board that the qualifications of such applicants are equal to the qualifications of holders of similar licenses in North Carolina and upon payment of the required fee. (1969, c. 669, s. 1.)

Effect of Amendments. — Session Laws 1979, c. 904, s. 12, deleted "License to nonresidents," which previously appeared at the beginning of the catchline to this section.

§ 87-50.1. Public awareness program.

The Board shall establish and implement a public awareness program to inform the general public of the purpose and function of the Board. (1979, c. 904, s. 13.)

§ 87-51. Severability of provisions.

If any provision of this Article or the application thereof to any person or circumstances is for any reason held invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are declared to be severable. (1969, c. 669, s. 1.)

Article 5.

Refrigeration Contractors.

§ 87-52. State Board of Refrigeration Examiners; appointment; term of office.

For the purpose of carrying out the provisions of this Article, the State Board of Refrigeration Examiners is created, consisting of seven members appointed by the Governor to serve seven-year staggered terms. The Board shall consist of one member who is a wholesaler or a manufacturer of refrigeration equipment; one member from an engineering school of The Greater University of North Carolina, one member from the Division of Public Health of The Greater University of North Carolina, two licensed refrigeration contractors, and two members who have no ties with the construction industry to represent the interest of the public at large. The term of office of one member shall expire

each year. Vacancies occurring during a term shall be filled by appointment of the Governor for the unexpired term. Whenever the term "Board" is used in this Article, it means the State Board of Refrigeration Examiners. No Board member shall serve more than one complete consecutive term. (1955, c. 912, s. 1; 1959, c. 1206, s. 2; 1973, c. 476, s. 128; 1979, c. 712, s. 1.)

Effect of Amendments. — The 1979 amendment rewrote this section.

Session Laws 1979, c. 712, s. 5, provides: "Schedule. — Members of the State Board of Refrigeration Examiners who are serving on the date of ratification of this act [May 30, 1979] shall continue to serve until their respective terms expire. Upon expiration of the term of the current member who is an employee of the Department of Human Resources, and of the current member who is a wholesaler or a manufacturer (as the case may be) of refrigeration equipment, the Governor shall appoint a public member as the successor to each of those two members. Thereafter, as terms of all members expire the Governor shall appoint a successor to each member from the same group as the person whose term is expiring."

Legal Periodicals. — For comment on this Article, see 33 N.C.L. Rev. 520 (1955).

§ 87-53. Removal, qualifications and compensation of members; allowance for expenses.

The Governor may remove any member of the Board for misconduct, incompetency or neglect of duty. Each member of the Board shall be a resident of this State at the time of his appointment. Payment of compensation and reimbursement of expenses of Board members shall be governed by G.S. 93B-5. (1955, c. 912, s. 2; 1969, c. 445, s. 9; 1979, c. 712, ss. 2, 7.)

Effect of Amendments. — The 1979 amendment deleted "a citizen of the United States and" following "shall be" in the second sentence, and rewrote the last sentence, which formerly read: "Each member of the Board shall receive the amount of per diem provided by G.S. 138-5 for attending sessions of the Board or of its committees, and for the time spent in necessary traveling in carrying out the provisions of this Article, and in addition to the per diem compensation, each member shall be reimbursed by the Board from funds in its hands for necessary traveling expenses and for such expenses incurred in carrying out the provisions hereof, as shall be approved by a majority of the members of the Board."

§ 87-54. Organization meeting; officers; seal; rules.

The Board shall within 30 days after its appointment meet in the City of Raleigh and organize, and shall elect a chairman and secretary and treasurer, each to serve for one year. Thereafter said officer shall be elected annually. The secretary and treasurer shall give bond approved by the Board for the faithful performance of his duties, in such sum as the Board may, from time to time, determine. The Board shall have a common seal, shall formulate rules to govern its actions, and is hereby authorized to employ such personnel as it may deem necessary to carry out the provisions of this Article. (1955, c. 912, s. 3.)

§ 87-55. Regular and special meetings; quorum.

The Board after holding its first meeting, as hereinbefore provided, shall thereafter hold at least two regular meetings each year. Special meetings may be held at such times and places as the bylaws and/or rules of the Board provide; or as may be required in carrying out the provisions hereof. A quorum of the Board shall consist of four members. (1955, c. 912, s. 4.)

§ 87-56. Record of proceedings and register of applicants; reports.

The Board shall keep a record of its proceedings and a register of all applicants for examination, showing the date of each application, the name, age and other qualifications, places of business and residence of each applicant. The books and records of the Board shall be prima facie evidence of the correctness of the contents thereof. On or before the first day of March of each year the Board shall submit to the Governor a report of its activities for the preceding year, and file with the Secretary of State a copy of such report, together with a statement of receipts and expenditures of the Board attested by the chairman and secretary. (1955, c. 912, s. 5.)

§ 87-57. License required of persons, firms or corporations engaged in the refrigeration trade.

In order to protect the public health, safety, morals, order and general welfare of the people of this State, all persons, firms or corporations, whether resident or nonresident of the State of North Carolina, before engaging in refrigeration business or contracting, as defined in this Article, shall first apply to the Board and shall procure a license. (1955, c. 912, s. 6.)

§ 87-58. Definitions; contractors licensed by Board; towns excepted; examinations.

(a) As applied in this Article, "refrigeration trade or business" is defined to include all persons, firms or corporations engaged in the installation, maintenance, servicing and repairing of refrigerating machinery, equipment, devices and components relating thereto and within limits as set forth in the codes, laws and regulations governing refrigeration installation, maintenance, service and repairs within the State of North Carolina or any of its political subdivisions, provided however, that this Article shall not apply to the replacement of lamps and fuses and to the installation and servicing of appliances and equipment connected by means of attachment plug-in devices to suitable receptacles which have been permanently installed, "or devices using gas as a fuel, or ice using or storing equipment"; and provided, further, that the provisions of this Article shall not repeal any wording, phrase, or paragraph as set forth in North Carolina General Statutes, Chapter 87, Article 2; and provided, further, that this Article shall not apply to employees of persons, firms, or corporations or persons, firms or corporations, not engaged in refrigeration contracting as herein defined, that install, maintain and service their own refrigerating machinery, equipment and devices. The provisions of this Article shall not apply to any person, firm or corporation engaged in the business of selling, repairing and installing any air-conditioning units, devices or systems for the purpose of cooling offices, buildings, houses, works, manufacturing plants, or any machinery, manufactured article or processing of material.

(b) The phrase "refrigeration contractor" is hereby defined to be a person, firm or corporation engaged in the business of refrigeration contracting.

(c) Any person, firm or corporation who for valuable consideration engages in the refrigeration business or trade as herein defined shall be deemed and held to be in the business of refrigeration contracting.

(d) In order to protect the public health, comfort and safety, the Board shall prescribe the standard of efficiency to be required of an applicant for license and shall give an examination designed to ascertain the technical and practical knowledge of the applicant concerning the analysis of plans and specifications, estimating cost, fundamentals of installation and design as same pertain to

refrigeration; and as a result of such examination, the Board shall issue a certificate of license in refrigeration to applicants who pass the required examination and a license shall be obtained in accordance with the provisions of this Article, before any person, firm or corporation shall engage in, or offer to engage in the business of refrigeration contracting as herein defined. Each application for examination shall be accompanied by a check, post-office money order or cash in the amount of the annual license fee required by this Article. Regular examinations shall be given in the months of April and October of each year and additional examinations may be given at such other times as the Board may deem wise and necessary. Any person may demand in writing a special examination and upon payment by the applicant of the cost of holding such examination and the deposit of the amount of the annual license fee, the Board in its discretion will fix a time and place for such examination. A person who fails to pass any examination shall not be reexamined until the next regular examination.

(e) Repealed by Session Laws 1979, c. 843, s. 1, effective July 1, 1979.

(f) Licenses Granted without an Examination. — Persons who had an established place of business prior to July 1, 1979, and who produce satisfactory evidence that they are engaged in the refrigeration business as herein defined in any city, town or other area in which Article 5 of Chapter 87 of the General Statutes did not previously apply shall be granted a certificate of license, without examination, upon application to the Board and payment of the license fee, provided such completed applications shall be made prior to June 30, 1981.

(g) The current license issued in accordance with the provisions of this Article shall be posted in the business location of the licensee, and its number shall appear on all proposals or contracts and requests for permits issued by municipalities. (1955, c. 912, s. 7; 1959, c. 1206, s. 1; 1979, c. 843, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted subsection (e), which limited the application of this Article to contractors engaging or attempting to engage in business in cities or towns having a population of more than 10,000, and rewrote subsection (f).

§ 87-59. Revocation or suspension of license for cause.

(a) The Board shall have power to revoke or suspend the license of any refrigeration contractor who is guilty of any fraud or deceit in obtaining a license, or who fails to comply with any provision or requirement of this Article, or for gross negligence, incompetency, or misconduct, in the practice of or in carrying on the business of a refrigeration contractor as defined in this Article. Any person may prefer charges of such fraud, deceit, gross negligence, incompetency, misconduct, or failure to comply with any provision or requirement of this Article, against any refrigeration contractor who is licensed under the provisions of this Article. All of such charges shall be in writing and verified by the complainant, and such charges shall be heard and determined by the Board in accordance with the provisions of Chapter 150A of the General Statutes.

(b) The Board shall adopt and publish guidelines, consistent with the provisions of this Article, governing the suspension and revocation of licenses.

(c) The Board shall establish and maintain a system whereby detailed records are kept regarding complaints against each licensee. This record shall include, for each licensee, the date and nature of each complaint, investigatory action taken by the Board, any findings of the Board, and the disposition of the matter. (1955, c. 912, s. 8; 1973, c. 1331, s. 3; 1979, c. 712, s. 3.)

Effect of Amendments. — The 1979 amendment designated the provisions of the former section as subsection (a) and added subsections (b) and (c).

§ 87-60. Reissuance of revoked licenses; replacing lost or destroyed licenses.

The Board may in its discretion reissue license to any person, firm or corporation whose license may have been revoked: Provided, three or more members of the Board vote in favor of such reissuance for reasons deemed sufficient by the Board. A new certificate of registration to replace any license which may be lost or destroyed may be issued subject to the rules and regulations of the Board. (1955, c. 912, s. 9.)

§ 87-61. Violations made misdemeanor; employees of licensees excepted.

Any person, firm or corporation who shall engage in or offer to engage in, or carry on the business of refrigeration contracting as defined in this Article, without first having been licensed to engage in such business, or businesses, as required by the provisions of this Article; or any person, firm or corporation holding a refrigeration license under the provisions of this Article who shall practice or offer to practice or carry on any type of refrigeration contracting not authorized by said license; or any person, firm or corporation who shall give false or forged evidence of any kind to the Board, or any member thereof, in obtaining a license, or who shall falsely impersonate any other practitioner of like or different name, or who shall use an expired or revoked license, or who shall violate any of the provisions of this Article, shall be guilty of a misdemeanor and upon conviction fined not less than one hundred dollars ($100.00) or imprisoned for not more than three months, or both, in the discretion of the court. Employees, while working under the supervision and jurisdiction of a person, firm or corporation licensed in accordance with the provisions of this Article, shall not be construed to have engaged in the business of refrigeration contracting. (1955, c. 912, s. 10.)

§ 87-61.1. Board may seek injunctive relief.

Whenever it appears to the Board that any person, firm or corporation is violating any of the provisions of this Article or of the rules and regulations promulgated under this Article, the Board may apply to the superior court for a restraining order and injunction to restrain the violation; and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed by reason of the violation. (1979, c. 712, s. 4.)

§ 87-62. Only one person in partnership or corporation need have license.

A corporation or partnership may engage in the business of refrigeration contracting provided one or more persons connected with such corporation or partnership is registered and licensed as herein required; and provided such licensed person shall execute all contracts, exercise general supervision over the work done thereunder and be responsible for compliance with all the provisions of this Article. Nothing in this Article shall prohibit any employee from becoming licensed pursuant to the provisions thereof. (1955, c. 912, s. 11.)

§ 87-63. License fees payable in advance; application of.

All license fees shall be paid in advance as hereafter provided to the secretary and treasurer of the Board and by him held as a fund for the use of the Board. The compensation and expenses of the members of the Board as herein provided, the salaries of its employees, and all expenses incurred in the discharge of its duties under this Article shall be paid out of such fund, upon the warrant of the chairman and secretary and treasurer: Provided, upon the payment of the necessary expenses of the Board as herein set out, and the retention by it of twenty-five per centum (25%) of the balance of funds collected hereunder the residue, if any, shall be paid to the State Treasurer. (1955, c. 912, s. 12.)

§ 87-64. Examination and license fees; annual renewal.

Each applicant for a license by examination shall pay to the Board of Refrigeration Examiners a nonrefundable examination fee in an amount not to exceed the sum of forty dollars ($40.00). In the event the applicant successfully passes said examination, the examination fee so paid shall be applied to the license fee required of licensees for the current year in which the examination was taken and passed.

The license of every person licensed under the provisions of this statute shall be annually renewed. On or before November 1 of each year the Board shall cause to be mailed an application for renewal of license to every person who has received from the Board a license to engage in the refrigeration business, as heretofore defined. On or before January 1 of each year every licensed person who desires to continue in the refrigeration business shall forward to the Board a renewal fee in an amount not to exceed forty dollars ($40.00) together with the application for renewal. Upon receipt of the application and renewal fee the Board shall issue a renewal certificate for the current year. Failure to renew the license annually shall automatically result in a forfeiture of the right to engage in the refrigeration business. Any licensee who allows his license to lapse may be reinstated by the Board upon payment of a fee not to exceed forty-five dollars ($45.00); provided any person who fails to renew his license for two consecutive years shall be required to take and pass the examination prescribed by the Board for new applicants before being licensed to engage further in the refrigeration business. (1955, c. 912, s. 13; 1969, c. 314; 1979, c. 843, ss. 3, 4.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote the first paragraph, which formerly provided for a fee of $30.00, to be refunded if the applicant failed the examination. The amendment also substituted "in an amount not to exceed forty dollars ($40.00)" for "of thirty dollars ($30.00)" in the third sentence of the second paragraph and substituted "not to exceed forty-five dollars ($45.00)" for "of thirty-five dollars ($35.00)" in the last sentence of the second paragraph.

§ 87-64.1. Public awareness program.

The Board shall establish and implement a public awareness program to inform the general public of the purpose and function of the Board. (1979, c. 712, s. 4.)

Article 6.

Water Well Contractors.

§§ 87-65 to 87-82: Repealed by Session Laws 1977, c. 712, s. 2, effective July 1, 1979.

Editor's Note. — This Article is repealed, effective July 1, 1979, by the "Sunset Law," Session Laws 1977, c. 712, s. 2, codified as § 143-34.11. Session Laws 1977, c. 712, s. 5, codified as § 143-34.14, provides: "Upon termination, each program or function shall continue in operational existence until July 1 of the next succeeding year as a winding-up period. During the winding-up period, termination shall not reduce or otherwise limit the powers or authority of the responsible agencies. Upon the expiration of the one-year period after termination, each such program or function shall cease operation entirely."

Article 7.

North Carolina Well Construction Act.

§ 87-83. Short title.

This Article shall be known and may be cited as the North Carolina Well Construction Act. (1967, c. 1157, s. 1.)

§ 87-84. Findings and policy.

The General Assembly of North Carolina finds that improperly constructed, operated, maintained, or abandoned wells can adversely affect the public health and the groundwater resources of the State. Consistent with the duty to safeguard the public welfare, safety, health and to protect and beneficially develop the groundwater resources of this State, it is declared to be the policy of this State to require that the location, construction, repair, and abandonment of wells, and the installation of pumps and pumping equipment conform to such reasonable requirements as may be necessary to protect the public welfare, safety, health and groundwater resources. (1967, c. 1157, s. 2.)

§ 87-85. Definitions.

As used in this Article, unless the context otherwise requires:

(1) "Abandoned well" means a well whose use has been discontinued, or which is in such a state of disrepair that continued use for obtaining groundwater or other useful purpose is impracticable.

(2) "Aquifer" means a geologic formation, group of such formations, or a part of such a formation that is water bearing.

(3) "Artesian well" means a well tapping a confined or artesian aquifer.

(4) "Environmental Management Commission" means the North Carolina Environmental Management Commission or its successor, unless otherwise indicated.

(5) "Construction of wells" means all acts necessary to construct wells for any intended purpose or use, including the location and excavation of the well; placement of casings, screens and fittings; development and testing.

(5a) "Department" means the Department of Natural Resources and Community Development unless otherwise indicated.

(6) "Installation of pumps and pumping equipment" means the procedure employed in the placement and preparation for operation of pumps and pumping equipment, including all construction involved in making entrances to the well and establishing seals.
(7) "Municipality" means a city, town, county, district, or other public body created by or pursuant to State law, or any combination thereof acting cooperatively or jointly.
(8) "Nonpotable mineralized water" means brackish, saline, or other water containing minerals of such quantity or type as to render the water unsafe, harmful or generally unsuitable for human consumption and general use.
(9) "Person" shall mean any and all persons, including individuals, firms, partnerships, associations, public or private institutions, municipalities or political subdivisions, governmental agencies, or private or public corporations organized or existing under the laws of this State or any other state or country.
(10) "Polluted water" means water containing organic or other contaminants of such type and quantity as to render it unsafe, harmful or unsuitable for human consumption and general use.
(11) "Pumps" and "pumping equipment" means any equipment or materials utilized or intended for use in withdrawing or obtaining groundwater including well seals.
(12) "Repair" means work involved in deepening, reaming, sealing, installing or changing casing depths, perforating, screening, or cleaning, acidizing or redevelopment of a well excavation, or any other work which results in breaking or opening the well seal.
(13) "Water supply well" means any well intended or usable as a source of water supply, but not to include a well constructed by an individual on land which is owned or leased by him, appurtenant to a single-family dwelling, and intended for domestic use (including household purposes, farm livestock, or gardens).
(14) "Well" means any excavation that is cored, bored, drilled, jetted, dug or otherwise constructed for the purpose of locating, testing or withdrawing groundwater or for evaluating, testing, developing, draining or recharging any groundwater reservoirs or aquifer, or that may control, divert, or otherwise cause the movement of water from or into any aquifer. Provided, however, this shall not include a well constructed by an individual on land which is owned or leased by him, appurtenant to a single-family dwelling, and intended for domestic use (including household purposes, farm livestock, or gardens).
(15) "Well driller," "driller" or "water well contractor" means any person, firm, or corporation engaged in the business of constructing wells.
(16) "Well seal" means an approved arrangement or device used to cap a well or to establish and maintain a junction between the casing or curbing of a well and the piping or equipment installed therein, the purpose or function of which is to prevent pollutants from entering the well at the upper terminal. (1967, c. 1157, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4.)

§ 87-86. Scope.

No person shall construct, repair, or abandon, or cause to be constructed, repaired, or abandoned, any well, nor shall any person install, repair, or cause to be installed or repaired, any pump or pumping equipment contrary to the provisions of this Article and applicable rules and regulations, provided that this Article shall not apply to any distribution of water beyond the point of discharge from the pump. (1967, c. 1157, s. 4.)

§ 87-87. Authority to adopt rules, regulations, and procedures.

The Environmental Management Commission shall adopt, and may from time to time amend, rules and regulations not inconsistent with this Article governing the location, construction, repair, and abandonment of wells, and the installation and repair of pumps and pumping equipment, and shall be responsible for the administration of this Article. With respect thereto it shall:

(1) Hold public hearings, upon not less than 30 days' prior notice setting forth the date, place, and time of hearing, and the proposed rules and regulations to be considered at said public hearing, which notice shall be published in one or more newspapers having general circulation throughout the State, in connection with proposed rules and regulations and amendments thereto;

(2) Enforce the provisions of this Article, and any rules and regulations not inconsistent with the provisions of this Article adopted pursuant thereto;

(3) Establish procedures and forms for the submission, review, approval, and rejection of applications, notifications, and reports required under this Article; and

(4) Issue such additional regulations as may be necessary to carry out the provisions of this Article. (1967, c. 1157, s. 5; 1973, c. 1262, s. 23.)

§ 87-88. General standards and requirements.

(a) Prior Permission. — Prior permission shall be obtained from the Environmental Management Commission for the construction of (i) any water well or of well systems with a designed capacity of 100,000 gallons per day or greater; and (ii) of any well in a geographical area where the Environmental Management Commission finds, after public hearings, such permission to be reasonably necessary to protect the groundwater resources and the public welfare, safety and health, taking into consideration other applicable State laws; provided, however, that the Environmental Management Commission shall not reject any application under this subsection for permission to construct a well except upon the ground that the well would not be in compliance with a provision of this Article or with a rule or regulation of the Environmental Management Commission adopted pursuant to the provisions of G.S. 87-87 of this Article. Notification of approval or rejection of an application for permission to construct a well shall be given the applicant within a period of 15 days after receipt of such application.

(b) Reports. — Any person completing or abandoning any well shall furnish the Environmental Management Commission a certified record of the construction or abandonment of such well within a period of 30 days after completion of construction or abandonment.

(c) Prevention of Contamination. — Every well shall be constructed and maintained in a condition whereby it is not a source or channel of contamination of the groundwater supply or any aquifer. Contamination as used herein shall mean the act of introducing into water foreign materials of such a nature, quality, and quantity as to cause degradation of the quality of the water.

(d) Valves and Casing on Flowing Artesian Wells. — Valves and casing on all flowing artesian wells shall be maintained in a condition so that the flow of water can be completely stopped when the well is not being put to a beneficial use. Valves shall be closed when a beneficial use is not being made.

(e) Access Port. — Every water-supply well and such other wells, as may be specified by the Environmental Management Commission, shall be equipped

with a usable access port or air line and to be a minimum of 0.5 inch inside diameter opening so that the position of the water level can be determined at any time. Such port shall be installed and maintained in such manner as to prevent entrance of water or foreign material.

(f) Mineralized Water. — Whenever a water-bearing stratum or aquifer that contains nonpotable mineralized water is encountered in well construction, the stratum shall be adequately cased or cemented off as conditions may require so that contamination of the overlying or underlying groundwater zones will not occur.

(g) Polluted Water. — In constructing any well, all water-bearing zones that are known to contain polluted water shall be adequately cased or cemented off so that pollution of the overlying and underlying groundwater zones will not occur.

(h) Well Test. — Every water-supply well shall be tested for capacity by a method and for a period of time acceptable to the Department and depending on the intended use of the well.

(i) Chlorination of the Well. — Upon completion of the well construction and pump installation, all water-supply wells installed for the purpose of obtaining groundwater for domestic consumption shall be sterilized in accordance with standards for sterilization of drinking water wells established by the U.S. Public Health Service.

(j) Use of Well for Recharge or Disposal. — No well shall be used for recharge, injection or disposal purposes without prior permission from the Environmental Management Commission after consultation with and recommendation by the Department of Human Resources.

(k) Abandonment of Wells. —

(1) Temporary Abandonment: When any well is temporarily removed from service, the top of the well shall be sealed with a water-tight cap or seal.

(2) Permanent Abandonment: Any well that is to be permanently abandoned shall be filled, plugged, or sealed in such a manner as to prevent the well from being a channel allowing the vertical movement of water and a source of contamination of the groundwater supply. (1967, c. 1157, s. 6; 1973, c. 476, s. 128; c. 1262, s. 23.)

§ 87-89. Existing installations.

No well or pump installation in existence and in use on July 6, 1967, shall be required to conform to provisions of subsection (a) of G.S. 87-88, or any rules or regulations adopted pursuant thereto not inconsistent with the provisions of this Article; provided, however, that any well now or hereafter abandoned, including any well deemed to have been abandoned, as defined in the Article, shall, within such time as may be specified by the Environmental Management Commission, be brought into compliance with the requirements of this Article and any applicable rules or regulations with respect to abandonment of wells. It is the intention of the General Assembly that if the provisions of this section are held invalid as a grant of an exclusive or separate emolument or privilege, within the meaning of Article I, Sec. 7 of the North Carolina Constitution, the remainder of this Article shall be given effect without the invalid provision or provisions. (1967, c. 1157, s. 7; 1973, c. 1262, s. 23.)

Editor's Note. — The reference to the Constitution in this section is to the Constitution adopted in 1868, as amended. See now N.C. Const., Art. 1, § 32.

§ 87-90. Rights of investigation, entry, access and inspection.

The Environmental Management Commission or Department shall have the right to conduct such investigations as it may reasonably find necessary to carry on its duties prescribed in this Article, and for this purpose to enter at reasonable times upon any property, public or private, for the purpose of investigating the condition, installation, or operation of any well or associated equipment, facility, or property, and to require written statements or the filing of reports under oath, with respect to pertinent questions relating to the installation or operation of any well: Provided, that no person shall be required to disclose any secret formula, processes or methods used in any manufacturing operation or any confidential information concerning business activities carried on by him or under his supervision. No person shall refuse entry or access to any authorized representative of the Environmental Management Commission who requests entry for purposes of inspection, and who presents appropriate credentials, nor shall any person obstruct, hamper or interfere with any such representative while in the process of carrying out his official duties, consistent with the provisions of this Article. (1967, c. 1157, s. 8; 1973, c. 1262, s. 23.)

§ 87-91. Notice.

(a) Whenever the Environmental Management Commission has reasonable grounds to believe that there has been a violation of this Article, or any rule or regulation adopted pursuant thereto, the Environmental Management Commission or Department shall give written notice to the person or persons alleged to be in violation. Such notice shall identify the provision of this Article, or regulation issued hereunder, alleged to be violated and the facts alleged to constitute such violation.

(b) Such notice shall be served on the person by sending the same to such person by registered or certified mail to his last known post-office address or by personal service by an agent or employee of the Department of Natural Resources and Community Development, and may be accompanied by an order of the Environmental Management Commission requiring described remedial action, which if taken within the time specified in such order, will effect compliance with the requirements of this Article and the rules and regulations issued hereunder. Such order shall become final unless a request for a hearing as hereinafter provided is made within 30 days from the date of service of such order. In addition to, or in lieu of such order, the Environmental Management Commission may appoint a time and place for such person to be heard. Notice by the Environmental Management Commission or Department may be given to any person upon whom a summons may be served in accordance with the provisions of law governing civil actions in the superior courts of this State. The Environmental Management Commission may prescribe the form and content of any particular notice. (1967, c. 1157, s. 9; 1973, c. 1262, s. 23; 1977, c. 771, s. 4.)

§ 87-92. Hearings.

The following provisions, together with any additional provisions not inconsistent herewith which the Environmental Management Commission may prescribe, shall be applicable in connection with hearings pursuant to this Article, except where other provisions are applicable in connection with specific types of hearings.

(1) Any hearing held pursuant to this Article whether called at the instance of the Environmental Management Commission or of any person, shall be held upon not less than 30 days' written notice given by the Environmental Management Commission to any person who is a party to the proceedings with respect to which such hearing is to be held, unless a shorter notice is agreed upon by all such parties.

(2) All hearings shall be before the Environmental Management Commission, or before one or more of its own members, or before one or more of the Department's own qualified employees, and the hearings shall be open to the public. Any employee of the Department or member of the Environmental Management Commission to whom a delegation of power is made to conduct a hearing shall report the hearing with its evidence and record to the Environmental Management Commission for decision.

(3) A full and complete record of all proceedings at any hearing shall be taken by a reporter appointed by the Department of Natural Resources and Community Development or by any other method approved by the Attorney General. Any party to a proceeding shall be entitled to a copy of such record upon the payment of the reasonable cost thereof as determined by the Department of Natural Resources and Community Development.

(4) The Environmental Management Commission and the Department's agents shall follow generally the procedures applicable in civil actions in the superior court insofar as practicable, including rules and procedures with regard to the taking and use of depositions, the making and use of stipulations, and the entering into of agreed settlements and consent orders.

(5) The Department of Natural Resources and Community Development, or the duly authorized agents of the said Department of Natural Resources and Community Development, may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, and other documents belonging to the said person.

(6) Subpoenas issued by the Environmental Management Commission, in connection with any hearing, shall be directed to any officer authorized by law to serve process, and the further procedures and rules of law applicable with respect thereto shall be prescribed in connection with subpoenas to the same extent as if issued by a court of record. In case of a refusal to obey a subpoena issued by the Environmental Management Commission, application may be made to the superior court of the appropriate county for enforcement thereof.

(7) The burden of proof at any hearing shall be upon the person or the Environmental Management Commission as the case may be, at whose instance the hearing is being held.

(8) No decision or order of the Environmental Management Commission shall be made in any proceeding unless the same is supported by competent, material and substantial evidence upon consideration of the whole record.

(9) Following any hearing, the Environmental Management Commission shall afford the parties thereto a reasonable opportunity to submit within such time as prescribed by the Environmental Management Commission proposed findings of fact and conclusions of law and any brief in connection therewith. The record in the proceeding shall show the Environmental Management Commission's ruling with respect to each such requested finding of fact and conclusion of law.

(10) All orders and decisions of the Environmental Management Commission shall set forth separately the Environmental Man-

agement Commission's findings of fact and conclusions of law and shall, wherever necessary, cite the appropriate provision of law or other source of authority on which any action or decision of the Environmental Management Commission is based.

(11) As previously recited above, the Environmental Management Commission shall have the authority to adopt a seal which shall be the seal of said Environmental Management Commission and which shall be judicially noticed by the courts of the State. Any document, proceeding, order, decree, special order, rule, regulation, rule of procedure or any other official act or records of the Environmental Management Commission or its minutes may be certified by the Secretary of Natural Resources and Community Development under his hand and the seal of the Environmental Management Commission and when so certified shall be received in evidence in all actions or proceedings in the courts of the State without further proof of the identity of the same if such records are competent, relevant and material in any such action or proceeding. The Environmental Management Commission shall have the right to take judicial notice of all studies, reports, statistical data or any other official reports or records of the federal government or of any sister state and all such records, reports and data may be placed in evidence by the Environmental Management Commission or by any other person or interested party where material, relevant and competent. (1967, c. 1157, s. 10; 1973, c. 1262, s. 23; 1977, c. 771, s. 4.)

§ 87-93. Judicial review.

Any person against whom any final order or decision has been made except where no appeal is allowed as provided by G.S. 143-215.2(j) shall have a right of appeal to the Superior Court of Wake County or of the county where the order or decision is effective within 30 days after such order or decision has become final. Upon such appeal the Department shall send a certified transcript of all testimony and exhibits introduced before the Environmental Management Commission, the order or decision, and the notice of appeal to the superior court. The matter on appeal shall be heard and determined de novo on the transcript certified to the court and any evidence or additional evidence as shall be competent under rules of evidence then applicable to trials in the superior court without a jury upon any question of fact; provided, the court shall allow any party to introduce evidence or additional evidence upon any question of fact. At the conclusion of the hearing, the judge shall make findings of fact and enter his decision thereto. Appeals from the judgment and orders of the superior court shall lie to the Supreme Court. No bond shall be required of the Environmental Management Commission to the Supreme Court.

(1) Upon appeal filed by any party, the Environmental Management Commission shall forthwith furnish each party to the proceeding with a copy of the certified transcript and exhibits filed with the Environmental Management Commission. A reasonable charge shall be paid the Department for said copies.

(2) Within 15 days after receipt of copy of certified transcript and exhibits, any party may file with the court exceptions to the accuracy or omissions of any evidence or exhibits included in or excluded from said transcript. (1967, c. 1157, s. 11; 1973, c. 1262, s. 23.)

Editor's Note. — Section 143-215.2, as rewritten in 1973, no longer contains a subsection (j). The subject of appeals is covered by § 143-215.2(c).

§ 87-94. Penalties.

Any person who violates any provisions of this Article, or regulations issued hereunder, or order pursuant thereto, shall be subject to penalty of one hundred dollars ($100.00). In addition, if any person is adjudged to have committed such violation willfully, the court may determine that each day during which such violation continued constitutes a separate violation. (1967, c. 1157, s. 12.)

§ 87-95. Injunctive relief.

Upon violation of any of the provisions of or any order issued pursuant to this Article, or duly adopted regulation of the Commission implementing the provisions of this Article, the Secretary of the Department of Natural Resources and Community Development may, either before or after the institution of proceedings for the collection of the penalty imposed by this Article for such violations, request the Attorney General to institute a civil action in the superior court in the name of the State upon the relation of the Department of Natural Resources and Community Development for injunctive relief to restrain the violation or require corrective action, and for such other or further relief in the premises as said court shall deem proper. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this Article for any violation of same. (1967, c. 1157, s. 13; 1973, c. 1262, s. 23; 1975, c. 842, s. 1; 1977, c. 771, s. 4.)

§ 87-96. Conflict with other laws.

The provisions of any law, or regulation of the State or any municipality establishing standards affording greater protection to the public welfare, safety, health and groundwater resources shall prevail within the jurisdiction of such agency or municipality over the provisions of this Article and regulations adopted hereunder.

This Article or any rules or regulations adopted pursuant thereto, shall not be in conflict with any laws, rules, or regulations of the Commission for Health Services pertaining to public health, wells and groundwater supplies. All laws, rules, and regulations presently in effect that are administered by the Department of Human Resources shall remain in effect. (1967, c. 1157, s. 14; 1973, c. 476, s. 128.)

Chapter 88.

Cosmetic Art.

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Repeal of Chapter. — This Chapter is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.

On and after June 30, 1933, no person or combination of persons shall, for pay or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this Chapter by the State Board of Cosmetic Art Examiners hereinafter established.

The operator of a cosmetic art shop, beauty parlor or hairdressing establishment may employ unlicensed personnel to do shampooing only, where the shampooing is done under the supervision of a registered cosmetologist. As used in this paragraph, "shampooing" includes only the application of shampoo

to hair and the removal of the shampoo from the hair, and does not include any arranging, dressing, waving, marcelling or other treatment of hair. This paragraph does not apply to barbershops. This paragraph shall not apply to the following counties: Duplin, Durham, Guilford, Jones, Lenoir, Mecklenburg, Onslow, Randolph, Richmond, Sampson, Scotland.

On and after February 1, 1976, any person, firm or corporation, before establishing or opening a cosmetic art shop not heretofore licensed by the State Board of Cosmetic Art, shall make application to the Board, on forms to be furnished by the Board, for a permit to operate a cosmetic art shop. The shop of such applicant shall be inspected and approved by the State Board of Cosmetic Art by an agent designated for such purpose by the Board before such cosmetic art shop shall be opened for business. It shall be unlawful to open a new cosmetic art shop for the practice of cosmetology until such shop has been inspected, as heretofore required, and determined by the Board to be in compliance with the requirements set forth in this Chapter. Upon the determination by the Board that the applicant has complied with the requirements of this Chapter, the Board shall issue to such applicant a permit to operate a cosmetic art shop. A fee of twenty-five dollars ($25.00) shall be paid to the Board for the inspection of a cosmetic art shop. Such fee must accompany the application for a permit to operate a cosmetic art shop at the time such application is filed with the Board.

All cosmetic art shops in operation as of February 1, 1976, shall be required to make application to the Board of Cosmetic Art, on forms supplied by the Board, for a permit to operate. The fee required for such permit shall be three dollars ($3.00) per active booth in said shop.

Thereafter, all permits shall be renewed as of the first day of February of each and every year, and the fee for annual renewal of cosmetic art shop permits shall be as set forth in G.S. 88-21. No permit or certificate shall be transferable. Each cosmetic art shop permit shall be conspicuously posted within such cosmetic art shop for which same is issued. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472.)

§ 88-2. Cosmetic art.

Any one or a combination of the following practices, when done for pay, or reward, shall constitute the practice of cosmetic art in the meaning of this Chapter:

The systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands; the use of cosmetic preparations and antiseptics; manicuring; cutting, dyeing, cleansing, arranging, dressing, waving, and marcelling of the hair, and the use of electricity for stimulating growth of hair. (1933, c. 179, s. 2.)

§ 88-3. Cosmetologist.

"Cosmetologist" is any person who, for compensation, practices cosmetic art, or conducts, or maintains a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 3.)

§ 88-4. Beauty parlor, etc.

"Cosmetic art shop," "beauty parlor," or "hairdressing establishment" is any building, or part thereof wherein cosmetic art is practiced. (1933, c. 179, s. 4.)

§ 88-5. Manager.

"Manager," or "managing cosmetologist," as used in this Chapter, is defined as any person who has direct supervision over operators, or apprentices in a cosmetic art shop, beauty parlor, or hairdressing establishment. (1933, c. 179, s. 5.)

§ 88-6. Operator.

"Operator" is any person who is not a manager, itinerant, or apprentice cosmetologist, who practices cosmetic art under the direction and supervision of a managing cosmetologist. (1933, c. 179, s. 6.)

§ 88-7. Itinerant cosmetologist; application of Chapter.

"Itinerant cosmetologist" is any person who practices as a business cosmetic art outside of a cosmetic art shop, beauty parlor, or hairdressing establishment, either in going from house to house or from place to place at regular, or irregular intervals: Provided, this Chapter shall not apply to persons attending female institutions of learning, who defray the cost or a part of the cost of such attendance by the occasional practice of cosmetic art as defined herein, or to persons practicing the cosmetic art in rural communities without the use of mechanical appliances. (1933, c. 179, s. 7.)

Cross References. — As to other persons exempt from this Chapter, see § 88-22.

§ 88-8. Manicurist.

"Manicurist" means any person who does manicuring or pedicuring and who makes a charge for such service. (1933, c. 179, s. 8; 1963, c. 1257, s. 1.)

§ 88-9. Apprentice.

"Apprentice" is any person who is not a manager, itinerant cosmetologist, or operator, who is engaged in learning and acquiring the practice of cosmetic art under the direction and supervision of a licensed managing cosmetologist. (1933, c. 179, s. 9.)

§ 88-10. Qualifications for certificate of registration.

No person shall be issued a certificate of registration as a registered apprentice by the State Board of Cosmetic Art Examiners, hereinafter established —

(1) Unless such person is at least 16 years of age.

(2) Repealed by Session Laws 1973, c. 450, s. 1.

(3) Unless such person has completed at least 1,200 hours in classes in a reliable cosmetic art school, or college approved by said Board of Cosmetic Art Examiners.

(4) Unless such person passes the examination prescribed by the Board of Cosmetic Art Examiners and pays the required fees hereinafter enumerated.

(5) Unless such person is admitted as an apprentice under the reciprocity section of this Chapter. (1933, c. 179, s. 10; 1941, c. 234, s. 1; 1953, c. 1304, ss. 1, 2; 1963, c. 1257, s. 2; 1973, c. 450, s. 1.)

§ 88-11. When apprentice may operate shop.

No registered apprentice, registered under the provisions of this Chapter, shall operate a cosmetic art beauty shop, beauty parlor, or hairdressing establishment in this State, but must serve his or her period of apprenticeship under the direct supervision of a registered managing cosmetologist as required by this Chapter: Provided, however, that any apprentice who, on June 30, 1933, is regularly employed under the direct supervision of one who is entitled to registration as a managing cosmetologist under the provisions of G.S. 88-19 shall, upon recommendation of such managing cosmetologist, and upon passing a satisfactory physical examination, be entitled to registration as a registered cosmetologist. (1933, c. 179, s. 11.)

CASE NOTES

This Chapter does not alter common-law rules governing liability of employer of an apprentice cosmetologist for the consequences of the employee's acts in the course of her employment. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Liability of Cosmetologist. — Like the physician, or other person undertaking to perform professional services, the cosmetologist is not an insurer against injury from the treatment she undertakes to render, nor is she liable for the consequences of every error of judgment. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Employer Need Not Personally Direct Each Act of Apprentice. — It was not the intent of this section to impose upon the employer of an apprentice cosmetologist a duty, owed to customers of the establishment, to stand at the side of the apprentice and personally direct each act performed in the rendering of each service to each customer. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Assignment of Customer to Inexperienced Apprentice. — The proprietor of a beauty salon may not, by the assignment of a customer to an inexperienced apprentice, nothing else appearing, reduce the undertaking of the proprietor to bring to the performance of the service the degree of professional skill and ability ordinarily possessed by those engaged in the trade in the particular locality or area. If, however, the apprentice performing the service possesses such skill, exercises reasonable care in the application of it to the customer's case, and uses her best judgment in the performance of the service, there can be no liability for injury upon either the apprentice or the proprietor of a salon on the basis of negligence in the performance of the service. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

§ 88-12. Qualifications for registered cosmetologist.

A certificate of registration as a registered cosmetologist shall be issued by the Board, hereinafter designated, to any person who is qualified under the provisions of this Chapter, or meets the following qualifications:

(1) Who is qualified under the provisions of G.S. 88-10;
(2) Who is at least 17 years of age;
(3) Repealed by Session Laws 1973, c. 450, s. 2;
(4) Who has worked as a registered apprentice for a period of at least six months under the direct supervision of a registered managing cosmetologist, and this fact must be demonstrated to the Board of Cosmetic Art Examiners by the sworn affidavit of three registered cosmetologists, or by such other methods of proof as the board may prescribe and deem necessary; or has completed 300 hours of cosmetic art education in a cosmetic art school, public school or post-secondary institution (community college or technical institute), college or university approved by the board in addition to the 1,200 hours set out in G.S. 88-10, making a total of 1,500 hours; and
(5) Who has passed a satisfactory examination, conducted by the Board, to determine his or her fitness to practice cosmetic art, such examination

to be prepared and conducted, as to determine whether or not the applicant is possessed of the requisite skill in such trade, to properly perform all the duties thereof, and services incident thereto, and has sufficient knowledge concerning the diseases of the face, skin, and scalp, to avoid the aggravation and spreading thereof in the practice of said profession. (1933, c. 179, s. 12; 1953, c. 1304, s. 3; 1973, c. 450, s. 2; 1977, c. 899, s. 1.)

CASE NOTES

Cited in Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 25 N.C. App. 131, 212 S.E.2d 657 (1975); Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978).

§ 88-13. State Board of Cosmetic Art Examiners created; appointment and qualifications of members; term of office; removal for cause.

A board to be known as the State Board of Cosmetic Art Examiners is hereby established, to consist of three members appointed by the Governor of the State. Each member shall be an experienced cosmetologist, who has followed the practice of all branches of the cosmetic art in the State of North Carolina for at least five years next preceding his or her appointment, and who, during such period of time, and at the time of appointment, shall be free of connection in any manner with any cosmetic art school or college or academy or training school. Certification is required of each person prior to his appointment to the Board.

On July 1, 1977, the Governor shall appoint three members for a term of three years. Thereafter, as the term of any member expires, their successor shall be appointed for a term of three years and shall serve until their successor is appointed and qualified. The Governor, at his option, may remove any member for good cause shown and appoint members to fill unexpired terms. (1933, c. 179, s. 13; 1935, c. 54, s. 2; 1973, c. 1360, s. 1; 1975, c. 857, s. 2.)

CASE NOTES

Relator Must Show Interest in Action to Vacate Office. — It is necessary that a relator in an action to vacate an office under this section, have some interest in the action, though it is not required that he be a contestant for the office. State ex rel. Associated Cosmetologists of N.C., Inc. v. Ritchie, 206 N.C. 808, 175 S.E. 308 (1934).

Cited in Poole v. State Bd. of Cosmetic Art Exmrs., 221 N.C. 199, 19 S.E.2d 635 (1942).

§ 88-14. Office in Raleigh; seal; officers and secretary.

The Board of Cosmetic Art Examiners shall maintain a suitable office in Raleigh, North Carolina, and shall adopt and use a common seal for the authentication of its orders and records. The Board shall operate under its present structure and composure until July 1, 1977, and thereafter said Board shall elect its own officers and in addition thereto shall employ an executive secretary, who shall not be a member of the Board. The salary of such executive secretary shall be fixed by the State Personnel Department. The secretary shall keep and preserve all the records of the Board, issue all necessary notices and perform such other duties, clerical and otherwise, as may be imposed upon

such secretary by said Board of Cosmetic Art Examiners. The secretary is hereby authorized and empowered to collect in the name and on behalf of said Board the fees prescribed by this Chapter and shall turn over to the State Treasurer all funds collected or received under this Chapter, which fund shall be credited to the Board of Cosmetic Art Examiners, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina exclusively for the administration and enforcement of the provisions of this Chapter. The said secretary shall, before entering upon the duties of the office, execute a satisfactory bond with a duly licensed surety or other surety approved by the Director of the Budget, said bond to be in the penal sum of not less than ten thousand dollars ($10,000), and conditioned upon the faithful performance of the duties of the office and the true and correct accounting of all funds received by such secretary by virtue of such office. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8. Nothing in this Chapter shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer, derived from fees and fines collected under the provisions of this Chapter and received by the State Treasurer in the manner aforesaid. (1933, c. 179, s. 14; 1943, c. 354, s. 1; 1957, c. 1184, s. 1; 1969, c. 844, s. 4; 1971, c. 355, s. 1; c. 616, ss. 1, 2; 1975, c. 857, s. 3.)

§ 88-15. Compensation and expenses of Board members; inspectors; reports; budget; audit.

Each member of the Board of Cosmetic Art Examiners shall receive compensation for his services and expenses as provided in G.S. 93B-5 but shall be limited to payment for services deemed to be official business of the Board. Official business of the Board deemed to be official business of the Board shall include meetings called by the chairman, supervision or administering of examinations, or investigations or inspections made subject to the regulations cited in the following paragraph. No Board member shall be authorized to attend trade shows or to travel out of the State and no per diem or travel expenses shall be paid for such travel unless said Board member is an officer of the organization holding such meeting.

Said Board, with the approval of the Director of the Budget, shall appoint necessary inspectors who shall be experienced in all branches of cosmetic art. The salaries for such inspectors shall be fixed by the State Personnel Department. The inspectors or agents so appointed shall perform such duties as may be prescribed by the Board. Any inspector appointed under authority of this section or any member of the Board shall have the authority at all reasonable hours to examine cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies or training schools with respect to and in compliance with the provisions of this Chapter. No member of the Board shall exercise this authority on a routine basis but shall do so at the direction of either the Board, the chairman, the executive secretary or the inspector assigned to the territory, such direction to be governed by a complaint or problem registered with the Board of Cosmetic Art office or when an inspector deems it necessary to call in a Board member. Reimbursement for per diem and travel is subject to these provisions. Prior to reimbursement, the requesting Board member must submit a detailed written report to the Board of Cosmetic Art office for the official file. The inspectors and agents appointed under authority of this Chapter shall make such reports to the Board of Cosmetic Art Examiners as said Board may require. The said Board shall, on or before June 1 of each year, submit a budget to the Director of the Budget for the ensuing fiscal year, which shall begin July first of each year. The said budget so submitted shall include all estimated receipts and expenditures for

the ensuing fiscal year including the estimated compensation and expenses of Board members. The said budget shall be subject to the approval of the Director of the Budget and no expenditures shall be made unless the same shall have been set up in the budget adopted by the Board of Cosmetic Art Examiners, and approved by the Director of the Budget of the State of North Carolina; that all salaries and expenses in connection with the administration of this Chapter shall be paid upon a warrant drawn on the State Treasurer, said warrants to be drawn by the secretary of the Board and approved by the State Auditor.

The provisions of the Executive Budget Act and the Personnel Act shall fully apply to the administration of this Chapter.

There shall be annually made by the Auditor of the State of North Carolina a full audit and examination of the receipts and disbursements of the State Board of Cosmetic Art Examiners. The State Board shall report annually to the Governor a full statement of receipts and disbursements and also a full statement of its work during the year. (1933, c. 179, s. 15; 1935, c. 54, s. 3; 1941, c. 234, s. 2; 1943, c. 354, s. 2; 1957, c. 1184, s. 2; 1971, c. 355, ss. 2, 3; c. 616, ss. 1, 3; 1973, c. 1360, s. 2; 1975, c. 857, s. 4.)

§ 88-16. Applicants for examination.

Each applicant for an examination shall:

(1) Make application to the Board of Cosmetic Art Examiners on blank forms prepared and furnished by the full-time secretary, such application to contain proof under the applicant's oath of the particular qualifications of the applicant.

(2) Pay to the secretary of the said Board the required examination fee, hereinafter established.

(3) All applications for said examination must be filed with the full-time secretary at least 30 days prior to the actual taking of such examination by applicant. (1933, c. 179, s. 16.)

§ 88-17. Regular and special meetings of Board; examinations.

The Board of Cosmetic Art Examiners shall meet four times a year in the months of January, April, July and October on the first Tuesday in each of said months, for the purpose of transacting all business of the Board of Cosmetic Art Examiners and to conduct examinations of applicants for certificates of registration to practice as registered cosmetologists, and of applicants for certificates of registration to practice as registered apprentices, meetings to be held at such places as the Board may determine to be most convenient for such examinations; provided, however, that examinations are conducted at no less than three locations other than Raleigh, scattered geographically throughout the State of North Carolina, and the locations for examinations conducted outside of Raleigh shall be in publicly supported two-year post-secondary educational institutions with appropriate facilities. The examinations conducted for applicants for certificates of registration as registered cosmetologists and registered apprentices shall be open to all applicants, and shall include such practical demonstration and oral and written tests as the said Board may determine and the examinations conducted for applicants for certificates of registration as registered cosmetologists and registered apprentices shall be administered by teachers or instructors qualified and approved by the Board of Cosmetic Art Examiners. Examinations held in post-secondary educational institutions shall be supervised by not more than one member of the Board of Cosmetic Art and shall be administered by teachers or instructors, other than Board members, who are qualified and approved by the Board. Examinations

held in Raleigh shall be administered by the minimum number of Board members required to conduct such examinations and the chairman of the Board is authorized and empowered to make the decision, based on the number of applicants scheduled for examination, and to appoint such Board members to conduct the scheduled examinations. The chairman of the Board is hereby authorized and empowered to call a meeting of said Board whenever necessary, said meetings to be in addition to the quarterly meetings hereinbefore provided for. No payment for per diem or travel expenses shall be authorized or paid for Board meetings other than those called by the chairman of the Board. (1933, c. 179, s. 17; 1935, c. 54, s. 4; 1973, c. 1360, ss. 3, 4; 1975, c. 857, s. 5.)

§ 88-18. Certificate of registration.

Whenever the provisions of this Chapter have been complied with, the said Board shall issue or cause to be issued, a certificate of registration as registered cosmetologist, or as a registered apprentice to the applicant, as the case may be. (1933, c. 179, s. 18.)

§ 88-19. Admitting operators from other states.

Any person who has been licensed to practice cosmetic art in another state, either as an apprentice or registered cosmetologist by the examining board of such other state by whatever name called, shall be admitted to practice cosmetic art in North Carolina under the same reciprocity or comity provisions which the state of his or her registration or licensing grants to cosmetologists licensed under the laws of this State. All applicants from states which have no examining, licensing or registering board or agency for cosmetologists and all applicants from states which do not grant reciprocity or comity to cosmetologists licensed under the laws of this State, before being issued a certificate of registration to practice cosmetic art in this State, must have completed at least 1200 hours in classes in a reliable college approved by the Board of Cosmetic Art Examiners and shall be required to take and pass an examination as provided in subdivision (5) of G.S. 88-20 and pay a fee of fifteen dollars ($15.00) in addition to the regular license fee of eight dollars ($8.00). (1933, c. 179, s. 19; 1953, c. 1304, s. 4; 1957, c. 1184, s. 3; 1963, c. 1257, s. 3; 1973, c. 256, s. 1.)

§ 88-20. Registration procedure.

The procedure for the registration of present practitioners of cosmetic art shall be as follows:

(1) Every person who has been practicing cosmetic art in North Carolina and who is practicing such art on June 30, 1933, upon making an affidavit to that effect, and complying with the provisions of this Chapter as to physical fitness, and upon paying the required fee to the Board of Cosmetic Art Examiners shall be issued a certificate of registration as a registered cosmetologist.

(2) Any person who, on June 30, 1933, is operating a shop as a managing cosmetologist, shall, upon making an affidavit to that effect, and complying with the provisions of this Chapter as to physical fitness and upon paying the required fee to the Board of Cosmetic Art Examiners be issued a certificate of registration as a managing cosmetologist.

(3) Any person who, on June 30, 1933, is regularly employed under a person who has registered as a managing cosmetologist shall be entitled to register as a cosmetologist as provided in G.S. 88-11.

(4) All persons who are not actively engaged in the practice of cosmetic art on June 30, 1933, shall be required to comply with all of the provisions of this Chapter.

(5) All persons, however, who do not make application prior to January 1, 1942, shall be required to take the examination prescribed by the State Board of Cosmetic Art Examiners and otherwise comply with the provisions of this Chapter, as amended, before engaging in the practice of cosmetic art. (1933, c. 179, s. 20; 1941, c. 234, s. 3.)

CASE NOTES

Subdivision (1) prescribes a mandatory duty, and the Board of Cosmetic Art Examiners has no discretionary power to refuse to issue the certificate in such instance, and therefore a complaint in suit for mandamus alleging full compliance with the provisions of the statute in this respect and the refusal of the Board to issue the certificate to plaintiff, is not demurrable. Poole v. State Bd. of Cosmetic Art Exmrs., 221 N.C. 199, 19 S.E.2d 635 (1942).

§ 88-21. Fees required.

The fee to be paid by an applicant for a certificate of registration to practice cosmetic art as an apprentice shall be five dollars ($5.00). The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered cosmetologist shall be ten dollars ($10.00). The regular or annual license fee of a registered cosmetologist shall be eight dollars ($8.00), and the renewal of the license of a registered cosmetologist shall be eight dollars ($8.00) if renewed before the same becomes delinquent, and if renewed after the same becomes delinquent there shall be charged a penalty of three dollars ($3.00) in addition to the regular license fee of eight dollars ($8.00); the annual license fee of a registered apprentice shall be four dollars ($4.00), and all licenses, both for apprentices and for registered cosmetologists, shall be renewed as of the first day of October each and every year. All cosmetic art shops in operation shall pay an annual fee of three dollars ($3.00) for each active booth on or before February 1, if paid before it becomes delinquent, and if renewed after the same becomes delinquent, there shall be charged a penalty of ten dollars ($10.00) in addition to the regular permit fee. The fee for registration of an expired permit of a cosmetic art shop shall be twenty-five dollars ($25.00). All cosmetic art schools shall pay a fee of fifty dollars ($50.00) annually. The fees herein set out shall not be increased by the Board of Cosmetic Art Examiners, but said Board may regulate the payment of said fees and prorate the license fees in such manner as it deems expedient. The fee for registration of an expired certificate for a registered cosmetologist shall be five dollars ($5.00) and registration of an expired certificate of an apprentice shall be three dollars ($3.00). (1933, c. 179, s. 21; 1955, c. 1265; 1973, c. 256, s. 2; 1975, c. 857, s. 6.)

§ 88-22. Persons exempt.

The following persons are exempt from the provisions of this Chapter while engaged in the proper discharge of their professional duties:

(1) Persons authorized under the laws of the State to practice medicine and surgery.
(2) Commissioned medical or surgical officers of the United States army, navy, or marine hospital services.
(3) Registered nurses.
(4) Undertakers.
(5) Registered barbers.
(6) Manicurists as herein defined. (1933, c. 179, s. 22.)

Cross References. — As to other persons exempt from this Chapter, see § 88-7.

§ 88-23. Rules and regulations of Board; inspections; granting of certificates to Board members; employment of former Board members.

The State Board of Cosmetic Art Examiners shall have authority to make reasonable rules and regulations for the sanitary management of cosmetic art shops, beauty parlors, hairdressing establishments, cosmetic art schools, colleges, academies and training schools, hereinafter called shops and schools, and to have such rules and regulations enforced. The duly authorized agents of said Board shall have authority to enter upon and inspect any shop or school at any time during business hours. A copy of the rules and regulations adopted by said Board and approved by the Commission for Health Services shall be furnished from the office of the Board or by the above-mentioned authorized agents to the owner or manager of each shop or school in the State, and such copy shall be kept posted in a conspicuous place in each shop and school.

The Board of Cosmetic Art shall not hereafter be authorized to grant teacher's or instructor's certificates to Board members during their term of appointment on said Board. Teacher's or instructor's certificates granted to members by official action of the Board, without prior examination, shall be rescinded upon such member's termination from the Board of Cosmetic Art.

Any person appointed to the Board of Cosmetic Art shall be prohibited from being employed by the Board for a period of one year after that person's term of appointment expires, whether or not that person served his whole term. (1933, c. 179, s. 23; 1935, c. 54, s. 5; 1973, c. 476, s. 128; 1975, c. 857, s. 9.)

§ 88-24. Posting of certificates.

Every holder of a certificate of registration shall display it in a conspicuous place adjacent to or near his, or her work chair. (1933, c. 179, s. 24.)

§ 88-25. Annual renewal of certificates and permits.

Every registered cosmetologist and every registered apprentice, who continues in active practice or service shall annually, on or before October 1 of each year, renew his, or her certificate of registration which has not been renewed prior to, or during the month of October in any year, and which shall expire on the first day of November in that year. A registered cosmetologist, or a registered apprentice whose certificate of registration has expired may have his or her certificate restored immediately upon payment of the required restoration fee. Any registered cosmetologist who retires from the practice of cosmetic art for not more than three years may renew his or her certificate of registration upon payment of the required restoration fee, and by paying the license fee for the years that such license fees have not been paid.

Every cosmetic art shop, which continues to operate, shall annually, on or before February 1 of each year, renew its permit to operate, and any permit that has not been renewed before or during the month of February in any year shall expire on the first day of March in that year. A cosmetic art shop whose permit has expired may have its permit restored immediately upon payment of restoration fee, as required in G.S. 88-21, in addition to the renewal fee. (1933, c. 179, s. 25; 1957, c. 1184, s. 4; 1973, c. 256, s. 3; c. 450, s. 3; 1975, c. 857, s. 7.)

§ 88-26. Causes for revocation of certificates.

The Board of Cosmetic Art Examiners may either refuse to issue or renew, or may suspend, or revoke any certificate of registration for any one, or combination of the following causes:

(1) Conviction of a felony shown by certified copy of the record of the court of conviction.
(2) Gross malpractice, or gross incompetency, which shall be determined by the Board of Cosmetic Art Examiners.
(3) Continued practice by a person knowingly having an infectious, or contagious disease.
(4) Advertising by means of knowingly false, or deceptive statements.
(5) Habitual drunkenness, or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.
(6) The commission of any of the offenses described in G.S. 88-28, subdivisions (3), (4), (6) and (7). (1933, c. 179, s. 26; 1941, c. 234, s. 4.)

§ 88-27. Procedure for refusal, suspension or revocation of certificate.

The Board may neither refuse to issue, nor refuse to renew, nor suspend, nor revoke any certificate of registration, however, for any of these causes, except in accordance with the provisions of Chapter 150A of the General Statutes. (1933, c. 179, s. 27; 1939, c. 218, s. 1; 1953, c. 1041, s. 8; 1973, c. 1331, s. 3.)

§ 88-28. Acts made misdemeanors.

Each of the following constitutes a misdemeanor punishable upon conviction by a fine of not less than twenty-five dollars ($25.00) and not more than one hundred dollars ($100.00), or up to 30 days in jail, or both:

(1) The violation of any of the provisions of G.S. 88-1.
(2) Permitting any person in one's employ, supervision, or control to practice as an apprentice unless that person has a certificate of registration as a registered apprentice.
(3) Permitting any person in one's employ, supervision, or control, to practice as a cosmetologist unless that person has a certificate as a registered cosmetologist.
(4) Obtaining, or attempting to obtain, a certificate of registration for money other than required fee, or any other thing of value, or by fraudulent misrepresentations.
(5) Practicing or attempting to practice by fraudulent misrepresentations.
(6) The willful failure to display a certificate of registration as required by G.S. 88-24.
(7) The willful violation of the reasonable rules and regulations adopted by the State Board of Cosmetic Art Examiners and approved by the Commission for Health Services. (1933, c. 179, s. 28; 1949, c. 505, s. 2; 1973, c. 476, s. 128; 1975, c. 857, s. 8.)

CASE NOTES

Variance. — Where defendant was tried upon a warrant charging that she permitted persons in her employ to practice as apprentices without certificate of registration as registered apprentices or registered cosmetologists, and the jury returned a special verdict to the effect that defendant permitted unlicensed students to work in her school, there is a fatal variance between the warrant and the special verdict and a failure of proof, and the adjudication that the defendant was not guilty is affirmed. State v. McIver, 216 N.C. 734, 6 S.E.2d 493 (1940).

§ 88-28.1. Restraining orders against persons engaging in illegal practices.

The Department of Human Resources and/or any county, city or district health officer and/or the State Board of Cosmetic Art Examiners, if it shall be found that any licensed cosmetologist, cosmetic art shop, or other person, who is subject to the provisions of this Chapter, is violating any of the rules and regulations adopted by the State Board of Cosmetic Art Examiners, as approved by the Commission for Health Services, or any provisions of Chapter 88, section 28, of the General Statutes of North Carolina [G.S. 88-28], may, after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order to restrain such person from continuing such illegal practices. If, upon such application, it shall appear to the court that such person has violated and/or is violating any of the said rules and regulations or any provisions of Chapter 88, section 28, of the General Statutes of North Carolina [G.S. 88-28], the court may issue an order restraining any further violations thereof. All such actions for injunctive relief shall be governed by the provisions of Article 37 of Chapter 1 of the General Statutes: Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this Chapter. (1949, c. 505, s. 1; 1973, c. 476, s. 128; 1975, c. 857, s. 10.)

Legal Periodicals. — For brief comment on this section, see 27 N.C.L. Rev. 407.

§ 88-29. Records to be kept by Board.

The Board of Cosmetic Art Examiners shall keep a record of its proceedings relating to the issuance, refusal, renewal, suspension and revocation of certificates of registration. This record shall also contain the name, place of business, and residence of each registered cosmetologist and registered apprentice, and the date and number of his certificate of registration. This record shall be open to public inspection during all days, excepting Sundays and legal holidays. (1933, c. 179, s. 29.)

§ 88-30. Registered manicurist.

A person may be licensed to engage in the practice of manicuring or pedicuring in a cosmetic art shop, beauty parlor or hairdressing establishment without being a registered cosmetologist. A certificate of registration as a registered manicurist shall be issued by the Board of Cosmetic Art Examiners to any person who meets the following qualifications:

(1) Who has completed 150 hours in classes in a cosmetic art school or college approved by the Board;
(2) Who is at least 17 years of age;
(3) Repealed by Session Laws 1973, c. 450, s. 4.
(4) Who has passed a satisfactory examination, conducted by the Board, to determine his or her fitness to practice manicuring, such examination to be so prepared and conducted as to determine whether or not the applicant is possessed of the requisite skill in such trade to properly perform all the duties thereof and services incident thereto. (1963, c. 1257, s. 4; 1973, c. 450, s. 4.)

Chapter 89.

Engineering and Land Surveying.

§§ 89-1 to 89-16: Recodified as §§ 89C-1 to 89C-28.

Editor's Note. — This Chapter was rewritten by Session Laws 1975, c. 681, s. 1, and has been recodified as Chapter 89C.

Chapter 89A.

Landscape Architects.

Sec.
89A-1. Definitions.
89A-2. Use of title "landscape architect" without registration prohibited; use of seal.
89A-3. North Carolina Board of Landscape Architects; appointments; powers.
89A-4. Application, examination, certificate.
89A-5. Annual renewal of certificate.
89A-6. Fees.
89A-7. Refusal, revocation or suspension of certificate.
89A-8. Violation a misdemeanor; injunction to prevent violation.

Repeal of Chapter. — Session Laws 1979, c. 872, which amended §§ 89A-3 through 89A-6 and deleted this Chapter from the list of statutes repealed by § 143-34.11, provides, in s. 7: "This Chapter is repealed effective July 1, 1981, subject to continuation for one year after that date for a "winding-up" period pursuant to the provisions of G.S. 143-34.14."

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§ 89A-1. Definitions.

(a) "Board" shall mean the North Carolina Board of Landscape Architects, established by G.S. 89A-3.

(b) "Landscape architect" shall mean a person who, on the basis of demonstrated knowledge acquired by professional education or practical experience, or both, has been granted, and holds a current certificate entitling him to use the title "landscape architect" in North Carolina under the authority of this Chapter.

(c) "Landscape architecture," or the "practice of landscape architecture" shall mean the preparation of plans and specifications and supervising the execution of projects involving the arranging of land and the elements used thereon for public and private use and enjoyment, embracing drainage, soil conservation, grading and planting plans and erosion control, in accordance with the accepted professional standards of public health, safety and welfare. (1969, c. 672, s. 1.)

§ 89A-2. Use of title "landscape architect" without registration prohibited; use of seal.

(a) On and after January 1, 1970, no person shall use the designation "landscape architect," "landscape architecture," or "landscape architectural," or advertise any title or description tending to convey the impression that he is a landscape architect unless such person is registered or has obtained a temporary permit as a landscape architect in the manner hereinafter provided and shall thereafter comply with the provisions of this Chapter. Every holder of a certificate shall display it in a conspicuous place in his principal office, place of business or employment.

(b) Nothing in this Chapter shall be construed as authorizing a landscape architect to engage in the practice of architecture, engineering or land surveying, nor to restrict or otherwise affect the rights of any person licensed to practice architecture under Chapter 83, or engineering or land surveying under Chapter 89 of the General Statutes; or to restrict any person from engaging in the occupation of grading lands whether by hand tools or machin-

ery, or the planting, maintaining or marketing of plants or plant materials: Provided, however, that no individual shall use the title "landscape architect" unless he has complied with the provisions of this Chapter.

(c) Each landscape architect shall, upon registration, obtain a seal of the design authorized by the Board, bearing the name of the registrant, date of registration, number of certificate and the legend "N.C. Registered Landscape Architect." Such seal may be used only while the registrant's certificate is in full force and effect.

Nothing in this Chapter shall be construed as authorizing the use or acceptance of the seal of a landscape architect in lieu of or substitute for the seal of an architect, engineer or land surveyor. (1969, c. 672, s. 2.)

Editor's Note. — Chapter 83, referred to in this section, was recodified as Chapter 83A by Session Laws 1979, c. 871, s. 1.

Chapter 89, referred to in this section, was recodified by Session Laws 1975, c. 681, s. 1. For present statutes relating to the same subject matter, see Chapter 89C.

§ 89A-3. North Carolina Board of Landscape Architects; appointments; powers.

(a) There is created the North Carolina Board of Landscape Architects, consisting of seven members appointed by the Governor for four-year staggered terms. Five members of the Board shall have been engaged in the practice of landscape architecture in North Carolina at least five years at the time of their respective appointments. Two members of the Board shall not be landscape architects and shall represent the interest of the public at large. Each member shall hold office until the appointment and qualification of his successor. Vacancies occurring prior to the expiration of the term shall be filled by appointment for the unexpired term. No member shall serve more than two complete consecutive terms.

The Governor shall appoint the two public members not later than July 1, 1979, to serve four-year terms.

The Board shall be subject to the provisions of Chapter 93B of the General Statutes.

(b) The Board shall elect annually from its members a chairman and a vice-chairman and shall hold such meetings during the year as it may determine to be necessary, one of which shall consist of the annual meeting. A quorum of the Board shall consist of not less than three members.

(c) The Board shall have power to compel the attendance of witnesses, to administer oaths, and to take testimony and proofs of all matters within its jurisdiction. The Board shall have the power to make such rules not inconsistent with law as may be necessary in the performance of its duties.

(d) The Board shall elect a secretary, who may or may not be a member of the Board, and who shall hold office at the pleasure of the Board. The members of the Board shall not be compensated except that the secretary shall receive such salary as is fixed by the Board. The members of the Board shall, however, be entitled to be reimbursed from Board funds for all proper traveling and incidental expenses incurred in carrying out the provisions of this Chapter. (1969, c. 672, s. 3; 1979, c. 872, s. 1.)

Effect of Amendments. — The 1979 amendment rewrote subsection (a).

§ 89A-4. Application, examination, certificate.

(a) Any person hereafter desiring to be registered and licensed to use the title "landscape architect" in the State, shall make a written application for examination to the Board, on a form prescribed by the Board, together with such evidence of his qualifications as may be prescribed by rules and regulations of the Board. Minimum qualifications under such rules shall require that the applicant be at least 18 years of age and of good moral character; and that the applicant shall be a graduate of an accredited collegiate curriculum in landscape architecture as approved by the Board and have at least one year's experience; in lieu of such graduation and experience any person who has had a minimum of seven years of education and experience in landscape architecture, in any combination deemed suitable by the Board, may make application to the Board for examination.

(b) If said application is satisfactory to the Board, and is accompanied by the fees required by this Chapter, then the applicant shall be entitled to an examination to determine his qualifications. If the result of the examination of any applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to use the title "landscape architect" in North Carolina. Examinations shall be held at least once a year at a time and place to be fixed by the Board which shall determine the subjects and scope of the examination. The Board may adopt rules for administering the examination in one or more parts at the same time or at different times.

(c) The Board, within its discretion, may issue temporary permits pending examinations, or without examination may grant licenses, by reciprocity, to persons holding a license or certificate in landscape architecture from any legally constituted board of examiners in another state whose registration requirements are deemed to be equal or equivalent to those of this State.

(d) Provided that his application and application fee be received by the Board prior to the first day of July, 1971, any applicant who presents evidence satisfactory to the Board that he was actively engaged in the practice of landscape architecture as herein defined, on or before July 1, 1968, shall be issued a certificate without the requirement for examination. (1969, c. 672, s. 4; 1971, c. 162; 1979, c. 872, ss. 2, 3.)

Effect of Amendments. — The 1979 amendment rewrote the second sentence of subsection (a), which formerly read: "Minumum qualifications under such rules shall require that the applicant be a United States citizen, at least 21 years of age and of good moral character; and that he shall have graduated from a four-year course of study in landscape architecture in a college approved by the Board, with at least three years practical experience under the supervision of an experienced practicing landscape architect, or in lieu of such graduation or experience, such equivalent combination of education and experience as may be prescribed by the Board." The amendment also added the last sentence of subsection (b).

§ 89A-5. Annual renewal of certificate.

Every registrant under this Chapter shall, on or before the first day of July in each year, obtain a renewal of a certificate for the ensuing year, by application, accompanied by the required fee; and upon failure to renew, his certificate shall be automatically revoked; but such certificate may be renewed at any time within one year upon payment of the prescribed renewal fee and penalty for late renewal, as provided by this Chapter, upon evidence satisfactory to the Board that the applicant has not used his certificate or title after notice of revocation and is otherwise eligible for registration under the provisions of this Chapter. When necessary to protect the public health, safety, or welfare, the Board shall require such evidence as it deems necessary to establish the continuing competency of licensees as a condition of license renewal. (1969, c. 672, s. 5; 1979, c. 872, s. 4.)

Effect of Amendments. — The 1979 amendment added the last sentence.

§ 89A-6. Fees.

Fees are to be determined by the Board, but shall not exceed the amounts specified herein, however; fees must reflect actual expenses of the Board.

Application	$100.00
Examination	250.00
License by reciprocity	250.00
Annual license renewal	100.00
Late renewal penalty	50.00
Reissue of certificate	25.00
Temporary permit	150.00
Corporate certificate	250.00

Fees shall be paid to the Board at the times specified by the Board. (1969, c. 672, s. 6; 1979, c. 872, s. 5.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote this section, increasing all fees, adding the fee for a corporate certificate, and making other changes.

§ 89A-7. Refusal, revocation or suspension of certificate.

The Board may, in accordance with the provisions of Chapter 150A, Uniform Revocation of Licenses, of the General Statutes of North Carolina, (i) deny permission to take an examination duly applied for; (ii) deny license after examination for any cause other than failure to pass; (iii) withhold renewal of a license for cause; and (iv) suspend or revoke a license. Grounds for such action or actions shall be dishonest practice, unprofessional conduct, incompetence, conviction of a felony or addiction to habits of such character as to render him unfit to continue professional practice. The procedure for all such actions shall be in accordance with the provisions of Chapter 150A of the General Statutes. (1969, c. 672, s. 7; 1973, c. 1331, s. 3.)

Editor's Note. — "Uniform Revocation of Licenses," referred to above, is the title of former Chapter 150, which has been rewritten and recodified as Chapter 150A, the "Administrative Procedure Act."

§ 89A-8. Violation a misdemeanor; injunction to prevent violation.

(a) It shall be a misdemeanor for any person to use, or to hold himself out as entitled to practice under, the title of landscape architect or landscape architecture unless he is duly registered under the provisions of this Chapter.

(b) The Board may appear in its own name in the courts of the State and apply for injunctions to prevent violations of this Chapter, in accordance with the provisions of Chapter 150A of the General Statutes. (1969, c. 672, s. 8; 1973, c. 1331, s. 3.)

Chapter 89B.

Foresters.

Sec.
89B-1. General provisions.
89B-2. Definitions.
89B-3. State Board of Registration for Foresters; appointment of members; terms.
89B-4. Compensation and expenses of Board members.
89B-5. Organization and meetings of the Board.
89B-6. Powers of the Board.
89B-7. Receipts and disbursements.
89B-8. Records and reports.
89B-9. General requirements for registration.
89B-10. Application and registration fees.
89B-11. Expiration and renewals.
89B-12. Examinations.
89B-13. Revocations and reissuance of registration.
89B-14. Roster of registered foresters.
89B-15. Violation and penalties.

Repeal of Chapter. — This Chapter is repealed, effective July 1, 1983, by Session Laws 1977, c. 712, s. 4. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 89B-1. General provisions.

(a) No person shall, in connection with his name or otherwise, assume, use or advertise any title or description tending to convey, directly or indirectly, the impression that he is a registered forester without first having been registered as a registered forester as hereinafter provided.

(b) It is the intention of this Chapter to benefit and protect the public by improving the standards relative to the practice of professional forestry in North Carolina. (1975, c. 531, s. 1.)

§ 89B-2. Definitions.

As used in this Chapter:

(1) "Board" shall mean the State Board of Registration for Foresters, provided for by this Chapter.

(2) "Forester" means a person who by reason of his special knowledge and training in natural sciences, mathematics, silviculture, forest protection, forest mensuration, forest management, forest economics, and forest utilization is qualified to engage in the practice of forestry as hereinafter defined.

(3) "Practicing" means giving professional forestry services, including but not limited to, consultation, investigation, evaluation, education, planning, or responsible supervision of any forestry activities requiring knowledge, and training in and experience of forestry principles and techniques.

(4) "Registered forester" means a person who has been registered pursuant to this Chapter. (1975, c. 531, s. 2.)

§ 89B-3. State Board of Registration for Foresters; appointment of members; terms.

(a) A State Board of Registration for Foresters is hereby created whose duty it shall be to administer the provisions of this Chapter. The Board shall consist of four duly practicing registered foresters and one at-large member, who shall be appointed by the Governor for a term of five years. In the initial appointments of foresters, the Governor shall appoint four practicing foresters, at least three of whom shall hold at least a bachelor's degree from an accredited forestry school. The appointments shall have the effect of duly registering the appointees who are practicing foresters. The initial Board shall be appointed for terms of one, two, three, four, and five years respectively beginning July 1, 1975. The members of the Board shall serve for the terms hereinbefore specified and until their successors are duly appointed and qualified. Upon the expiration of the term of any forester Board member, the Governor shall appoint as his successor a practicing registered forester. Upon the expiration of the term of the at-large member, the Governor shall appoint an at-large successor.

(b) Each member of the Board shall be a citizen of the United States and a resident of North Carolina.

(c) Vacancies in the membership of the Board shall be filled by appointment by the Governor for the unexpired term.

(d) The Board shall elect annually the following officers: a chairman, and a vice-chairman, who shall be members of the Board, and a secretary who may be a member of the Board. A quorum of the Board shall consist of not less than three voting members of the Board. (1975, c. 531, s. 3.)

§ 89B-4. Compensation and expenses of Board members.

Each member of the Board shall receive per diem and allowances as provided with respect to occupational licensing boards by G.S. 93B-5. (1975, c. 531, s. 4.)

§ 89B-5. Organization and meetings of the Board.

The Board shall meet on call of the Governor within 30 days after its initial members are appointed, and thereafter shall hold at least two regular meetings each year. Special meetings may be held at such time and place as the bylaws of the Board may provide. (1975, c. 531, s. 5.)

§ 89B-6. Powers of the Board.

The Board may make all reasonable and necessary rules for the proper performance of its duties and the regulation of the proceedings before it. The Board shall adopt an official seal. Any member of the Board may administer oaths or affirmations to witnesses appearing before the Board. (1975, c. 531, s. 6.)

§ 89B-7. Receipts and disbursements.

The secretary of the Board shall receive and account for all moneys derived under the provision of this Chapter, and shall keep such moneys in a separate fund to be known as the "Registered Foresters' Fund." Moneys in the aforesaid fund shall be expended to carry out the purposes of the Board. The secretary of the Board shall give surety bond to the Board in such sum as the Board may determine, the premium of which shall be regarded as a proper expense of the Board and shall be paid from the Registered Foresters' Fund.

The Board may employ and fix the compensation of necessary clerical and other assistants. The compensation of such assistants shall be paid out of the Registered Foresters' Fund. (1975, c. 531, s. 7.)

§ 89B-8. Records and reports.

The Board shall keep a record of its proceedings and a register of all applications for registration. The register shall show the name, age and residence of each applicant; the date of the application; applicant's place of business; his educational and other qualifications; whether or not examination was required; whether application was rejected or registration was granted; date of action by the Board; and other information as may be deemed necessary by the Board. Annually on July 1 the Board shall submit to the Governor a report of its transactions of the preceding year. (1975, c. 531, s. 8.)

§ 89B-9. General requirements for registration.

(a) Applicants for registration shall be registered upon satisfactory showing to the Board that the applicant:

(1) Is of good moral character, and

(2) Has either:

a. Graduated with a bachelor's or higher degree in a forestry curriculum from a school or college of forestry approved by the Board and has had two or more years' experience in forestry; or

b. Passed a written examination designed to show knowledge approximating that obtained through graduation from a four-year curriculum in forestry in a university or college approved by the Board, and has a record of five or more years of active practice in forestry work of a character satisfactory to the Board; provided that five or more years shall be immediately prior to the application; or

c. Is a resident of North Carolina and has engaged in the practice of forestry for five years immediately prior to July 1, 1975, and has held himself out in writing and has been employed as a practicing forester for that period. Such person shall make written application under oath of the Board to be registered on or before June 30, 1976, and thereafter no person shall be registered under this subparagraph.

(b) Registration shall be determined upon the basis of individual personal qualification. No firm, company, partnership, corporation or public agency shall be registered as a registered forester.

(c) A nonresident of North Carolina may become a registered forester under this Chapter by complying with its terms, and by filing a consent as to service of process and pleadings upon the Board secretary. In connection with the practice of forestry by such nonresident in North Carolina, the consent as to service of process and pleadings shall be held binding and valid in all courts, as if due service had been made personally upon said nonresident by the Board, when such process has been served upon the Board secretary.

(d) A person not a resident of North Carolina, or one who has recently become a resident thereof, may become registered under this Chapter upon written application to the Board, provided: (i) Such person is legally registered as a registered forester in his own state or country and has submitted evidence to the Board that he is so registered; and (ii) the state or country in which he is so registered observes these same rules of reciprocity in regard to persons registered under the provisions of this Chapter.

(e) A nonresident of North Carolina may use the term "registered forester" in North Carolina without becoming registered under this Chapter provided

that he is registered in another state which will reciprocate with the provision of this Chapter. (1975, c. 531, s. 9.)

§ 89B-10. Application and registration fees.

Applications for registration shall be made on forms prescribed and furnished by the Board. The application fee for a certificate of registration as a registered forester shall be fifteen dollars ($15.00), which shall accompany the application. An additional fifteen dollars ($15.00) shall be paid upon issuance of the certificate of registration. Should the applicant fail or refuse to remit the certificate fee within 30 days after being notified in the usual manner that the applicant has successfully qualified, he forfeits the right to have the certificate so issued and said applicant may be required again to submit an original application fee therefor. Should the Board deny the issuance of a certificate of registration to any applicant, the initial application fee deposited by the applicant shall be retained by the Board. (1975, c. 531, s. 10.)

§ 89B-11. Expiration and renewals.

Registrations shall expire on the last day of June following issuance or renewal and shall become invalid after that date unless renewed. It shall be the duty of the secretary of the Board to notify, at his last registered address, every person registered under this Chapter of the date of the expiration of his registration and the amount of fee which shall be required for its renewal for one year. Such notices shall be mailed at least 30 days in advance of the expiration date of such registrations. The annual renewal fee for certificates shall be ten dollars ($10.00). The fee for issuance of replacement certificates of registration shall be five dollars ($5.00).

Any registration which has expired may be renewed by paying a fee of ten dollars ($10.00) plus one dollar ($1.00) per calendar month from the date of expiration. Charges above the renewal fee shall not exceed twenty dollars ($20.00). (1975, c. 531, s. 11.)

§ 89B-12. Examinations.

When written examinations are required, they shall be held at such time and places in the State of North Carolina as the Board shall determine. The methods of procedure will be described by the Board. A candidate failing an examination may apply for reexamination at the expiration of six months and will be reexamined with payment of an additional fee of fifteen dollars ($15.00). Subsequent examinations will be granted upon payment of a fee of fifteen dollars ($15.00) for each examination. (1975, c. 531, s. 12.)

§ 89B-13. Revocations and reissuance of registration.

The Board shall have the power to revoke or suspend the certificate of registration of any registrant who is found, by the Board, to be guilty of gross negligence, fraud, deceit or flagrant misconduct in the practice of forestry, or who is found by the Board to have demonstrated incompetence as a practicing forester. The Board is empowered to designate a person or persons to investigate and report to it upon any charges of fraud, deceit, gross negligence, incompetency or other misconduct in connection with any forestry practice against any registrant that may come to its attention.

Any person may prefer charges against any registrant. Such charges shall be in writing and shall be sworn to by the person making them and shall be filed with the secretary of the Board. The time and place for a hearing before the Board shall be fixed by the Board. At any hearing the accused may appear

in person or by counsel. The Board may reissue a certificate of registration to any person whose certificate of registration has been revoked or suspended. (1975, c. 531, s. 13.)

§ 89B-14. Roster of registered foresters.

A roster showing the names, registration numbers, and places of business residence of all registered foresters qualified according to the provisions of this Chapter shall be prepared by the secretary of the Board during the month of July of each year. Copies of this roster shall be placed on file with the Secretary of State of North Carolina and each clerk of superior court in North Carolina. A copy shall be sent to each registrant, and copies may be furnished to the public upon request and upon payment of a fee to be set by the Board. (1975, c. 531, s. 14.)

§ 89B-15. Violation and penalties.

Any person who, without being registered in accordance with the provisions of this Chapter, shall use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is a registered forester; or any person who shall give any false or forged information of any kind to the Board or to any member thereof in obtaining a certificate of registration; or any person, firm, partnership or corporation who shall violate any of the provisions of this Chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than fifty dollars ($50.00), or imprisoned not more than 30 days. (1975, c. 531, s. 15.)

Chapter 89C.

Engineering and Land Surveying.

Sec.
89C-1. Short title.
89C-2. Declarations; prohibitions.
89C-3. Definitions.
89C-4. State Board of Registration; appointments; terms.
89C-5. Board members; qualifications.
89C-6. Compensation and expenses of Board members.
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89C-9. Executive secretary; duties and liabilities.
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89C-12. Records and reports of Board; evidence.
89C-13. General requirements for registration.
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89C-15. Examinations.
89C-16. Certificates of registration; effect; seals.
89C-17. Expirations and renewals of certificates.
89C-18. Reissuance of certificates.
89C-19. Public works; requirements where public safety involved.
89C-20. Rules of professional conduct.
89C-21. Disciplinary action — Reexamination, revocation, suspension, reprimand, or fine.
89C-22. Disciplinary action — Charges; procedure.
89C-23. Unlawful to practice engineering or land surveying without registration; unlawful use of title or terms; penalties; Attorney General to be legal adviser.
89C-24. Corporate or partnership practice of engineering or land surveying.
89C-25. Limitations on application of Chapter.
89C-25.1. Supervision of unregistered individuals by registered person.
89C-25.2. Program of licensure by discipline.
89C-26. Duties of register of deeds.
89C-27. Invalid sections; severability.
89C-28. Existing registration not affected.

Editor's Note. — This Chapter is Chapter 89 as rewritten by Session Laws 1975, c. 681, s. 1, and recodified. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the new Chapter.

Session Laws 1975, c. 681, s. 2, provides: "All laws and clauses of law in conflict with this act are repealed. Nothing herein, however, shall be construed to repeal any of the provisions of Chapters 150, 150A or 93B of the General Statutes."

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§ 89C-1. Short title.

This Chapter shall be known and may be cited as "The North Carolina Engineering and Land Surveying Act." (1951, c. 1084, s. 1; 1975, c. 681, s. 1.)

CASE NOTES

Constitutionality of Former Chapter 89. — See State v. Covington, 34 N.C. App. 457, 238 S.E.2d 794 (1977), cert. denied, 294 N.C. 184, 241 S.E.2d 519 (1978).

Chapter Not Admission that Former Guidelines Inadequate. — This Chapter, which redefines "the practice of engineering," cannot be considered an admission by the legislature that the former statute set forth inadequate guidelines. State v. Covington, 34 N.C. App. 457, 238 S.E.2d 794 (1977), cert. denied, 294 N.C. 184, 241 S.E.2d 519 (1978).

§ 89C-2. Declarations; prohibitions.

In order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest. It shall be unlawful for any person to practice or to offer to practice engineering or land surveying in this State, as defined in the provisions of this Chapter, or to use in connection with his name or otherwise assume or advertise any title or description tending to convey the impression that he is either a professional engineer or a registered land surveyor, unless such person has been duly registered as such. The right to engage in the practice of engineering or land surveying shall be deemed a personal right, based on the qualifications of the individual as evidenced by his certificate of registration, which shall not be transferable. (1921, c. 1, s. 1; C. S., s. 6055(b); 1951, c. 1084, s. 1; 1975, c. 681, s. 1.)

CASE NOTES

Legislative Intent. — The Chapter, when read as a whole, makes it clear that the legislature's intent in the "representation," "conveying" and "holding out" provisions of the Chapter was to protect the public from misrepresentations of professional status or expertise. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

This Section and § 89C-23 Must Be Read Together. — Section 89C-23, the part of the Chapter prescribing penalties, must be read subject to the basic prohibitory section of the Chapter, this section, which makes it unlawful "to use in connection with his name or otherwise or advertise any title or description tending to convey the impression that he is . . . a professional engineer . . . unless such person has been duly registered as such." North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

This section and § 89C-23 authorize the Board to prohibit only those uses of the title engineer which imply or represent professional engineering status or expertise. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

The mere use of the term "Customer Engineer" on business cards and in a newspaper article does not constitute the offering to practice engineering or the representation of professional engineering status or expertise in violation of this section. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

§ 89C-3. Definitions.

When used in this Chapter, unless the context otherwise requires:

(1) "Board" shall mean the North Carolina State Board of Registration for Professional Engineers and Land Surveyors provided for by this Chapter.

(2) "Engineer". — The term "engineer," within the intent of this Chapter, shall mean a person who, by reason of his special knowledge and use of the mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design, acquired by engineering education and engineering experience, is qualified to practice engineering.

(3) "Engineer-in-Training". — The term "engineer-in-training," as used in this Chapter, shall mean a person who complies with the requirements for education, experience and character, and has passed an examination in the fundamental engineering subjects, as provided in this Chapter.

(4) "Land Surveyor-in-Training". — The term "land surveyor-in-training," as used in this Chapter, shall mean a person who has qualified for, taken, and passed an examination on the basic disciplines of land surveying as provided in this Chapter.

(5) "Person" means any natural person, firm, partnership, corporation or other legal entity.

(6) "Practice of Engineering". —

a. The term, "practice of engineering," within the intent of this Chapter, shall mean any service or creative work, the adequate performance of which requires engineering education, training, and experience, in the application of special knowledge of the mathematical, physical, and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning, and design of engineering works and systems, planning the use of land and water, engineering surveys, and the observation of construction for the purposes of assuring compliance with drawings and specifications, including the consultation, investigation, evaluation, planning, and design for either private or public use, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products or equipment of a mechanical, electrical, hydraulic, pneumatic or thermal nature, insofar as they involve safeguarding life, health or property, and including such other professional services as may be necessary to the planning, progress and completion of any engineering services.

A person shall be construed to practice or offer to practice engineering, within the meaning and intent of this Chapter, who practices any branch of the profession of engineering; or who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer, or through the use of some other title implies that he is a professional engineer or that he is registered under this Chapter; or who holds himself out as able to perform, or who does perform any engineering service or work not exempted by this Chapter, or any other service designated by the practitioner which is recognized as engineering.

b. The term "practice of engineering" shall not be construed to permit the location, description, establishment or reestablishment of property lines or descriptions of land boundaries for conveyance.

(7) "Practice of land surveying" by registered land surveyors shall mean any service or work, the adequate performance of which involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for adequate evidence to the act of measuring and locating lines, angles, elevations, natural and man-made features in the air, on the surface of the earth, within underground workings, and on the beds of bodies of water for the purpose of determining areas and volumes, for the monumenting of property boundaries, and for the platting and layout of lands and subdivisions thereof, including the topography, alignment and grades of street and incidental drainage within the subdivision, and for the preparation and perpetuation of maps, record plats, field note records, and property descriptions that represent these surveys.

a. The term "practice of land surveying" shall not be construed to permit the design or preparation of specifications for (i) major highways; (ii) wastewater systems; (iii) wastewater or industrial waste treatment works; (iv) pumping or lift stations; (v) water supply, treatment, or distribution systems; (vi) streets or storm sewer systems except as incidental to a subdivision.

(8) "Professional Engineer". — The term, "professional engineer," as used in this Chapter, shall mean a person who has been duly registered and

licensed as a professional engineer by the Board established by this Chapter.

(9) "Registered land surveyor" shall mean a person who, by reason of his special knowledge of mathematics, surveying principles and methods, and legal requirements which are acquired by education and/or practical experience, is qualified to engage in the practice of land surveying, as herein defined, as attested by his registration as a registered land surveyor by the Board.

(10) "Responsible Charge". — This term means direct control and personal supervision, either of engineering work or of land surveying, as the case may be. (1951, c. 1084, s. 1; 1953, c. 999, s. 1; 1973, c. 449; 1975, c. 681, s. 1.)

CASE NOTES

Use of Word "Engineer" Does Not Represent Professional Engineering Status. — It is clear from the definition in subdivision (8) that the use of the word "engineer" without being modified by "professional," "registered" or "licensed," or some word of like import does not represent that one is "duly registered and licensed by the Board" and therefore cannot represent that one is a professional engineer as that term is defined in subdivision (8). Since such usage does not represent professional engineering status, it cannot constitute the practice of engineering as that term is defined in paragraph (6)a. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Therefore, such usage is not a violation of those provisions of this section and § 89C-23 which prohibit the practice or offer to practice engineering without proper registration. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

§ 89C-4. State Board of Registration; appointment; terms.

A State Board of Registration for Professional Engineers and Land Surveyors, whose duty it is to administer the provisions of this Chapter, is created. The Board shall consist of four registered professional engineers, three registered land surveyors and two public members, who are neither professional engineers nor land surveyors. Of the land surveyor members, one and only one may hold dual registration as a land surveyor and professional engineer. All of the members shall be appointed by the Governor. Appointments of the engineer and land surveyor members shall preferably, but not necessarily, be made from a list of nominees submitted by the professional societies for engineers and land surveyors in this State. Each member of the Board shall receive a certificate of appointment from the Governor and shall file with the Secretary of State his written oath or affirmation for the faithful discharge of his duties.

Members of the Board serve for staggered five-year terms, and no member may be appointed for more than two full terms. Members serve until the expiration of their respective terms and until their respective successors are appointed. If a vacancy occurs during a term, the Governor shall appoint a successor from the same classification as the person causing the vacancy to serve for the remainder of the unexpired term. If the vacancy is not filled within 90 days after it occurs, the Board may appoint a provisional member to serve until the appointment by the Governor becomes effective. The provisional member during his tenure has all the powers and duties of a regular member. (1921, c. 1, ss. 3-6; C. S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1; 1979, c. 819, s. 1.)

Effect of Amendments. — The 1979 amendment rewrote this section.

Session Laws 1979, c. 819, s. 6, provides: "Schedule. — To achieve appropriate

staggering of terms of members of the Board, those members serving at the time of ratification of this act [June 7, 1979] shall continue to serve for the remainder of the terms for which they were appointed. As soon as practicable after ratification of this act, the Governor shall appoint one public member for an initial term of four years, and one public member for an initial term of five years."

CASE NOTES

Stated in North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

§ 89C-5. Board members; qualifications.

Each engineer member of the Board shall be a resident of North Carolina and shall be a registered professional engineer engaged in the lawful practice of engineering in North Carolina for at least two years.

Each land surveyor member of the Board shall be a resident of North Carolina and shall be a registered land surveyor engaged in the lawful practice of land surveying in North Carolina for at least two years.

Each public member of the Board shall be a resident of North Carolina. (1921, c. 1, ss. 3-6; C. S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1; 1979, c. 819, s. 2.)

Effect of Amendments. — The 1979 amendment deleted "shall be a citizen of the United States" following "Board" in the first and second paragraphs and added the third paragraph.

§ 89C-6. Compensation and expenses of Board members.

Each member of the Board, when attending to the work of the Board or any of its committees, shall receive as compensation for his service the per diem and, in addition thereto, shall be reimbursed for travel expenses and incidentals not exceeding the maximum set forth by law. In addition to per diem allowances, travel and incidentals, the secretary may, with the approval of the Board, receive such reasonable additional compensation as is compatible with the actual hours of work required by the duties of his office. (1921, c. 1, ss. 3-6; C. S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1.)

§ 89C-7. Vacancies; removal of member.

The Governor may remove any member of the Board for misconduct, incompetency, neglect of duty, or any sufficient cause, in the manner prescribed by law for removal of State officials. Vacancies in the membership of the Board shall be filled for the unexpired term by appointment by the Governor as provided in G.S. 89C-4. (1921, c. 1, ss. 3-6; C. S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1.)

§ 89C-8. Organization of the Board; meetings; election of officers.

The Board shall hold at least two regular meetings each year. Special meetings may be held at such times and upon such notice as the rules and regulations of the Board may provide. The Board shall elect annually from its members a chairman, a vice-chairman, and a secretary. A quorum of the Board

shall consist of not less than five members. The Board shall operate under its rules and regulations supplemented by Robert's Rules of Order. (1921, c. 1, ss. 3-6; C. S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1.)

§ 89C-9. Executive secretary; duties and liabilities.

The Board shall employ an executive secretary who is not a member of the Board. The executive secretary shall be a full-time employee of the Board and perform such duties assigned to him by the secretary subject to the approval of the Board. The executive secretary shall receive a salary and compensation fixed by the Board. The executive secretary shall give a surety bond satisfactory to the Board conditioned upon the faithful performance of his duties. The premium on said bond shall be a necessary and proper expense of the Board. (1921, c. 1, ss. 3-6; C. S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1.)

§ 89C-10. Board powers.

(a) The Board shall have the power to adopt and amend all rules and regulations. Additionally, the Board shall have the power to adopt such rules, rules of procedure, and regulations, as may be reasonably necessary for the proper performance of its duties, the regulation of its procedures, meetings, records, the giving of examinations and the conduct thereof, and the power to enforce such rules of professional conduct as may, from time to time, be adopted by the Board pursuant to G.S. 89C-20.

The action by the Board in carrying out any of the powers specified above shall be binding upon all persons registered under this Chapter, including corporations holding certificates of authorization.

(b) The Board shall adopt and have an official seal, which shall be affixed to each certificate issued.

(c) The Board is hereby authorized in the name of the State to apply for relief, by injunction, in the established manner provided in cases of civil procedure, without bond, to enforce the provisions of this Chapter, or to restrain any violation thereof. In such proceedings, it shall not be necessary to allege or prove either that an adequate remedy at law does not exist, or that substantial or irreparable damage would result from the continued violation thereof. The members of the Board shall not be personally liable under this proceeding.

(d) The Board may subject an applicant for registration to such examination as it deems necessary to determine his qualifications.

(e) The Board shall have the power to issue an appropriate certificate of registration to any applicant who, in the opinion of the Board, has met the requirements of this Chapter.

(f) It shall be the responsibility and duty of the Board to conduct a regular program of investigation concerning all matters within its jurisdiction under the provisions of this Chapter. The Board may expend its funds for salaries, fees, and per diem expenses, in connection with its investigations, provided that no such funds other than per diem expenses shall be paid to any member of the Board in connection with its investigations, nor may any member of the Board give testimony and thereafter sit in deciding on any matter which may directly involve punitive action under such testimony.

(g) The Board is authorized and empowered to use its funds to establish and conduct instructional programs for persons who are currently registered to practice engineering or land surveying, as well as refresher courses for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to practice engineering or land surveying. The Board may expend its funds for these purposes and is authorized and empowered not only

to conduct, sponsor, and arrange for instructional programs, but also to carry out such programs through extension courses or other media, and the Board may enter into plans or agreements with community colleges, institutions of higher learning, both public and private, State and county boards of education, or with the governing authority of any industrial education center for the purpose of planning, scheduling or arranging such courses, instruction, extension courses, or in assisting in obtaining courses of study or programs in the field of engineering and land surveying. For the purpose of carrying out these objectives, the Board is authorized to make and promulgate such rules and regulations as may be necessary for such educational programs, instruction, extension services, or for entering into plans or contracts with persons or educational and industrial institutions. (1921, c. 1, ss. 3-6; C. S., ss. 6055(d)-6055(g); 1951, c. 1084, s. 1; 1957, c. 1060, s. 1; 1963, c. 843; 1965, c. 940; 1975, c. 681, s. 1.)

§ 89C-11. Secretary; duties and liabilities; expenditures.

The secretary of the Board shall receive and account for all moneys derived from the operation of the Board as provided in this Chapter, and shall deposit them in one or more special funds in banks or other financial institutions carrying deposit insurance and authorized to do business in North Carolina. The fund or funds shall be designated as "Fund of the Board of Registration for Professional Engineers and Land Surveyors" and shall be drawn against only for the purpose of implementing provisions of this Chapter as herein provided. All expenses certified by the Board as properly and necessarily incurred in the discharge of its duties, including authorized compensation, shall be paid out of said fund on the warrant signed by the secretary of the Board; provided, however, that at no time shall the total of warrants issued exceed the total amount of funds accumulated under this Chapter. The secretary of the Board shall give a surety bond satisfactory to the State Board of Registration for Professional Engineers and Land Surveyors, conditioned upon the faithful performance of his duties. The premium on said bond shall be regarded as a proper and necessary expense of the Board. The secretary of the Board may delegate to the executive secretary certain routine duties, such as receipt and disbursement of funds in stated amounts by a written authorization, which has the unanimous approval of the Board. (1921, c. 1, s. 7; C. S., s. 6055(h); 1951, c. 1084, s. 1; 1959, c. 617; 1975, c. 681, s. 1.)

§ 89C-12. Records and reports of Board; evidence.

The Board shall keep a record of its proceedings and a register of all applicants for registration, showing for each the date of application, name, age, education, and other qualifications, place of business and place of residence, whether the applicant was rejected or a certificate of registration granted, and the date of such action. The books and register of the Board shall be prima facie evidence of all matters recorded therein, and a copy duly certified by the secretary of the Board under seal shall be admissible in evidence as if the original were produced. A roster showing the names and places of business and of residence of all registered professional engineers and all registered land surveyors shall be prepared by the secretary of the Board current to the month of January of each year; such roster shall be printed by the Board out of the fund of said Board and distributed as set forth in the rules and regulations. On or before the first day of May of each year, the Board shall submit to the Governor a report on its transactions for the preceding year, and shall file with the Secretary of State a copy of such report, together with a complete statement of the receipts and expenditures of the Board, attested by the affidavits of the chairman and the secretary, and a copy of the said roster of registered profes-

sional engineers and registered land surveyors. (1921, c. 1, s. 8; C. S., s. 6055(i); 1951, c. 1084, s. 1; 1975, c. 681, s. 1.)

§ 89C-13. General requirements for registration.

(a) Engineer Applicant. — To be eligible for admission to examination for professional engineer an applicant must be of good character and reputation. An applicant desiring to take the examination in the fundamentals of engineering only must submit three character references. An applicant desiring to take the examination in the principles and practice of engineering must submit five references, two of whom shall be professional engineers having personal knowledge of his engineering experiences.

The following shall be considered as minimum evidence satisfactory to the Board that the applicant is qualified for registration:

(1) As a professional engineer.

a. Registration by Comity or Endorsement. — A person holding a certificate of registration to engage in the practice of engineering, on the basis of comparable qualifications, issued to him by a proper authority of a state, territory, or possession of the United States, the District of Columbia, or of Canada, who in the opinion of the Board, meets the requirements of this Chapter, based on verified evidence may, upon application, be registered without further examination.

A person holding a certificate of qualification issued by the Committee on National Engineering Certification of the National Council of Engineering Examiners, whose qualifications meet the requirements of this Chapter, may upon application, be registered without further examination.

b. E.I.T. Certificate, Experience, and Examination. — A holder of a certificate of engineer-in-training issued by the Board, and with a specific record of an additional four years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering, shall be admitted to an eight-hour examination in the principles and practices of engineering. Upon passing such examination, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

c. Graduation, Experience, and Examination. — A graduate of an engineering curriculum of four years or more approved by the Board as being of satisfactory standing, and with a specific record of an additional four years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering, shall be admitted to an eight-hour written examination in the fundamentals of engineering, and an eight-hour written examination in the principles and practices of engineering. Upon passing such examinations, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

d. Graduation, Experience, and Examination. — A graduate of an engineering or related science curriculum of four years or more, other than the ones approved by the Board as being of satisfactory standing or with an equivalent education and engineering experience satisfactory to the Board and with a specific record of eight years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the appli-

cant may be competent in the fundamentals of engineering, shall be admitted to an eight-hour written examination in the fundamentals of engineering, and an eight-hour written examination in the principles and practices of engineering. Upon passing such examinations, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

e. Long-Established Practice. — An individual with a specific record of 20 years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering shall be admitted to an eight-hour written examination in the principles and practice of engineering. Upon passing such examination, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

At its discretion the Board may require an applicant to submit exhibits, drawings, designs, or other tangible evidence of engineering work executed by him and which he personally accomplished or supervised.

The following shall be considered as minimum evidence that the applicant is qualified for certification:

(2) As an engineer-in-training.

a. Graduation and Examination. — A graduate of an engineering curriculum or related science curriculum of four years or more, approved by the Board as being of satisfactory standing, shall be admitted to an eight-hour written examination in the fundamentals of engineering. The applicant shall be notified if the examination was passed or not passed and if passed he shall be certified as an engineer-in-training, if he is otherwise qualified.

b. Graduation, Experience, and Examination. — A graduate of an engineering or related science curriculum of four years or more, other than the ones approved by the Board as being of satisfactory standing, or with equivalent education and engineering experience satisfactory to the Board and with a specific record of four or more years of progressive experience on engineering projects of a grade and character satisfactory to the Board, shall be admitted to an eight-hour written examination in the fundamentals of engineering. The applicant shall be notified if the examination was passed or not passed and if passed he shall be certified as an engineer-in-training if he is otherwise qualified.

(b) Land Surveyor Applicant. — To be eligible for admission to examination for land surveyor-in-training, or registered land surveyor, an applicant must be of good character and reputation and shall submit five references with his application for registration as a land surveyor, two of which references shall be registered land surveyors having personal knowledge of his land surveying experience, or in the case of an application for certification as a land surveyor-in-training by three references, one of which shall be a registered land surveyor having personal knowledge of the applicant's land surveying experience.

The evaluation of a land surveyor applicant's qualifications shall involve a consideration of his education, technical and land surveying experience, exhibits of land surveying projects with which he has been associated, recommendations by references, and reviewing of these categories during an oral examination. The land surveyor applicant's qualifications may be reviewed at an interview if the Board deems it necessary. Educational credit for institute courses, correspondence courses, etc., shall be determined by the Board.

The following shall be considered a minimum evidence satisfactory to the Board that the applicant is qualified for registration as a land surveyor or for certification as a land surveyor-in-training, respectively:

(1) As a registered land surveyor.

a. Rightful possession of a B.S. degree in surveying or other equivalent curricula, all approved by the Board and a record satisfactory to the Board of one year or more of progressive practical experience one year of which shall have been under a practicing registered land surveyor and satisfactorily passing such oral and written examination, taken in the presence of and required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying.

b. Rightful possession of an associate degree in surveying technology or civil engineering technology approved by the Board or with equivalent education and surveying experience satisfactory to the Board, and a record satisfactory to the Board of three years of progressive practical experience, two years of which shall have been under a practicing registered land surveyor, and satisfactorily passing such written and oral examination taken in the presence of and as required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying. Anyone who, on or before September 1, 1976, possessed an associate degree in surveying technology, previously approved by the Board, may be considered for examination with two years of experience which shall have been under a practicing registered land surveyor.

c. Land Surveyor-in-Training Certificate, Experience, and Examination. — A holder of a certificate of land surveyor-in-training issued by the Board, and with a specific record of an additional two years or more of progressive surveying experience, one year of which shall have been under a practicing registered land surveyor, of a grade and character which indicates to the Board that the applicant may be competent to practice land surveying, shall be admitted to two four-hour examinations. Upon passing such examinations, the applicant shall be granted a certificate of registration to practice land surveying in this State, provided he is otherwise qualified.

d. Graduation from a high school or the completion of a high school equivalency certificate and a record satisfactory to the Board of six years of progressive practical experience, four years of which shall have been under a practicing registered land surveyor, and satisfactorily passing such oral and written examination written in the presence of and required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying.

e. The Board shall require an applicant to submit exhibits, drawings, plats, or other tangible evidence of land surveying work executed by him under proper supervision and which he has personally accomplished or supervised.

f. Registration by Comity or Endorsement. — A person holding a certificate of registration to engage in the practice of land surveying issued on comparable qualifications from a state, territory, or possession of the United States will be given comity considerations. However, he may be asked to take such examinations as the Board deems necessary to determine his qualifications, but in any event he shall be required to pass a written examination of not less than four hours' duration, which shall include ques-

tions on laws, procedures, and practices pertaining to the practice of land surveying in North Carolina.

g. A licensed professional engineer who can satisfactorily demonstrate to the Board that his formal academic training in acquiring a degree and field experience in engineering includes land surveying, to the extent necessary to reasonably qualify the applicant in the practice of land surveying, may apply for and may be granted permission to take the two four-hour examinations on the principles and practices of land surveying. Upon satisfactorily passing the examinations, the applicant will be granted a license to practice land surveying in the State of North Carolina.

h. Professional Engineers in Land Surveying. — Any person presently licensed to practice professional engineering under this Chapter shall upon his application be licensed to practice land surveying, providing his written application is filed with the Board within one year next after June 19, 1975.

(2) As a land surveyor-in-training:

a. Rightful possession of an associate degree in surveying technology approved by the Board or with equivalent education and surveying experience satisfactory to the Board, and a record satisfactory to the Board of one year of progressive practical experience under a practicing registered land surveyor, and satisfactorily passing such written and oral examination taken in the presence of and as required by the Board.

b. Rightful possession of a B.S. degree in surveying or other equivalent curricula in surveying, all approved by the Board and satisfactorily passing such oral and written examination written in the presence of and required by the Board.

c. The Board shall require an applicant to submit exhibits, drawings, plats, or other tangible evidence of land surveying work executed by him under proper supervision and which he has personally accomplished or supervised. (1921, c. 1, s. 9; C. S., s. 6055(j); 1951, c. 1084, s. 1; 1953, c. 999, s. 2; 1957, c. 1060, ss. 2, 3; 1975, c. 681, s. 1.)

CASE NOTES

Requirement for Obtaining of License as Land Surveyor by Professional Engineer. — Subsection (b)(1)h, as enacted in 1975, does not require that a person theretofore licensed as a professional engineer show that he had actually engaged in the practice of, or that he had experience in, land surveying as a condition to obtaining a license as a registered land surveyor. Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219, cert. denied, 292 N.C. 467, 233 S.E.2d 922 (1977).

§ 89C-14. Application for registration; registration fees.

(a) Application for registration as a professional engineer or registered land surveyor shall be on a form prescribed and furnished by the Board. It shall contain statements made under oath, showing the applicant's education and a detailed summary of his technical and engineering or land surveying experience, and shall include the names and complete mailing addresses of the references, none of whom should be members of the Board.

The Board may accept the certified information on the copy of a current formal certificate of qualifications issued by the National Council of Engineering Examiners Committee or National Engineering Certification for Pro-

fessional Engineer applicants in lieu of the same information that is required for the form prescribed and furnished by the Board.

(b) The registration fee shall be established by the Board in amounts not to exceed seventy dollars ($70.00) for an engineer or seventy dollars ($70.00) for registration as a land surveyor which shall accompany the applications. The fee for comity registration of engineers and land surveyors who hold unexpired certificates in another state or a territory of the United States or in Canada shall be the total current fee as fixed by the Board.

(c) The certification fee for a corporation (see G.S. 89C-24) shall be in accordance with Chapter 55B.

(d) Should the Board deny the issuance of a certificate of registration to any applicant, the unobligated portion of fees paid shall be returned by the Board to the applicant.

(e) A candidate failing an examination may apply, and be considered by the Board, for reexamination at the end of six months. The Board shall make such reexamination charge as is necessary to defray the cost of the examination provided the charge for any reexamination shall not exceed twenty dollars ($20.00).

A candidate failing an examination three times will not be permitted to take a reexamination until he has made a written appeal to the Board and his tentative qualifications for the examination are reviewed and reaffirmed by the Board. (1921, c. 1, s. 9; C. S., s. 6055(j); 1951, c. 1084, s. 1; 1953, c. 999, s. 2; 1957, c. 1060, ss. 2, 3; 1975, c. 681, s. 1.)

§ 89C-15. Examinations.

(a) The examinations will be held at such times and places as the Board directs. The Board shall determine the passing grade on examinations. All examinations shall be approved by the entire Board.

(b) Written examinations will be given in sections and may be taken only after the applicant has met the other minimum requirements as given in G.S. 89C-13, and has been approved by the Board for admission to the examination as follows:

(1) Engineering Fundamentals. — Consists of an eight-hour examination on the fundamentals of engineering. Passing this examination qualifies the examinee for an engineer-in-training certificate, provided he has met all other requirements for certification required by this Chapter.

(2) Principles and Practice of Engineering. — Consists of an eight-hour examination on applied engineering. Passing this examination qualifies the examinee for registration as a professional engineer, provided he has met the other requirements for registration required by this Chapter.

(3) Surveying Fundamentals. — Consists of two four-hour examinations on the elementary disciplines of land surveying. Passing both of these examinations qualifies the examinee for a land surveyor-in-training certificate provided he has met all other requirements for certification required by this Chapter.

(4) Principles and Practices of Land Surveying. — Consists of two four-hour examinations on the basic and applied disciplines of land surveying, one examination on basic disciplines and the other examination covering applied disciplines. Passing each of these examinations qualifies the examinee for a registered land surveyor certificate provided he has met all other requirements for certification required by this Chapter. (1975, c. 681, s. 1.)

§ 89C-16. Certificates of registration; effect; seals.

(a) The Board shall issue to any applicant, who, in the opinion of the Board, has met the requirements of this Chapter, a certificate of registration giving the registrant proper authority to practice his profession in this State. The certificate of registration for a professional engineer shall carry the designation "professional engineer," and for a land surveyor, "registered land surveyor," shall give the full name of the registrant with his serial number and shall be signed by the chairman and the secretary under the seal of the Board.

(b) This certificate shall be prima facie evidence that the person named thereon is entitled to all rights, privileges and responsibilities of a professional engineer or a registered land surveyor, while the said certificate of registration remains unrevoked or unexpired.

(c) Each registrant hereunder shall upon registration obtain a seal of a design authorized by the Board bearing the registrant's name, serial number, and the legend, "professional engineer," or "registered land surveyor." Final drawings, specifications, plans and reports prepared by a registrant shall, when issued, be certified and stamped with the said seal or facsimile thereof unless the registrant is exempt under the provisions of G.S. 89C-25(7). It shall be unlawful for a registrant to affix, or permit his seal and signature or facsimile thereof to be affixed to any drawings, specifications, plans or reports after the expiration of a certificate or for the purpose of aiding or abetting any other person to evade or attempt to evade any provision of this Chapter. A professional engineer practicing land surveying shall use his registered land surveyor seal. (1921, c. 1, s. 11; C. S., s. 6055(m); 1951, c. 1084, s. 1; 1957, c. 1060, s. 6; 1975, c. 681, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Direct Control by Registrant Required. — For a registrant to be able to legally seal and sign plans prepared by others, it is necessary that the documents be prepared under his direct supervision, meaning a person employed by and under control of the registrant. Opinion of Attorney General to Mr. B.A. Saholsky, 41 N.C.A.G. 423 (1971).

§ 89C-17. Expirations and renewals of certificates.

Certificates for registration shall expire on the last day of the month of December next following their issuance or renewal, and shall become invalid on that date unless renewed. When necessary to protect the public health, safety, or welfare, the Board shall require such evidence as it deems necessary to establish the continuing competency of engineers and land surveyors as a condition of renewal of licenses. When the Board is satisfied as to the continuing competency of an applicant, it shall issue a renewal of the certificate upon payment by the applicant of a fee fixed by the Board but not to exceed thirty dollars ($30.00). The secretary of the Board shall notify by mail every person registered under this Chapter of the date of expiration of his certificate, the amount of the fee required for its renewal for one year, and any requirement as to evidence of continued competency. The notice shall be mailed at least one month in advance of the expiration date of the certificate. Renewal shall be effected at any time during the month of January immediately following, by payment to the secretary of the Board of a renewal fee, as determined by the Board, which shall not exceed thirty dollars ($30.00). Failure on the part of any registrant to renew his certificate annually in the month of January, as required above, shall deprive the registrant of the right to practice until renewal has been effected. Renewal may be effected at any

time during the first 36 months immediately following its invalidation of payment of the renewal fee increased ten percent (10%) for each month or fraction of a month that payment for renewal is delayed. Failure of a registrant to renew his registration for a period of 36 months shall require the individual, prior to resuming practice in North Carolina, to submit an application therefor on the prescribed form, and to meet all other requirements for registration as set forth in Chapter 89C. The secretary of the Board is instructed to remove from the official roster of engineers and land surveyors the names of all registrants who have not effected their renewal by the first day of February immediately following the date of their expiration. The Board may enact rules to provide for renewals in distress or hardship cases due to military service, prolonged illness, or prolonged absence from the State, where the applicant for renewal demonstrates to the Board that he has maintained his active knowledge and professional status as an engineer or land surveyor, as the case may be. It shall be the responsibility of each registrant to inform the Board promptly concerning change in address. (1921, c. 1, s. 9; C. S., s. 6055(k); 1951, c. 1084, s. 1; 1953, c. 1041, s. 9; 1957, c. 1060, s. 4; 1973, c. 1321; c. 1331, s. 3; 1975, c. 681, s. 1; 1979, c. 819, ss. 3, 4.)

Effect of Amendments. — The 1979 amendment deleted a former second sentence, which read: "It shall be the duty of the secretary of the Board to notify by mail every person, registered hereunder, of the date of the expiration of his certificate and the amount of the fee required for its renewal for one year; such notice shall be mailed at least one month in advance of the date of expiration of such certificate." The amendment added the present second, third, fourth and fifth sentences. The amendment also substituted "thirty dollars ($30.00)" for "fifteen dollars ($15.00)" in the present sixth sentence.

§ 89C-18. Reissuance of certificates.

A new certificate of registration, or certificate of authorization, to replace any certificate lost, destroyed, or mutilated, may be issued, subject to the rules of the Board. A charge of five dollars ($5.00) shall be made for such issuance. (1921, c. 1, s. 10; C. S., s. 6055(l); 1939, c. 218, s. 2; 1951, c. 1084, s. 1; 1953, c. 1041, s. 10; 1957, c. 1060, s. 5; 1973, c. 1331, s. 3; 1975, c. 681, s. 1.)

§ 89C-19. Public works; requirements where public safety involved.

This State and its political subdivisions such as counties, cities, towns, or other political entities or legally constituted boards, commissions, public utility companies, or authorities, or officials, or employees thereof shall not engage in the practice of engineering or land surveying involving either public or private property where the safety of the public is directly involved without the project being under the supervision of a professional engineer for the preparations of plans and specifications for engineering projects, or a registered land surveyor for land surveying projects, as provided for the practice of the respective professions by this Chapter.

An official or employee of the State or any political subdivision specified in this section, holding the positions set out in this section as of June 19, 1975, shall be exempt from the provisions of this section so long as such official or employee is engaged in substantially the same type of work as is involved in his present position.

Nothing in this section shall be construed to prohibit inspection, maintenance and service work done by employees of the State of North Carolina, any political subdivision thereof, or any municipality therein including construction, installation, servicing, and maintenance by regular full-time

employees of, secondary roads and drawings incidental thereto, streets, street lighting, traffic-control signals, police and fire alarm systems, waterworks, steam, electric and sewage treatment and disposal plants, the services of superintendents, inspectors or foremen regularly employed by the State of North Carolina or any political subdivision thereof, or municipal corporation therein.

The provisions in this section shall not be construed to alter or modify the requirements of Article 1 of Chapter 133 of the General Statutes. (1975, c. 681, s. 1.)

§ 89C-20. Rules of professional conduct.

In the interest of protecting the safety, health, and welfare of the public, the Board shall promulgate and adopt rules of professional conduct applicable to practice of engineering and land surveying. These rules, when adopted, shall be construed to be a reasonable exercise of the police power vested in the Board of Registration for Professional Engineers and Land Surveyors. The currently effective rules shall be published in the Annual Register. Every person registered by the Board shall subscribe to and observe the adopted rules as the standard of professional conduct for the practice of engineering and land surveying. In the case of violation of the rules of professional conduct, the Board shall have the responsibility and duty to proceed in accordance with G.S. 89C-22 and Article 3 of Chapter 150A of the General Statutes. (1975, c. 681, s. 1.)

§ 89C-21. Disciplinary action — reexamination, revocation, suspension, reprimand, or fine.

(a) The Board may suspend, refuse to renew, or revoke the certificate of registration, require reexamination, or levy a fine not in excess of five hundred dollars ($500.00) for any engineer or land surveyor, who is found:

(1) Guilty of the practice of any fraud or deceit in obtaining a certificate of registration or certificate of authorization.

(2) Guilty of any gross negligence, incompetence, or misconduct, in the practice of his profession. In the event the Board finds that a certificate holder is incompetent the Board may, in its discretion, require oral or written examinations, or other indication of the certificate holder's fitness to practice his profession and to suspend his license during any such period.

(3) Guilty of any felony or any crime involving moral turpitude.

(4) Guilty of violation of the Rules of Professional Conduct, as adopted by the Board.

(5) To have been declared insane or incompetent by a court of competent jurisdiction and has not thereafter been lawfully declared sane or competent.

(b) The Board shall have the power to (i) revoke a certificate of authorization, or (ii) to suspend a certificate of authorization for a period of time not exceeding two years, of any corporation where one or more of its officers or directors have committed any act or have been guilty of any conduct which would authorize a revocation or suspension of their certificates of registration under the provision of this section. (1921, c. 1, s. 10; C. S., s. 6055(l); 1939, c. 218, s. 2; 1951, c. 1084, s. 1; 1953, c. 1041, s. 10; 1957, c. 1060, s. 5; 1973, c. 1331, s. 3; 1975, c. 681, s. 1.)

§ 89C-22. Disciplinary action — charges; procedure.

(a) Any person may prefer charges of fraud, deceit, gross negligence, incompetence, misconduct, or violation of the rules of professional conduct, against any individual registrant or against any corporation holding a certificate of authorization. Such charges shall be in writing and shall be sworn to by the person or persons making them and shall be filed with the secretary of the Board.

(b) All charges, unless dismissed by the Board as unfounded or trivial, shall be heard by the Board within three months after the date on which they shall have been referred.

(c) If, after such hearing, a majority of the entire Board votes in favor of sustaining the charges, the Board shall reprimand, suspend, refuse to renew, or revoke the individual's certificate of registration, or a corporation's certificate of authorization.

(d) An individual registrant having a certificate of registration, or corporation holding a certificate of authorization, aggrieved by a final decision of the Board, may appeal for judicial review as provided by Article 4 of Chapter 150A.

(e) The Board may, upon petition of an individual or corporation, whose certificate has been revoked, for reasons it may deem sufficient, reissue a certificate of registration or authorization, provided that a majority of the members of the Board vote in favor of such issuance. (1921, c. 1, s. 10; C. S., s. 6055(l); 1939, c. 218, s. 2; 1951, c. 1084, s. 1; 1953, c. 1041, s. 10; 1957, c. 1060, s. 5; 1973, c. 1331, s. 3; 1975, c. 681, s. 1.)

§ 89C-23. Unlawful to practice engineering or land surveying without registration; unlawful use of title or terms; penalties; Attorney General to be legal adviser.

Any person who shall practice, or offer to practice, engineering or land surveying in this State without first being registered in accordance with the provisions of this Chapter, or any person, firm, partnership, organization, association, corporation, or other entity using or employing the words "engineer" or "engineering" or "professional engineer" or "professional engineering" or "land surveyor" or "land surveying," or any modification or derivative thereof in its name or form of business or activity except as registered under this Chapter or in pursuit of activities exempted by this Chapter, or any person presenting or attempting to use the certificate of registration or the seal of another, or any person who shall give any false or forged evidence of any kind to the Board or to any member thereof in obtaining or attempting to obtain a certificate of registration, or any person who shall falsely impersonate any other registrant of like or different name, or any person who shall attempt to use an expired or revoked or nonexistent certificate of registration, or who shall practice or offer to practice when not qualified, or any person who falsely claims that he is registered under this Chapter, or any person who shall violate any of the provisions of this Chapter, in addition to injunctive procedures set out hereinbefore, shall be guilty of a misdemeanor, and may, upon conviction, be sentenced to pay a fine [of] not less than one hundred dollars ($100.00), nor more than one thousand dollars ($1,000), or suffer imprisonment for a period not exceeding three months, or both, in the discretion of the court. In no event shall there be representation of or holding out to the public of any engineering expertise by unregistered persons. It shall be the duty of all duly constituted officers of the State and all political subdivisions thereof to enforce the provisions of this Chapter and to prosecute any persons violating same.

The Attorney General of the State or his assistant shall act as legal adviser to the Board and render such legal assistance as may be necessary in carrying out the provisions of this Chapter. The Board may employ counsel and necessary assistance to aid in the enforcement of this Chapter, and the compensation and expenses therefor shall be paid from funds of the Board. (1921, c. 1, s. 12; C. S., s. 6055(n); 1951, c. 1084, s. 1; 1975, c. 681, s. 1.)

CASE NOTES

This Section and § 89C-2 Must Be Read Together. — This section, the part of the Chapter prescribing penalties, must be read subject to the basic prohibitory section of the Chapter, § 89C-2, which makes it unlawful "to use in connection with his name or otherwise or advertise any title or description tending to convey the impression that he is ... a professional engineer ... unless such person has been duly registered as such." North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Section 89C-2 and this section authorize the Board to prohibit only those uses of the title engineer which imply or represent professional engineering status or expertise. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Use of Word "Engineer" Does Not Represent Professional Engineering Status. — It is clear from the definition in § 89C-3(8) that the use of the word "engineer" without being modified by "professional," "registered" or "licensed," or some word of like import does not represent that one is "duly registered and licensed by the Board" and therefore cannot represent that one is a professional engineer as that term is defined in § 89C-3(8). Since such usage does not represent professional engineering status, it cannot constitute the practice of engineering as that term is defined in § 89C-3(6)a. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Therefore, such usage is not a violation of those provisions of § 89C-2 and this section which prohibit the practice or offer to practice engineering without proper registration. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Stated in Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219 (1977).

§ 89C-24. Corporate or partnership practice of engineering or land surveying.

A corporation or partnership may engage in the practice of engineering or land surveying in this State; provided, however, the person or persons connected with such corporation or partnership in charge of the designing or supervision which constitutes such practice is or are registered as herein required of professional engineers and registered land surveyors. The same exemptions shall apply to corporations and partnerships as apply to individuals under this Chapter, provided further, that all corporations hereunder shall be subject to the provisions of Chapter 55B of the General Statutes of North Carolina. (1921, c. 1, s. 14; C. S., s. 6055(p); 1951, c. 1084, s. 1; 1969, c. 718, s. 18; 1975, c. 681, s. 1.)

§ 89C-25. Limitations on application of Chapter.

This Chapter shall not be construed to prevent or affect:

(1) The practice of architecture, landscape architecture, or contracting or any other legally recognized profession or trade; or

(2) The practice of professional engineering or land surveying in this State or by any person not a resident of this State and having no established place of business in this State when this practice does not aggregate more than 90 days in any calendar year, whether performed in this State or elsewhere, or involve more than one specific project; provided, however, that such person is legally qualified by registration to prac-

tice the said profession in his own state or country, in which the requirements and qualifications for obtaining a certificate of registration are satisfactory to the Board; in which case the person shall apply for and the Board will issue a temporary permit; or

(3) The practice of professional engineering or land surveying in this State not to aggregate more than 90 days by any person residing in this State, but whose residence has not been of sufficient duration for the Board to grant or deny registration; provided, however, such person shall have filed an application for registration as a professional engineer or registered land surveyor and shall have paid the fee provided for in G.S. 89C-14, and provided that such a person is legally qualified by registration to practice professional engineering or land surveying in his own state or country in which the requirements and qualifications for obtaining a certificate of registration are satisfactory to the Board, in which case the person shall apply for and the Board will issue a temporary permit; or

(4) Engaging in engineering or land surveying as an employee or assistant under the responsible charge of a professional engineer or registered land surveyor or as an employee or assistant of a nonresident professional engineer or a nonresident registered land surveyor provided for in subdivisions (2) and (3) of this section, provided that said work as an employee may not include responsible charge of design or supervision; or

(5) The practice of professional engineering or land surveying by any person not a resident of, and having no established place of business in this State, as a consulting associate of a professional engineer or registered land surveyor registered under the provisions of this Chapter; provided, the nonresident is qualified for such professional service in his own state or country; or

(6) Practice by members of the armed forces or employees of the government of the United States while engaged in the practice of engineering or land surveying solely for said government on government-owned works and projects; or

(7) The internal engineering or surveying activities of a person, firm or corporation engaged in manufacturing, processing, or producing a product, including the activities of public service corporations, public utility companies, authorities, State agencies, railroad[s], or membership cooperatives, or the installation and servicing of their product in the field; or research and development in connection with the manufacture of that product or their service; or of their research affiliates; or their employees in the course of their employment in connection with the manufacture, installation, or servicing of their product or service in the field, or on-the-premises maintenance of machinery, equipment, or apparatus incidental to the manufacture or installation of the product or service of a firm by the employees of the firm upon property owned, leased or used by the firm; inspection, maintenance and service work done by employees of the State of North Carolina, any political subdivision thereof, or any municipality therein including construction, installation, servicing, maintenance by regular full-time employees of streets, street lighting, traffic-control signals, police and fire alarm systems, waterworks, steam, electric and sewage treatment and disposal plants; the services of superintendents, inspectors or foremen regularly employed by the State of North Carolina or any political subdivision thereof, or municipal corporation therein; provided, however, that the internal engineering or surveying activity is not a holding out to or an offer to the public of engineering or any service thereof as prohibited by this

Chapter. Engineering work, not related to the foregoing exemptions, where the safety of the public is directly involved shall be under the responsible charge of a registered professional engineer, or in accordance with standards prepared or approved by a registered professional engineer.

(8) The performance of internal engineering or survey work by a manufacturing or communications common carrier company, or by a research and development company, or by employees of such corporations provided that such work is in connection with, or incidental to products of, or nonengineering services rendered by such corporations or their affiliates.

(9) The routine maintenance or servicing of machinery, equipment, facilities or structures, the work of mechanics in the performance of their established functions, or the inspection or supervision of construction by a foreman, superintendent, or agent of the architect or professional engineer, or services of an operational nature performed by an employee of a laboratory, a manufacturing plant, a public service corporation, or governmental operation. (1921, c. 1, s. 13; C. S., s. 6055(o); 1951, c. 1084, s. 1; 1975, c. 681, s. 1.)

CASE NOTES

Applied in North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

§ 89C-25.1. Supervision of unregistered individuals by registered person.

In all circumstances in which unregistered individuals are permitted under this Chapter to perform engineering or land surveying work, or both, under the supervision of a registered engineer, land surveyor, or both, the Board may by regulation establish a reasonable limit on the number of unregistered individuals which a registrant of the Board may directly or personally supervise at one time. (1979, c. 819, s. 5.)

§ 89C-25.2. Program of licensure by discipline.

The Board shall submit to the legislative committees of reference by July 1, 1981, a program of licensure by discipline and an analysis of the costs and merits thereof in order to permit the General Assembly to make a decision on the establishment of such a program. The "committees of reference" shall be the Senate and House Committees on State Government respectively or such other committees as the respective presiding officers may determine. (1979, c. 819, s. 5.)

§ 89C-26. Duties of register of deeds.

It shall be unlawful for the recorder of deeds or the register of titles or any county or proper public authority, to file or record any map, plat, survey, or other documents, within the definition of land surveying, which do not have impressed thereon, and affixed thereto, the personal signature and seal of a registered land surveyor by whom, or under whose responsible charge the map, plat, survey, or other documents were prepared. (1975, c. 681, s. 1.)

§ 89C-27. Invalid sections; severability.

If any of the provisions of this Chapter, or if any rule, regulation or order thereunder, or if the application of such provision to any person or circumstance shall be held invalid, the remainder of this Chapter and the application of such provision of this Chapter or rule, regulation or order to persons or circumstances, other than those as to which it is held valid, shall not be affected thereby. (1975, c. 681, s. 1.)

§ 89C-28. Existing registration not affected.

Nothing in this Chapter shall be construed as affecting the status of registration of any professional engineer or registered land surveyor who is rightfully in possession of a certificate of registration duly issued by the Board and valid as of July 1, 1975. (1951, c. 1084, s. 1; 1959, c. 1236, s. 2; 1975, c. 681, s. 1.)

Chapter 89D.

Landscape Contractors.

Sec.
89D-1. Certificate required.
89D-2. Definition.
89D-3. Application of Chapter.
89D-4. Landscape Contractors' Registration Board created; membership; compensation; powers, etc.
89D-5. Application for certificate; examination; renewal.
89D-6. Registers of applicants and certificate holders.
89D-7. Denial, revocation or suspension of certificate.
89D-8. Out-of-state applicants.
89D-9. Persons in practice prior to July 1, 1976.
89D-10. Injunctions for violation of Chapter.

Repeal of Chapter. — This Chapter is repealed, effective July 1, 1983, by Session Laws 1977, c. 712, s. 4. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 89D-1. Certificate required.

On and after December 1, 1975, it shall be unlawful for any person, partnership, association or corporation in this State to use the title "landscape contractor," or to advertise as such without first obtaining a certificate issued by the North Carolina Landscape Contractors' Registration Board under provisions of this Chapter. (1975, c. 741, s. 1.)

§ 89D-2. Definition.

A "landscape contractor" within the meaning of this Chapter is any person, partnership, association or corporation who for compensation or valuable consideration or promise thereof engages in the business requiring the art, experience, ability, knowledge, science and skill to install, plant, repair and maintain gardens, lawns, shrubs, vines, bushes, trees and other decorative vegetation including the grading and preparation of plots and areas of land for decorative treatment and arrangement; who constructs or installs garden pools, fountains, pavilions, conservatories, hothouses and greenhouses, incidental retaining walls, fences, walks, drainage and sprinkler systems; or who engages in incidental construction in connection therewith, or does any part thereof in such a manner that, under an agreed specification, an acceptable landscaping project can be executed. (1975, c. 741, s. 2.)

§ 89D-3. Application of Chapter.

The provisions of this Chapter shall not apply to and shall not include any person, partnership, association or corporation who shall perform any of the acts aforesaid in G.S. 89D-2 with reference to any property, so long as that person, partnership, association or corporation shall not use the title "landscape contractor." (1975, c. 741, s. 3.)

§ 89D-4. Landscape Contractors' Registration Board created; membership; compensation; power, etc.

(a) There is hereby created the North Carolina Landscape Contractors' Registration Board, hereinafter called the Board, which shall issue registration certificates of title to landscape contractors. The Board shall be composed of nine members. Two members shall be appointed by the Commissioner of Agriculture; two members shall be appointed by the Governor, with one being and having been for the preceding five years prior to the date of his appointment actively and principally engaged in the business of landscape contracting, and with one being a landscape architect as defined in G.S. 89A-1; and five members shall be appointed by the board of directors of the North Carolina Association of Nurserymen with at least one from the Western, Piedmont, Central, and Coastal Plain areas of the State.

On the initial Board the appointees of the Commissioner of Agriculture shall serve for a term of three years; one of the appointees of the Governor shall serve for a term of two years and the other appointee shall serve for a term of one year; one of the appointees of the board of directors shall serve for a term of three years, two for a term of two years, and two for a term of one year. The initial appointments shall be made prior to December 1, 1975, and the terms of successors shall begin on December 1 of the appropriate year thereafter.

After the terms of the initial members of the Board expire, all appointments shall be for terms of three years.

Any vacancy on the Board created by death, resignation or otherwise shall be filled for the unexpired term by the appropriate appointing dean, commissioner, Governor, or board of directors.

(b) From its funds, the Board shall pay its members at the rate set out in G.S. 93B-5: Provided, that at no time shall the expense exceed the cash balance on hand.

(c) The Board shall have power to make such rules and regulations as are not inconsistent with the provisions of this Chapter and the laws of North Carolina. The Board shall not make rules or regulations regulating commissions, salaries, or fees to be charged by registrants under this Chapter. The Board shall adopt a seal for its use, which shall bear thereon the words "North Carolina Landscape Contractors' Registration Board."

(d) The Board may employ a secretary-treasurer and such clerical assistance as may be necessary to carry out the provisions of this Chapter and to put into effect such rules and regulations as the Board may promulgate. The Board shall fix salaries for employees and shall require employees to make good and sufficient surety bond for the faithful performance of their duties.

(e) The Board shall be entitled to the services of the Attorney General of North Carolina in connection with the affairs of the Board or may, on approval of the Attorney General, employ an attorney to assist or represent it in the enforcement of this Chapter, but the fee paid for such service shall be approved by the Attorney General. (1975, c. 741, s. 4.)

§ 89D-5. Application for certificate; examination; renewal.

(a) Any person, partnership, association or corporation hereinafter desiring to register and be titled as a landscape contractor shall make written application for a certificate of title to the Board on such forms as are prescribed by the Board. Each applicant for a certificate of title as a landscape contractor shall be at least 18 years of age. Prior to July 1, 1976, each applicant for a certificate shall have been actively engaged as an untitled landscape contractor for at least one year prior to date of application. After July 1, 1976, an applicant shall furnish evidence satisfactory to the Board of three years' experience in

landscape contracting or the completion of a study or combination of study and experience in landscape contracting equivalent to three years' experience under a landscape contractor. Each application for an initial certificate shall be accompanied by an application fee of twenty dollars ($20.00).

(b) Any person who files such application to the Board in proper manner to be registered and titled as a landscape contractor shall be required to take an oral or written examination to determine his qualifications. The Board will compile a manual from which the examination will be prepared.

If the results of the examination shall be satisfactory, the Board shall issue to such a person a certificate, authorizing such person to be titled as a landscape contractor in the State of North Carolina, upon payment of privilege taxes now required by law, or that may hereafter be required by law. Anyone failing to pass an examination may be reexamined without payment of additional fee, under such rules as the Board may adopt in such cases.

(c) All certificates granted and issued by the Board under the provisions of this Chapter shall expire annually on December 31. Renewal of such certificates may be effected at any time during the month preceding the expiration date of such certificates upon proper application to the Board accompanied by the payment to the secretary-treasurer of the Board of a renewal fee, as set by the Board, of not more than fifty dollars ($50.00). The fee for an initial certificate shall be the same as for a renewal certificate and is in addition to the application fee. All certificates reinstated after expiration date thereof shall be subject to a late filing fee of ten dollars ($10.00). In the event a registrant fails to obtain a reinstatement of such certificate within 12 months from the date of expiration thereof, the Board may, in its discretion, consider such registrant subject to the provisions of this Chapter relating to the issuance of an original certificate. Duplicate certificates may be issued by the Board upon payment of a fee of one dollar ($1.00) by the registrant. (1975, c. 741, s. 5.)

§ 89D-6. Registers of applicants and certificate holders.

(a) The secretary-treasurer of the Board shall keep a register of all applicants for certificates of title. The register shall include the date of application, name, place of business, place of residence, and indicate whether the certificate of title was granted or refused.

(b) The secretary-treasurer of the Board shall also keep a current roster showing the names and places of business of all registered titled landscape contractors. The roster shall be kept on file in the office of the Board and be open to public inspection.

(c) On or before the first day of September of each year, the Board shall file with the Secretary of State a copy of the roster of landscape contractors holding certificates of title. At the same time the Board shall file with the Secretary of State a report containing a complete statement of receipts and disbursements of the Board for the preceding fiscal year ending June 30. Such statement shall be attested by the secretary-treasurer of the Board. (1975, c. 741, s. 6.)

§ 89D-7. Denial, revocation or suspension of certificate.

(a) The Board shall have power to revoke or suspend certificates of title herein provided. The Board may upon its own motion or upon a verified complaint in writing hold a hearing as hereinafter provided to investigate the actions of any titled landscape contractor. The Board shall have the power to suspend or revoke any certificate of title issued under the provisions of this Chapter if the registrant has by false or fraudulent representations obtained a certificate; if the registrant has been convicted or has entered a plea of nolo contendere to any crime involving moral turpitude in any court, State or

federal; if the registrant is found to have committed any act which constitutes improper, fraudulent or dishonest dealing; or if the registrant violates any rule or regulation duly promulgated by the Board.

(b) In all proceedings under this section for the revocation, denial or suspension of certificates, the provisions of Chapter 150 or Chapter 150A, of the General Statutes, whichever is in effect, shall be applicable. (1975, c. 741, s. 7.)

§ 89D-8. Out-of-state applicants.

An applicant from another state which offers registration privileges to residents of North Carolina may be registered by conforming to all the provisions of this Chapter and, in the discretion of the Board, such other terms and conditions as are required of North Carolina residents applying for a certificate in such other state. The Board may exempt from the examination prescribed in this Chapter a landscape contractor duly registered in another state if a similar exemption is extended to registered landscape contractors from North Carolina. (1975, c. 741, s. 8.)

§ 89D-9. Persons in practice prior to July 1, 1976.

Before July 1, 1976, any person, partnership, corporation or other legal entity submitting an application, application fee and evidence satisfactory to the Board that he has actively engaged in the practice of landscape contracting for one year prior to July 1, 1976, shall be issued a certificate of title without the requirement of examination. (1975, c. 741, s. 10.)

§ 89D-10. Injunctions for violation of Chapter.

The Board shall have authority to petition for, and the superior courts of the State shall have authority to issue, temporary restraining orders, and preliminary and permanent injunctions for violations of this Chapter. (1975, c. 741, s. 11.)

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90-42. Restoration of revoked license.
90-43. Compensation and expenses of Board.
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90-46. Filling prescriptions.
90-47. [Repealed.]
90-48. Rules and regulations of Board; violation a misdemeanor.
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Dental Peer Review Protection Act.

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The Licensing of Mouth Hygienists to Teach and Practice Mouth Hygiene in Public Institutions.

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Pharmacy.

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90-95. (See Editor's note for effective date) Violations; penalties.
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90-98. (See Editor's note for effective date) Attempt and conspiracy; penalties.
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90-122. Compensation and expenses of Board.
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Article 7.

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Nurse Practice Act.

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90-171.9. Procedure for accreditation of new educational unit; provisional accreditation.
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Article 10.

Midwives.

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Veterinarians.

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90-180. Title.
90-181. Definitions.
90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.
90-183. Meeting of Board.
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90-185. General powers of the Board.
90-186. Special powers of the Board.
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90-187.3. License without examination.
90-187.4. Temporary permit.
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90-187.8. Discipline of licensees.
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Article 12.

Podiatrists.

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Article 12A.

Podiatrists.

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90-202.3. Unlawful to practice unless registered.
90-202.4. Board of Podiatry Examiners; how elected; terms of office; powers; duties.
90-202.5. Applicants to be examined; examination fee; requirements.
90-202.6. Examinations; subjects; certificates.
90-202.7. Reexamination of unsuccessful applicants.
90-202.8. Revocation of certificate; grounds for; suspension of certificate.
90-202.9. Fees for certificates and examinations; compensation of Board.
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90-202.11. Continuing education courses required.
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90-202.13. Injunctions.
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Article 13A.

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Article 14.

Cadavers for Medical Schools.

90-211 to 90-216. [Repealed.]

Article 14A.

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Article 14B.

Disposition of Unclaimed Bodies.

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Article 14C.

Final Disposition or Transportation of Deceased Migrant Farm Workers and Their Dependents.

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90-223. Powers and duties of Board.
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Article 17.

Dispensing Opticians.

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90-235. Definition.
90-236. What constitutes practicing as a dispensing optician.
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90-239. Organization, meetings and powers of Board.
90-240. Qualifications for taking examination; subjects examined.
90-241. Fees required; licensing of opticians from outside State.
90-242. Persons practicing before passage of Article.
90-243. Certified copy of certificate.
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90-248. Compensation and expenses of Board members and secretary.
90-249. Powers of the Board.
90-250. Sale of optical glasses.
90-251. Licensee allowing unlicensed person to use his certificate or license.
90-252. Necessity for dispensing optician to supervise place of business; false and deceptive advertising.
90-253. Exemptions from Article.
90-254. General penalty for violation.
90-255. Gifts, premiums or discounts unlawful; refund of fees; illegal advertising.
90-255.1. Sale of flammable frames.

Article 18.

Physical Therapy.

90-256 to 90-270. [Recodified.]

Article 18A.

Practicing Psychologists.

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90-270.3. Practice of medicine and optometry not permitted.
90-270.4. Exemptions to this Article.
90-270.5. Temporary licenses.
90-270.6. Board of Examiners in Psychology; appointment; term of office; composition.
90-270.7. Qualifications of Board members.
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90-270.10. Annual report.
90-270.11. Licensing and examination.
90-270.12. [Repealed.]
90-270.13. Licensing of psychologist licensed or certified in other states; licensing of diplomates of American Board of Examiners in Professional Psychology.
90-270.14. Renewal of licenses.
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90-270.16. Prohibited acts.
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90-270.18. Disposition of fees.
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Article 18B.

Physical Therapy.

90-270.24. Definitions.
90-270.25. Board of Examiners.
90-270.26. Powers of the Board.
90-270.27. Records to be kept; copies of record.
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90-270.31. Certificates of licensure.
90-270.32. Renewal of license; lapse; revival.
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90-270.35. Unlawful practice.
90-270.36. Grounds for disciplinary action.
90-270.37. Enjoining illegal practices.
90-270.38. Title.
90-270.39. Osteopaths, chiropractors, and podiatrists not restricted.
90-270.40 to 90-270.44. [Reserved.]

Article 18C.

Marital and Family Therapy Certification Act.

90-270.45. Title of Article.
90-270.46. Policy and purpose.
90-270.47. Definitions.
90-270.48. Prohibited acts.
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90-270.50. Appointment and qualification of Board members.
90-270.51. Board meetings.
90-270.52. Certification application.
90-270.53. Application for certificate before January 1, 1981.
90-270.54. Application for certificate after January 1, 1981.
90-270.55. Examination.
90-270.56. Reciprocal certificates.
90-270.57. Fees.
90-270.58. Renewal of certificate.
90-270.59. Disposition of funds.
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90-270.61. Penalties.
90-270.62. Injunction.

Article 19.

Sterilization Operations.

90-271. Operation lawful upon request of married person or person over 18.
90-272. Operation on unmarried minor.
90-273. [Repealed.]
90-274. No liability for nonnegligent performance of operation.
90-275. Article does not affect eugenical or therapeutical sterilization laws.

Article 20.

Nursing Home Administrator Act.

Sec.

90-275.1. Title.
90-276. Definitions.
90-277. Composition of Board.
90-278. Qualifications for licensure.
90-279. Licensing function.
90-280. Fees; display of license; duplicate license; inactive list.
90-281. Collection of funds.
90-282. Advisory council.
90-283. Organization of Board; compensation; employees and services.
90-284. Exclusive jurisdiction of Board.
90-285. Functions and duties of the Board.
90-286. Renewal of license.
90-287. Reciprocity with other states.
90-288. Misdemeanor.

Article 21.

Determination of Need for Medical Care Facilities.

90-289 to 90-291. [Repealed.]

Article 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

90-292. Declaration of policy.
90-293. Definitions.
90-294. License required; Article not applicable to certain activities.
90-295. Qualifications of applicants for licensure.
90-296. Examinations.
90-297. Registration and issuance of licenses; licenses for persons licensed in other jurisdiction or engaged in practice on October 1, 1975.
90-298. Temporary license.
90-299. Licensee to notify Board of place of practice.
90-300. Renewal of licenses.
90-301. Grounds for suspension or revocation of license.
90-302. Prohibited acts and practices.
90-303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.
90-304. Powers and duties of Board.
90-305. Fees.
90-306. Penalty for violation.
90-307. Severability.
90-308 to 90-319. [Reserved.]

Article 23.

Right to Natural Death; Brain Death.

90-320. General purpose of Article.
90-321. Right to a natural death.
90-322. Procedures for natural death in the absence of a declaration.
90-323. Death; determination by physician.

Article 1.

Practice of Medicine.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-1. North Carolina Medical Society incorporated.

The association of regularly graduated physicians, calling themselves the State Medical Society, is hereby declared to be a body politic and corporate, to be known and distinguished by the name of The Medical Society of the State of North Carolina. (1858-9, c. 258, s. 1; Code, s. 3121; Rev., s. 4491; C. S., s. 6605.)

CASE NOTES

Stated in Powell v. Duke Univ., Inc., 18 N.C. App. 736, 197 S.E.2d 910 (1973); In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

§ 90-2. Board of Examiners.

In order to properly regulate the practice of medicine and surgery, there shall be established a board of regularly graduated physicians, to be known by the title of The Board of Medical Examiners of the State of North Carolina, which shall consist of seven regularly graduated physicians. (1858-9, c. 258, ss. 3, 4; Code, s. 3123; Rev., s. 4492; C. S., s. 6606; Ex. Sess. 1921, c. 44, s. 1.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Suit Against Board. — Neither the State nor any of its institutions or agencies, including this Board, can be sued without its permission. Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

The Board is not a "person" within the meaning of 42 U.S.C. § 1983 and cannot be subject to a suit for damages. Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978).

A suit against the Board directly under the Fourteenth Amendment is barred by the Eleventh Amendment. Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978).

Stated in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

§ 90-3. Medical Society appoints Board.

The Medical Society shall have power to appoint the Board of Medical Examiners. (1858-9, c. 258, s. 9; Code, s. 3126; Rev., s. 4493; C. S., s. 6607.)

CASE NOTES

Stated in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

§ 90-4. Board elects officers and fills vacancies.

The Board of Medical Examiners is authorized to elect all such officers and to frame all such bylaws as may be necessary, and in the event of any vacancy by death, resignation, or otherwise, of any member of said Board, the Board, or a quorum thereof, is empowered to fill such vacancy. (1858-9, c. 258, s. 11; Code, s. 3128; Rev., s. 4494; C. S., s. 6608.)

§ 90-5. Meetings of Board.

The Board of Medical Examiners may assemble once in every year in the City of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the State if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; C. S., s. 6609; 1935, c. 363.)

§ 90-6. Regulations governing applicants for license, examinations, etc.; appointment of subcommittee.

The Board of Medical Examiners is empowered to prescribe such regulations as it may deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations, and the conduct of examinations proper.

The Board of Medical Examiners shall appoint and maintain a subcommittee to work jointly with a subcommittee of the Board of Nursing to develop rules and regulations to govern the performance of medical acts by registered nurses. Rules and regulations developed by this subcommittee from time to time shall govern the performance of medical acts by registered nurses and shall become effective when adopted by both the Board of Medical Examiners and the Board of Nursing. The Board of Medical Examiners shall have responsibility for securing compliance with these regulations. (C. S., s. 6610; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2; 1973, c. 92, s. 2.)

§ 90-7. Bond of secretary.

The secretary of the Board of Medical Examiners shall give bond with good surety, to the president of the Board, for the safekeeping and proper payment of all moneys that may come into his hands. (1858-9, c. 258, s. 17; Code, s. 3134; Rev., s. 4497; C. S., s. 6611.)

§ 90-8. Officers may administer oaths, and subpoena witnesses and records.

The president and secretary of the Board are empowered to administer oaths to all persons appearing before it as the Board may deem necessary to the performance of its duties, and to summon and to issue subpoenas for the appearance of any witnesses deemed necessary to testify concerning any matter to be heard before or inquired into by the Board, and to order that records concerning the treatment of patients relevant to the Board's inquiry be produced before the Board or for inspection and copying by representatives of the Board by the custodian of such records. (1913, c. 20, s. 7; C.S., s. 6612; Ex. Sess. 1921, c. 44, s. 3; 1953, c. 1248, s. 1; 1975, c. 690, s. 1; 1979, c. 107, s. 8.)

Effect of Amendments. — The 1979 amendment substituted "are empowered to" for "may" near the beginning of the section.

§ 90-9. Examination for license; scope; conditions and prerequisites.

It shall be the duty of the Board of Medical Examiners to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: He shall, before he is admitted to examination, satisfy the Board that he has an academic education equal to the entrance requirements of the University of North Carolina, or furnish a certificate from the superintendent of public instruction of the county that he has passed an examination upon his literary attainments to meet the requirements of entrance in the regular course of the State University. He shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college or an osteopathic college approved by the American Osteopathic Association at the time of his graduation, which time of graduation shall have been on Jan-

uary 1, 1960, or subsequent thereto and which medical and osteopathic schools shall require an attendance of not less than four years or for a lesser period of time approved by the Board, and supply such facilities for clinical and scientific instruction as shall meet the approval of the Board.

The examination shall cover the branches of medical science and subjects which the Board deems necessary to determine competence to practice medicine.

If the applicant successfully passes such examination as determined by the Board, and if the applicant also satisfies the Board that he has successfully completed one year of training after his graduation from medical school in a medical education program approved by the Board, the Board shall grant such applicant a license authorizing the applicant to practice medicine in any of its branches.

Applicants shall be examined by number only; names and other identifying information shall not appear on examination papers. (Rev., s. 4498; 1913, c. 20, ss. 2, 3, 6; C. S., s. 6613; 1921, c. 47, s. 1; 1969, c. 612, s. 1; c. 929, s. 1; 1971, c. 1150, s. 1; 1977, c. 838, s. 1.)

CASE NOTES

Constitutional Discrimination. — That the statute is not in violation of the State Constitution is held in State v. Van Doran, 109 N.C. 864, 14 S.E. 32 (1891).

It is not to be questioned that the lawmaking power of the State has the right to require an examination and certificate as to the competency of persons desiring to practice law or medicine. State v. Call, 121 N.C. 643, 28 S.E. 517 (1897); State v. Siler, 169 N.C. 314, 84 S.E. 1015 (1915).

Stated in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

§ 90-10. Provision in lieu of examination.

In lieu of the above examination, the Board may grant a license to an applicant who is found to have passed the examination given by the National Board of Medical Examiners, or who has passed such other examination which the Board deems to be equivalent to the examination given by the Board, provided the applicant meets the other qualifications set forth in this Article. (C. S., s. 6614; 1921, c. 41, s. 2; Ex. Sess. 1921, c. 44, s. 4; 1969, c. 612, s. 2; c. 929, s. 2; 1971, c. 1150, s. 2; 1975, c. 690, s. 2.)

§ 90-11. Qualifications of applicant for license.

Every person making application for a license to practice medicine or surgery in the State shall be not less than 21 years of age, and of good moral character, before any license can be granted by the Board of Medical Examiners. (C. S., s. 6615; 1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5; 1971, c. 1150, s. 3.)

§ 90-12. Limited license.

The Board may, whenever in its opinion the conditions of the locality where the applicant resides are such as to render it advisable, make such modifications of the requirements of the preceding sections, both as to application for examination and examination for license, as in its judgment the interests of the people living in that locality may demand, and may issue to such applicant a special license, to be entitled a "Limited License," authorizing the holder thereof to practice medicine and surgery within the limits only of the districts specifically described therein. The holder of the limited license practicing

medicine or surgery beyond the boundaries of the districts as laid down in said license shall be guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for each and every offense; and the Board is empowered to revoke such limited license, in its discretion, after due notice. (1909, c. 218, s. 1; C. S., s. 6616; 1967, c. 691, s. 42.)

CASE NOTES

Stated in Powell v. Duke Univ., Inc., 18 N.C. App. 736, 197 S.E.2d 910 (1973).

§ 90-13. When license without examination allowed.

The Board of Medical Examiners shall in their discretion issue a license to any applicant to practice medicine and surgery in this State without examination if said applicant exhibits a diploma or satisfactory proof of graduation from a medical or osteopathic college, approved as provided in G.S. 90-9 and requiring an attendance of not less than four years or for such lesser period of time approved by the Board, and a license issued to him to practice medicine and surgery by the Board of Medical Examiners of another state, and has successfully completed one year of training after his graduation from medical college in a medical education and training program approved by the Board, in which program the Board may permit him to practice medicine. Such a license may be granted for such a period of time and upon such conditions as the Board may deem advisable. (1907, c. 890; 1913, c. 20, s. 3; C. S., s. 6617; 1969, c. 612, s. 3; 1971, c. 1150, s. 4; 1975, c. 690, s. 3; 1977, c. 838, s. 2.)

§ 90-14. Revocation, suspension, annulment or denial of license.

The Board shall have the power to deny, annul, suspend, or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:

(1) Immoral or dishonorable conduct;

(2) Producing or attempting to produce an abortion contrary to law;

(3) Made false statements or representations to the Board, or who has willfully concealed from the Board material information in connection with his application for a license;

(4) Repealed by Session Laws 1977, c. 838, s. 3.

(5) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals, or any other type of material or by reason of any physical or mental abnormality. The Board is empowered and authorized to require a physician licensed by it to submit to a mental or physical examination by physicians designated by the Board before or after charges may be presented against him, and the results of examination shall be admissible in evidence in a hearing before the Board;

(6) Unprofessional conduct, including, but not limited to, any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of his practice or

otherwise, and whether committed within or without North Carolina;

(7) Conviction in any court of the commission of a crime involving moral turpitude, or of the violation of a law involving the practice of medicine or the conviction of a felony;

(8) By false representations has obtained or attempted to obtain practice, money or anything of value;

(9) Has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he has been educated;

(10) Adjudication of mental incompetency, which shall automatically suspend a license unless the Board orders otherwise;

(11) Lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients. In this connection the Board may consider repeated acts of a physician indicating his failure to properly treat a patient and may require such physician to submit to inquiries or examinations, written or oral, by members of the Board or by other physicians licensed to practice medicine in this State, as the Board deems necessary to determine the professional qualifications of such licensee;

(12) Promotion of the sale of drugs, devices, appliances or goods provided for a patient in such a manner as to exploit the patient for financial gain of the physician;

(13) Suspension or revocation of a license to practice medicine in any other state, or territory of the United States, or other country.

For any of the foregoing reasons, the Board may deny the issuance of a license to an applicant, revoke a license issued to it, may suspend such a license for a period of time, and may impose conditions upon the continued practice after such period of suspension as the Board may deem advisable, may limit the accused physician's practice of medicine with respect to the extent, nature or location of his practice as the Board deems advisable. The Board may, in its discretion and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked or rescinded. (C. S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; 1953, c. 1248, s. 2; 1969, c. 612, s. 4; c. 929, s. 6; 1975, c. 690, s. 4; 1977, c. 838, s. 3.)

CASE NOTES

Constitutionality. — The test of whether this section is vague or overbroad is whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

This section does not deny due process. Hoke v. Board of Medical Exmrs., 395 F. Supp. 357 (W.D.N.C. 1975).

The combination in an agency of investigative and adjudicatory functions does not itself violate due process. Hoke v. Board of Medical Exmrs., 395 F. Supp. 357 (W.D.N.C. 1975).

This section's language itself and in conjunction with established medical ethics sufficiently informs physicians of the standards by which they are to conduct themselves and their practice. Hoke v. Board of Medical Exmrs., 395 F. Supp. 357 (W.D.N.C. 1975).

Unprofessional Conduct. — While the Board does not have the power to revoke a license on the sole ground that the holder thereof has been convicted of the violation of a criminal statute in force in the State or in the United States, the Board has the power to revoke a license upon a finding that the holder thereof was guilty of unprofessional conduct in that he had violated the provisions of the statute. State ex rel. Board of Medical Exmrs. v. Gardner, 201 N.C. 123, 159 S.E. 8 (1931).

Conviction of Crime. — This section does not authorize the revocation of a license of a physician on the ground that he has violated a law of this State or a federal law unless and until he has been convicted thereof. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Writing Unwarranted Prescriptions. — Findings of the Board that the physician wrote prescriptions for controlled substances without

determining whether or not the drugs were necessary for the treatment of any ailment or disease and not for any legitimate medical purpose and not in the course of the legitimate practice of medicine, supported by the record, authorized the revocation of the physician's license. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Any reasonably intelligent physician would know that to prescribe a highly dangerous drug for a complete stranger, without making any examination of the patient or any inquiry as to his medical history or current symptoms and complaints, would be included within the phrase "unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his profession," the terminology of former § 90-14. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Findings that the physician issued the prescription not for any legitimate medical purpose and not in the course of the legitimate practice of medicine being supported by competent evidence in the record, are conclusive on judicial review of the order of the Board. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Conditional Suspension of Revocation. — While this section does not authorize the revocation of a license of a physician on the ground that he has violated a law of this State or a federal law unless and until he has been convicted thereof, nothing in this section precludes the Board from suspending its order of revocation, based on such a conviction, upon the condition that the physician not violate a State or federal law. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

A proceeding before the Board for the revocation of a physician's license on the ground that he has violated a condition of a prior, suspended order of revocation, is a civil proceeding. Consequently, such violation of the condition of suspension of the prior order does not have to be shown beyond a reasonable doubt, but only by a preponderance of the evidence. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Appeal. — The appeal from the State Board of Medical Examiners allowed to a physician whose license has been revoked for immoral conduct in the practice of his profession follows the procedure allowed in analogous cases, and the intent of the legislature is interpreted to give a trial de novo in the superior court wherein the jury are to decide upon the evidence adduced before them the facts involved in the issue. State ex rel. Board of Medical Exmrs. v. Carroll, 194 N.C. 37, 138 S.E. 339 (1927).

Stated in Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978).

Quoted in In re Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967).

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969); Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529 (1976).

§ 90-14.1. Judicial review of Board's decision denying issuance of a license.

Whenever the Board of Medical Examiners has determined that a person who has duly made application to take an examination to be given by the Board showing his education, training and other qualifications required by said Board, or that a person who has taken and passed an examination given by the Board, has failed to satisfy the Board of his qualifications to be examined or to be issued a license, for any cause other than failure to pass an examination, the Board shall immediately notify such person of its decision, and indicate in what respect the applicant has so failed to satisfy the Board. Such applicant shall be given a formal hearing before the Board upon request of such applicant filed with or mailed by registered mail to the secretary of the Board at Raleigh, North Carolina, within 10 days after receipt of the Board's decision, stating the reasons for such request. The Board shall within 20 days of receipt of such request notify such applicant of the time and place of a public hearing, which shall be held within a reasonable time. The burden of satisfying the Board of his qualifications for licensure shall be upon the applicant. Following such hearing, the Board shall determine whether the applicant is qualified to be examined or is entitled to be licensed as the case may be. Any such decision of the Board shall be subject to judicial review upon appeal to the Superior Court of Wake County upon the filing with the Board of a written notice of appeal with exceptions taken to the decision of the Board within 20 days after service of notice of the Board's final decision. Within 30 days after receipt of notice of appeal, the secretary of the Board shall certify to the clerk of the Superior

Court of Wake County the record of the case which shall include a copy of the notice of hearing, a transcript of the testimony and evidence received at the hearing, a copy of the decision of the Board, and a copy of the notice of appeal and exceptions. Upon appeal the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony may be taken by the court. The decision of the Board shall be upheld unless the substantial rights of the applicant have been prejudiced because the decision of the Board is in violation of law or is not supported by any evidence admissible under this Article, or is arbitrary or capricious. Each party to the review proceeding may appeal to the Supreme Court as hereinafter provided in G.S. 90-14.11. (1953, c. 1248, s. 3.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Applied in In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Stated in In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

§ 90-14.2. Hearing before revocation or suspension of a license.

Before the Board shall revoke, restrict or suspend any license granted by it, the licensee shall be given a written notice indicating the general nature of the charges, accusation, or complaint made against him, which notice may be prepared by a committee or one or more members of the Board designated by the Board, and stating that such licensee will be given an opportunity to be heard concerning such charges or complaint at a time and place stated in such notice, or at a time and place to be thereafter designated by the Board, and the Board shall hold a public hearing not less than 30 days from the date of the service of such notice upon such licensee, at which such licensee may appear personally and through counsel, may cross examine witnesses and present evidence in his own behalf. A physician who is mentally incompetent shall be represented at such hearing and shall be served with notice as herein provided by and through a guardian ad litem appointed by the clerk of the court of the county in which the physician has his residence. Such licensee or physician may, if he desires, file written answers to the charges or complaints preferred against him within 30 days after the service of such notice, which answer shall become a part of the record but shall not constitute evidence in the case. (1953, c. 1248, s. 3; 1975, c. 690, s. 5.)

CASE NOTES

The function of the Board under this section is certainly quasi-judicial. Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

Absolute Privilege of Board. — The public policy which supports the doctrine of absolute privilege in defamation actions fully supports the application of the doctrine to the Board of Medical Examiners and the individual members in the performance of their quasi-judicial statutory duties. Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

Satisfaction of Due Process Requirements. — Where the physician was notified in writing of the charges against him, given ample time in which to prepare his defense, was present in person and represented by able coun-

sel, of his choice, at the hearing, was confronted by his accusers, was given ample opportunity to cross-examine them and testified in his own behalf, procedurally, the hearing was conducted in accordance with the statute and fulfilled the requirements of the federal due process clause and the law of the land clause of the State Constitution. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Quoted in Hoke v. Board of Medical Exmrs., 395 F. Supp. 357 (W.D.N.C. 1975).

Cited in Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978).

§ 90-14.3. Service of notices.

Any notice required by this Chapter may be be served either personally or by an officer authorized by law to serve process, or by registered mail, return receipt requested, directed to the licensee or applicant at his last known address as shown by the records of the Board. If notice is served personally, it shall be deemed to have been served at the time when the officer delivers the notice to the person addressed. Where notice is served by registered mail, it shall be deemed to have been served on the date borne by the return receipt showing delivery of the notice to addressee or refusal of the addressee to accept the notice. (1953, c. 1248, s. 3.)

§ 90-14.4. Place of hearings for revocation or suspension of license.

Upon written request of the accused physician, given to the secretary of the Board 20 days after service of the charges or complaints against him, a hearing for the purpose of determining revocation or suspension of his license shall be conducted in the county in which such physician maintains his residence, or at the election of the Board, in any county in which the act or acts complained of occurred. In the absence of such request, the hearing shall be held at a place designated by the Board, or as agreed upon by the physician and the Board. (1953, c. 1248, s. 3.)

§ 90-14.5. Use of trial examiner or depositions.

Where the licensee requests that the hearing herein provided for be held by the Board in a county other than the county designated for the holding of the meeting of the Board at which the matter is to be heard, the Board may designate in writing one or more of its members to conduct the hearing as a trial examiner or trial committee, to take evidence and report a written transcript thereof to the Board at a meeting where a majority of the members are present and participating in the decision. Evidence and testimony may also be presented at such hearings and to the Board in the form of depositions taken before any person designated in writing by the Board for such purpose or before any person authorized to administer oaths, in accordance with the procedure for the taking of depositions in civil actions in the superior court. (1953, c. 1248, s. 3.)

§ 90-14.6. Evidence admissible.

In proceedings held pursuant to this Article the Board shall admit and hear evidence in the same manner and form as prescribed by law for civil actions. A complete record of such evidence shall be made, together with the other proceedings incident to such hearing. (1953, c. 1248, s. 3.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Applied in In Re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Quoted in In re Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967).

§ 90-14.7. Procedure where person fails to request or appear for hearing.

If a person who has requested a hearing does not appear, and no continuance has been granted, the Board or its trial examiner or committee may hear the evidence of such witnesses as may have appeared, and the Board may proceed to consider the matter and dispose of it on the basis of the evidence before it. For good cause, the Board may reopen any case for further hearing. (1953, c. 1248, s. 3.)

§ 90-14.8. Appeal from Board's decision revoking or suspending a license.

A physician whose license is revoked or suspended by the Board may obtain a review of the decision of the Board in the Superior Court of Wake County or in the superior court in the county in which the hearing was held or upon agreement of the parties to the appeal in any other superior court of the State, upon filing with the secretary of the Board a written notice of appeal within 20 days after the date of the service of the decision of the Board, stating all exceptions taken to the decision of the Board and indicating the court in which the appeal is to be heard.

Within 30 days after the receipt of a notice of appeal as herein provided, either by an applicant or a licensee, the Board shall prepare, certify and file with the clerk of the superior court in the county to which the appeal is directed the record of the case comprising a copy of the charges, notice of hearing, transcript of testimony, and copies of documents or other written evidence produced at the hearing, decision of the Board, and notice of appeal containing exceptions to the decision of the Board. (1953, c. 1248, s. 3.)

§ 90-14.9. Appeal bond; stay of Board order.

The person seeking the review shall file with the clerk of the reviewing court a copy of the notice of appeal and an appeal bond of two hundred dollars ($200.00) at the same time the notice of appeal is filed with the Board. At any time before or during the review proceeding the aggrieved person may apply to the reviewing court for an order staying the operation of the Board decision pending the outcome of the review, which the court may grant or deny in its discretion. (1953, c. 1248, s. 3.)

§ 90-14.10. Scope of review.

Upon the review of the Board's decision revoking or suspending a license, the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The court may affirm the decision of the Board or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board are in violation of substantive or procedural law, or are not supported by competent, material, and substantial evidence admissible under this Article, or are arbitrary or capricious. At any time after

the notice of appeal has been filed, the court may remand the case to the Board for the hearing of any additional evidence which is material and is not cumulative and which could not reasonably have been presented at the hearing before the Board. (1953, c. 1248, s. 3.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Findings of Board Supported by Evidence Are Conclusive. — The findings of the Board, supported by evidence in the record, although contradicted by the testimony of the respondent himself, are conclusive upon judicial review of the Board's order. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Findings that the physician issued the prescription not for any legitimate medical purpose and not in the course of the legitimate practice of medicine being supported by competent evidence in the record, are conclusive on judicial review of the order of the Board. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

The credibility of the witnesses and the resolution of conflicts in their testimony is for the Board, not a reviewing court, and the findings of the Board supported by competent evidence, are conclusive upon judicial review of the Board's order. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Reviewing court may not substitute its discretion for Board's. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Grounds for Remand. — The superior court was not required to remand the matter of the revocation of a physician's license to the Board for further proceedings in the absence of some preliminary showing by the physician of basis for his accusation of racial discrimination and prejudice against him. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Quoted in In re Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967).

§ 90-14.11. Appeal to Supreme Court; appeal bond.

Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the superior court under rules of procedure applicable in other civil cases. No appeal bond shall be required of the Board. The appealing party may apply to the superior court for a stay of that court's decision or a stay of the Board's decision, whichever shall be appropriate, pending the outcome of the appeal to the Supreme Court. (1953, c. 1248, s. 3.)

CASE NOTES

Stated in In re Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967); In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

§ 90-14.12. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. (1953, c. 1248, s. 3.)

§ 90-15. License fee; salaries, fees, and expenses of Board.

Each applicant for a license by examination shall pay to the treasurer of the Board of Medical Examiners of the State of North Carolina a fee which shall be prescribed by said Board in an amount not exceeding the sum of two hundred dollars ($200.00) before being admitted to the examination. Whenever any license is granted without examination, as authorized in G.S. 90-13, the applicant shall pay to the treasurer of the Board a fee in an amount to be prescribed by the Board not in excess of one hundred dollars ($100.00). Whenever a limited license is granted as provided in G.S. 90-12, the applicant shall pay to the treasurer of the Board a fee of fifty dollars ($50.00), except where a limited license to practice in a medical education and training program approved by the Board for the purpose of education or training, the applicant shall pay a fee of ten dollars ($10.00). A fee of ten dollars ($10.00) shall be paid for the issuance of a duplicate license. All fees shall be paid in advance to the treasurer of the Board of Medical Examiners of the State of North Carolina, to be held by him as a fund for the use of said Board. The compensation and expenses of the members and officers of the said Board and all expenses proper and necessary in the opinion of the Board to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of said fund, upon the warrant of the said Board and all expenses proper and necessary in the opinion of the officers and members of said Board shall be fixed by the Board but shall not exceed ten dollars ($10.00) per day per member for time spent in the performance and discharge of his duties as a member of said Board, and reimbursement for travel and other necessary expenses incurred in the performance of his duties as a member of said Board. Any unexpended sum or sums of money remaining in the treasury of said Board at the expiration of the terms of office of the members thereof shall be paid over to their successors in office.

For the initial and annual registration of an assistant to a physician, the Board may require the payment of a fee not to exceed a reasonable amount. (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C. S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; 1953, c. 187; 1969, c. 929, s. 4; 1971, c. 817, s. 2; c. 1150, s. 5; 1977, c. 838, s. 4; 1979, c. 196, s. 1.)

Effect of Amendments. — The 1979 amendment, effective Sept. 1, 1979, substituted "two hundred dollars ($200.00)" for "one hundred dollars ($100.00)" in the first sentence.

§ 90-15.1. Registration every two years with Board.

Every person heretofore or hereafter licensed to practice medicine by said Board of Medical Examiners shall, during the month of January, 1958, and during the month of January in every even-numbered year thereafter, register with the secretary-treasurer of said Board his name and office and residence address and such other information as the Board may deem necessary and shall pay a registration fee fixed by the Board not in excess of twenty-five dollars ($25.00). In the event a physician fails to register as herein provided he shall pay an additional amount of ten dollars ($10.00) to the Board. Should a physician fail to register and pay the fees imposed, and should such failure continue for a period of 30 days, the license of such physician may be suspended by the Board, after notice and hearing at the next regular meeting of the Board. Upon payment of all fees and penalties which may be due, not to exceed a total of two hundred dollars ($200.00) of accumulated fees and penalties, the license of any such physician shall be reinstated. (1957, c. 597; 1969, c. 929, s. 5; 1979, c. 196, s. 2.)

Effect of Amendments. — The 1979 amendment, effective Sept. 1, 1979, substituted "twenty-five dollars ($25.00)" for "ten dollars ($10.00)" in the first sentence and substituted "two hundred dollars ($200.00)" for "one hundred dollars ($100.00)" in the last sentence.

§ 90-16. Board to keep record; publication of names of licentiates; transcript as evidence; receipt of evidence concerning treatment of patient who has not consented to public disclosure.

The Board of Examiners shall keep a regular record of its proceedings in a book kept for that purpose, together with the names of the members of the Board present, the names of the applicants for license, and other information as to its actions. The Board of Examiners shall cause to be entered in a separate book the name of each applicant to whom a license is issued to practice medicine or surgery, along with any information pertinent to such issuance. The Board of Examiners shall publish the names of those licensed in three daily newspapers published in the State of North Carolina, within 30 days after granting the same. A transcript of any such entry in the record books, or certificate that there is not entered therein the name and proficiency or date of granting such license of a person charged with the violation of the provisions of this Article, certified under the hand of the secretary and the seals of the Board of Medical Examiners of the State of North Carolina, shall be admitted as evidence in any court of this State when it is otherwise competent.

The Board may in an executive session receive evidence involving or concerning the treatment of a patient who has not expressly or impliedly consented to the public disclosure of such treatment as may be necessary for the protection of the rights of such patient or of the accused physician and the full presentation of relevant evidence. All records, papers and other documents containing information collected and compiled by the Board, or its members or employees as a result of investigations, inquiries or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any such investigation, inquiry or interview; and provided, further, that if any such record, paper or other document containing information theretofore collected and compiled by the Board, as hereinbefore provided, is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record within the meaning of Chapter 132 of the General Statutes.

In any proceeding before the Board, in any record of any hearing before the Board, and in the notice of the charges against any licensee (notwithstanding any provision herein to the contrary) the Board may withhold from public disclosure the identity of a patient who has not expressly or impliedly consented to the public disclosure of treatment by the accused physician. (1858-9, c. 258, s. 12; Code, s. 3129; Rev., s. 4500; C. S., s. 6620; 1921, c. 47, s. 6; 1977, c. 838, s. 5.)

CASE NOTES

Stated in Hoke v. Board of Medical Exmrs., 445 F. Supp. 1313 (W.D.N.C. 1978).

§ 90-17: Repealed by Session Laws 1967, c. 691, s. 59.

§ 90-18. Practicing without license; practicing defined; penalties.

No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this Article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this Article, he shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00), or imprisoned at the discretion of the court for each and every offense.

Any person shall be regarded as practicing medicine or surgery within the meaning of this Article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited:

(1) The administration of domestic or family remedies in cases of emergency.

(2) The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and dental surgery.

(3) The practice of pharmacy by any legally licensed pharmacist engaged in the practice of pharmacy.

(4) The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.

(5) The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.

(6) The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.

(7) The practice of midwifery by any woman who pursues the vocation of midwife.

(8) The practice of chiropody by any legally licensed chiropodist when engaged in the practice of chiropody, and without the use of any drug.

(9) The practice of osteopathy by any legally licensed osteopath when engaged in the practice of osteopathy as defined by law, and especially G.S. 90-129.

(10) The practice of chiropractic by any legally licensed chiropractor when engaged in the practice of chiropractic as defined by law, and without the use of any drug or surgery.

(11) The practice of medicine or surgery by any reputable physician or surgeon in a neighboring state coming into this State for consultation with a resident registered physician. This proviso shall not apply to physicians resident in a neighboring state and regularly practicing in this State.

(12) Any person practicing radiology as hereinafter defined shall be deemed to be engaged in the practice of medicine within the meaning of this Article. "Radiology" shall be defined as, that method of medical practice in which demonstration and examination of the normal and

abnormal structures, parts or functions of the human body are made by use of X ray. Any person shall be regarded as engaged in the practice of radiology who makes or offers to make, for a consideration, a demonstration or examination of a human being or a part or parts of a human body by means of fluoroscopic exhibition or by the shadow imagery registered with photographic materials and the use of X rays; or holds himself out to diagnose or able to make or makes any interpretation or explanation by word of mouth, writing or otherwise of the meaning of such fluoroscopic or registered shadow imagery of any part of the human body by use of X rays; or who treats any disease or condition of the human body by the application of X rays or radium. Nothing in this subdivision shall prevent the practice of radiology by any person licensed under the provisions of Articles 2, 7, 8, and 12 of this Chapter.

(13) Any act, task or function performed by an assistant to a person licensed as a physician by the Board of Medical Examiners when

a. Such assistant is approved by and annually registered with the Board as one qualified by training or experience to function as an assistant to a physician, except that no more than two assistants may be currently registered for any physician, and

b. Such act, task or function is performed at the direction or under the supervision of such physician, in accordance with rules and regulations promulgated by the Board, and

c. The services of the assistant are limited to assisting the physician in the particular field or fields for which the assistant has been trained, approved and registered;

Provided that this subdivision shall not limit or prevent any physician from delegating to a qualified person any acts, tasks or functions which are otherwise permitted by law or established by custom.

(14) The practice of nursing by a registered nurse engaged in the practice of nursing and the performance of acts otherwise constituting medical practice by a registered nurse when performed in accordance with rules and regulations developed by a joint subcommittee of the Board of Medical Examiners and the Board of Nursing and adopted by both boards. (1858-9, c. 258, s. 2; Code, s. 3122; 1885, c. 117, s. 2; c. 261; 1889, c. 181, ss. 1, 2; Rev., ss. 3645, 4502; C. S., s. 6622; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8; 1941, c. 163; 1967, c. 263, s. 1; 1969, c. 612, s. 5; c. 929, s. 3; 1971, c. 817, s. 1; c. 1150, s. 6; 1973, c. 92, s. 1.)

Cross References. — As to indictment and prosecution for violation of section, see note to § 90-21.

Editor's Note. — Article 12 of this Chapter, referred to in subdivision (12) of this section, has been recodified as Article 12A.

CASE NOTES

I. General Consideration.
II. Osteopaths.
III. Drugs.

I. GENERAL CONSIDERATION.

Validity. — This statute is not invalid, as it is the exercise of police power to protect the public, and is not the creation of a monopoly. State v. Call, 121 N.C. 643, 28 S.E. 517 (1897).

Nonmedical Physicians. — The statute is applicable only to one holding himself out as a medical physician. If one cures by other means he is not subject to this statute. State v. Biggs, 133 N.C. 729, 46 S.E. 401 (1903).

A patent medicine vendor cannot hold himself out as a physician, and then avoid the statute by prescribing only his own products. State v. Van Doran, 109 N.C. 864, 14 S.E. 32 (1891).

Applied in State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964); Allen v. Hinson, 12 N.C. App. 515, 183 S.E.2d 852 (1971).

Quoted in Crawford v. Crowell-Collier Publishing Co., 87 F. Supp. 509 (W.D.N.C. 1949).

II. OSTEOPATHS.

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by Articles 1 and 7 of this Chapter. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

The legislature has denied to a licensed osteopath the privilege of using drugs in his practice. It necessarily follows that he exceeds the limits of his certificate and is guilty of practicing medicine without being licensed so to do within the purview of this section if he administers or prescribes drugs in treating the ailments of his patients. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948). See § 90-129 and note.

But he is not guilty of practicing medicine without a license in administering violet ray treatments to his patients suffering with skin diseases. Subdivision (12) specifically confers upon him the privilege of practicing radiology. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

A person administers drugs when he gives or applies drugs to a patient. Thus, the giving of a hypodermic injection of a drug is administering a drug. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Or Gives Oral Directions for Their Use or Application. — The giving of oral directions by an osteopath to his patient directly, or indirectly by telephone directions to the druggist, for the use or application by the patient of recommended remedies, is prescribing drugs. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

III. DRUGS.

"Drugs" Defined. — The same substance may be a drug under one set of circumstances, and not a drug under another. The test is whether it is administered or employed as a medicine. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Insofar as the practice of osteopathy is concerned, a "drug" is any substance used as a medicine or in the composition of medicines for internal or external use, and a "medicine" is any substance or preparation used in treating disease. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Laxatives and tonics are "drugs" insofar as the practice of osteopathy is concerned. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Also Patent or Proprietary Remedies. — A person who holds himself out as an expert in medical affairs and prescribes drugs for his patients and charges fees for so doing practices medicine notwithstanding the drugs are patent or proprietary remedies purchasable without a prescription, and notwithstanding the fact that the recommendation of such remedies to acquaintances without the charge of a fee would not be unlawful. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Canned Milk Is Not a Drug. — An osteopath does not practice medicine in advising a client to feed her baby a designated brand of canned milk, since milk is a food and not a drug. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

Whether a vitamin preparation is a drug or a food is ordinarily a question of fact. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948), wherein for the purpose of the particular case it was assumed that vitamin preparations were used solely for nourishment, and that the defendant did not transgress the scope of his osteopathic certificate in urging their use by his patients.

§ 90-18.1. Limitations on physician assistants.

(a) Any person who is approved under the provisions of G.S. 90-18 (13) to perform medical acts, tasks or functions as an assistant to a physician may use the title "physician assistant." Any other person who uses the title in any form or holds out to be a physician assistant or to be so approved, shall be deemed to be in violation of this Article.

(b) Physician assistants are authorized to write prescriptions for drugs under the following conditions:

(1) The Board of Medical Examiners has adopted regulations governing the approval of individual physician assistants to write prescriptions with such limitations as the Board may determine to be in the best interest of patient health and safety;

(2) The physician assistant has current approval from the Board;

(3) The Board of Medical Examiners has assigned an identification number to the physician assistant which is shown on the written prescription; and

(4) The supervising physician has provided to the physician assistant written instructions about indications and contraindications for prescribing drugs and a written policy for periodic review by the physician of the drugs prescribed.

(c) Physician assistants are authorized to compound and dispense drugs under the following conditions:

(1) The function is performed under the supervision of a licensed pharmacist; and

(2) Rules and regulations of the North Carolina Board of Pharmacy governing this function are complied with.

(d) Physician assistants are authorized to order medications, tests and treatments in hospitals, clinics, nursing homes and other health facilities under the following conditions:

(1) The Board of Medical Examiners has adopted regulations governing the approval of individual physician assistants to order medications, tests and treatments with such limitations as the Board may determine to be in the best interest of patient health and safety;

(2) The physician assistant has current approval from the Board;

(3) The supervising physician has provided to the physician assistant written instructions about ordering medications, tests and treatments, and when appropriate, specific oral or written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the Board, after the medication, test or treatment is ordered; and

(4) The hospital or other health facility has adopted a written policy, approved by the medical staff after consultation with the nursing administration, about ordering medications, tests and treatments, including procedures for verification of the physician assistants' orders by nurses and other facility employees and such other procedures as are in the interest of patient health and safety.

(e) Any prescription written by a physician assistant or order given by a physician assistant for medications, tests or treatments shall be deemed to have been authorized by the physician approved by the Board as the supervisor of the physician assistant and such supervising physician shall be responsible for authorizing such prescription or order.

(f) Any registered nurse or licensed practical nurse who receives an order from a physician assistant for medications, tests or treatments is authorized to perform that order in the same manner as if it were received from a licensed physician. (1975, c. 627; 1977, c. 904, s. 1; 1977, 2nd Sess., c. 1194, s. 1.)

§ 90-18.2. Limitations on nurse practitioners.

(a) Any nurse approved under the provisions of G.S. 90-18(14) to perform medical acts, tasks or functions may use the title "nurse practitioner." Any other person who uses the title in any form or holds out to be a nurse practitioner or to be so approved, shall be deemed to be in violation of this Article.

(b) Nurse practitioners are authorized to write prescriptions for drugs under the following conditions:

(1) The Board of Medical Examiners and Board of Nursing have adopted regulations developed by a joint subcommittee governing the approval of individual nurse practitioners to write prescriptions with such limitations as the boards may determine to be in the best interest of patient health and safety;

(2) The nurse practitioner has current approval from the boards;
(3) The Board of Medical Examiners has assigned an identification number to the nurse practitioner which is shown on the written prescription; and
(4) The supervising physician has provided to the nurse practitioner written instructions about indications and contraindications for prescribing drugs and a written policy for periodic review by the physician of the drugs prescribed.

(c) Nurse practitioners are authorized to compound and dispense drugs under the following conditions:
(1) The function is performed under the supervision of a licensed pharmacist; and
(2) Rules and regulations of the North Carolina Board of Pharmacy governing this function are complied with.

(d) Nurse practitioners are authorized to order medications, tests and treatments in hospitals, clinics, nursing homes and other health facilities under the following conditions:
(1) The Board of Medical Examiners and Board of Nursing have adopted regulations developed by a joint subcommittee governing the approval of individual nurse practitioners to order medications, tests and treatments with such limitations as the boards may determine to be in the best interest of patient health and safety;
(2) The nurse practitioner has current approval from the boards;
(3) The supervising physician has provided to the nurse practitioner written instructions about ordering medications, tests and treatments, and when appropriate, specific oral or written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the Board, after the medication, test or treatment is ordered; and
(4) The hospital or other health facility has adopted a written policy, approved by the medical staff after consultation with the nursing administration, about ordering medications, tests and treatments, including procedures for verification of the nurse practitioners' orders by nurses and other facility employees and such other procedures as are in the interest of patient health and safety.

(e) Any prescription written by a nurse practitioner or order given by a nurse practitioner for medications, tests or treatments shall be deemed to have been authorized by the physician approved by the boards as the supervisor of the nurse practitioner and such supervising physician shall be responsible for authorizing such prescription or order.

(f) Any registered nurse or licensed practical nurse who receives an order from a nurse practitioner for medications, tests or treatments is authorized to perform that order in the same manner as if it were received from a licensed physician. (1977, 2nd Sess., c. 1194, s. 2.)

§§ 90-19, 90-20: Repealed by Session Laws 1967, c. 691, s. 59.

§ 90-21. Certain offenses prosecuted in superior court; duties of Attorney General.

In case of the violation of the criminal provisions of G.S. 90-18 to 90-20, the Attorney General of the State of North Carolina, upon complaint of the Board of Medical Examiners of the State of North Carolina, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the district attorney of the district in which the offense was committed to institute a criminal action against the offending persons. A district attor-

ney's fee of five dollars ($5.00) shall be allowed and collected in accordance with the provisions of G.S. 6-12. The Board of Medical Examiners may also employ, at their own expense, special counsel to assist the Attorney General or the district attorney.

Exclusive original jurisdiction of all criminal actions instituted for the violations of G.S. 90-18 to 90-20 shall be in the superior court, the provisions of any special or local act to the contrary notwithstanding. (1915, c. 220, s. 2; C. S., s. 6625; 1973, c. 47, s. 2.)

Editor's Note. — Sections 90-19 and 90-20, referred to in the first and second paragraphs, were repealed by Session Laws 1967, c. 691, s. 59. Section 6-12, referred to in the first paragraph, was repealed by Session Laws 1971, c. 269, s. 15.

CASE NOTES

This section merely establishes a method whereby the Board of Medical Examiners may procure an investigation by the Attorney General with respect to alleged violations of § 90-18 and former §§ 90-19 and 90-20. There is nothing in this Chapter which requires the Board of Medical Examiners or the Attorney General to take any action before a criminal prosecution may be instituted for such violations. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953).

Indictment Need Not Show Compliance with Section. — The contention that a strict compliance with the procedure outlined in this section is a prerequisite to any prosecution for the violation of § 90-18 and former §§ 90-19 and 90-20, and that a bill of indictment charging a violation of any such sections must show upon its face that there has been a compliance with the provisions of this section, is without merit. It would be unnecessary to include these averments as a prerequisite to the validity of a bill of indictment charging a violation of § 90-18 even though the prosecution was instituted pursuant to a complaint filed by the Board of Medical Examiners with the Attorney General. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953).

Solicitor (now District Attorney) Not Deprived of Authority and Duty to Prosecute. — There is nothing in this Chapter which would or could deprive the solicitor (now district attorney) of a district of his constitutional authority and sworn duty to prosecute violations of the criminal laws of the State. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953).

Article 1A.

Treatment of Minors.

§ 90-21.1. When physician may treat minor without consent of parent, guardian or person in loco parentis.

It shall be lawful for any physician licensed to practice medicine in North Carolina to render treatment to any minor without first obtaining the consent and approval of either the father or mother of said child, or any person acting as guardian, or any person standing in loco parentis to said child where:

(1) The parent or parents, the guardian, or a person standing in loco parentis to said child cannot be located or contacted with reasonable diligence during the time within which said minor needs to receive the treatment herein authorized, or

(2) Where the identity of the child is unknown, or where the necessity for immediate treatment is so apparent that any effort to secure approval would delay the treatment so long as to endanger the life of said minor, or

(3) Where an effort to contact a parent, guardian, or person standing in loco parentis would result in a delay that would seriously worsen the physical condition of said minor, or

(4) Where the parents refuse to consent to a procedure, and the necessity for immediate treatment is so apparent that the delay required to obtain a court order would endanger the life or seriously worsen the physical condition of the child. No treatment shall be administered to a child over the parent's objection as herein authorized unless the physician shall first obtain the opinion of another physician licensed to practice medicine in the State of North Carolina that such procedure is necessary to prevent immediate harm to the child.

Provided, however, that the refusal of a physician to use, perform or render treatment to a minor without the consent of the minor's parent, guardian, or person standing in the position of loco parentis, in accordance with this Article, shall not constitute grounds for a civil action or criminal proceedings against such physician. (1965, c. 810, s. 1; 1977, c. 625, s. 1.)

OPINIONS OF ATTORNEY GENERAL

"Minor" Is Person under 18. — See opinion of Attorney General to Lena S. Davis, 41 N.C.A.G. 489 (1971).

Protection Extends to Social Workers and Psychologists Working under Physicians. — See opinion of Attorney General to Mr. Ed McClearsen, Staff Attorney, Mental Health Study Commission, 47 N.C.A.G. 83 (1977).

Delegation of Responsibility to Nurse Practitioner or Physician's Assistant. — A physician associated with a publicly supported family planning clinic can delegate responsibility for medically related contraceptive services to a nurse practitioner or physician's assistant whom he supervises and who functions under his standing orders, if these functions are specifically approved for the individual nurse practitioner or physician's assistant by the Board of Medical Examiners. Opinion of Attorney General to Margie Rose, M.P.H. Branch Head, Family Planning Branch, Division of Health Services, 47 N.C.A.G. 80 (1977).

§ 90-21.2. "Treatment" defined.

The word "treatment" as used in G.S. 90-21.1 is hereby defined to mean any medical procedure or treatment, including X rays, the administration of drugs, blood transfusions, use of anesthetics, and laboratory or other diagnostic procedures employed by or ordered by a physician licensed to practice medicine in the State of North Carolina that is used, employed, or ordered to be used or employed commensurate with the exercise of reasonable care and equal to the standards of medical practice normally employed in the community where said physician administers treatment to said minor. (1965, c. 810, s. 2.)

§ 90-21.3. Performance of surgery on minor; obtaining second opinion as to necessity.

The word "treatment" as defined in G.S. 90-21.2 shall also include any surgical procedure which in the opinion of the attending physician is necessary under the terms and conditions set out in G.S. 90-21.1; provided, however, no surgery shall be conducted upon a minor as herein authorized unless the surgeon shall first obtain the opinion of another physician licensed to practice medicine in the State of North Carolina that said surgery is necessary under the conditions set forth in G.S. 90-21.1; provided further, that in any emergency situation that shall arise in a rural community, or in a community where it is impossible for the surgeon to contact any other physician for the purpose of obtaining his opinion as to the necessity for immediate surgery, it shall not be necessary for the surgeon to obtain approval from another physician before performing such surgery as is necessary under the terms and conditions set forth in G.S. 90-21.1. (1965, c. 810, s. 3.)

CASE NOTES

Cited in Brigham v. Hicks, 44 N.C. App. 152, 260 S.E.2d 435 (1979).

§ 90-21.4. Responsibility, liability and immunity of physicians.

(a) Any physician licensed to practice medicine in North Carolina providing health services to a minor under the terms, conditions and circumstances of this Article shall not be held liable in any civil or criminal action for providing such services without having obtained permission from the minor's parent, legal guardian, or person standing in loco parentis. The physician shall not be relieved on the basis of this Article from liability for negligence in the diagnosis and treatment of a minor.

(b) The physician shall not notify a parent, legal guardian, or person standing in loco parentis, without the permission of the minor, concerning the medical health services set out in G.S. 90-21.5(a), unless the situation in the opinion of the attending physician indicates that notification is essential to the life or health of the minor. If a parent, legal guardian or person standing in loco parentis contacts the physician concerning the treatment or medical services being provided to the minor, the physician may give information. (1965, c. 810, s. 4; 1977, c. 582, s. 1.)

OPINIONS OF ATTORNEY GENERAL

This section provides immunity from civil or criminal liability to a nurse practitioner or physician's assistant for non-negligent acts performed under the physician's supervision and while functioning under the physician's standing orders if the delegation of responsibility is proper. Opinion of Attorney General to Margie Rose, M.P.H. Branch Head, Family Planning Branch, Division of Health Services, 47 N.C.A.G. 80 (1977).

§ 90-21.5. Minor's consent sufficient for certain medical health services.

(a) Any minor may give effective consent to a physician licensed to practice medicine in North Carolina for medical health services for the prevention, diagnosis and treatment of (i) venereal disease and other diseases reportable under G.S. 130-81, (ii) pregnancy, (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance. This section does not authorize the inducing of an abortion, performance of a sterilization operation, or commitment to a mental institution or hospital for confinement or treatment of a mental condition.

(b) Any minor who is emancipated may consent to any medical treatment, dental and health services for himself or for his child. (1971, c. 35; 1977, c. 582, s. 2.)

§§ 90-21.6 to 90-21.10: Reserved for future codification purposes.

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.11. Definition.

As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(e)(2); or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home. (1975, 2nd Sess., c. 977, s. 4.)

Cross References. — As to limitation of actions for malpractice, see §§ 1-15, 1-17. As to the North Carolina Health Care Excess Liability Fund, see §§ 58-254.19 through 58-254.29. As to liability insurance or self-insurance covering health-care practitioners employed by the University of North Carolina, see §§ 116-219 through 116-222.

Legal Periodicals. — For comment on the statutory standard of care for North Carolina health care providers, see 1 Campbell L. Rev. 111 (1979).

§ 90-21.12. Standard of health care.

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. (1975, 2nd Sess., c. 977, s. 4.)

Legal Periodicals. — For comment on the statutory standard of care for North Carolina health care providers, see 1 Campbell L. Rev. 111 (1979).

CASE NOTES

Applied in Vassey v. Burch, 45 N.C. App. 222, 262 S.E.2d 865 (1980).

Quoted in Thompson v. Lockert, 34 N.C. App. 1, 237 S.E.2d 259 (1977).

Stated in Tatham v. Hoke, 469 F. Supp. 914 (W.D.N.C. 1979).

§ 90-21.13. Informed consent to health care treatment or procedure.

(a) No recovery shall be allowed against any health care provider upon the grounds that the health care treatment was rendered without the informed consent of the patient or the patient's spouse, parent, guardian, nearest relative or other person authorized to give consent for the patient where:

(1) The action of the health care provider in obtaining the consent of the patient or other person authorized to give consent for the patient was in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities; and

(2) A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities; or

(3) A reasonable person, under all the surrounding circumstances, would have undergone such treatment or procedure had he been advised by the health care provider in accordance with the provisions of subdivisions (1) and (2) of this subsection.

(b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact.

(c) A valid consent is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent.

(d) No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider.

(e) In the event of any conflict between the provisions of this section and those of Article 7 of Chapter 35 and Articles 1A and 19 of Chapter 90, the provisions of those Articles shall control and continue in full force and effect. (1975, 2nd Sess., c. 977, s. 4.)

§ 90-21.14. First aid or emergency treatment; liability limitation.

(a) Any person who renders first aid or emergency health care treatment to a person who is unconscious, ill or injured,

(1) When the reasonably apparent circumstances require prompt decisions and actions in medical or other health care, and

(2) When the necessity of immediate health care treatment is so reasonably apparent that any delay in the rendering of the treatment would seriously worsen the physical condition or endanger the life of the person,

shall not be liable for damages for injuries alleged to have been sustained by the person or for damages for the death of the person alleged to have occurred by reason of an act or omission in the rendering of the treatment unless it is established that the injuries were or the death was caused by gross negligence, wanton conduct or intentional wrongdoing on the part of the person rendering the treatment.

(b) Nothing in this section shall be deemed or construed to relieve any person from liability for damages for injury or death caused by an act or omission on the part of such person while rendering health care services in the normal and ordinary course of his business or profession.

(c) In the event of any conflict between the provisions of this section and those of G.S. 20-166(d), the provisions of G.S. 20-166(d) shall control and continue in full force and effect. (1975, 2nd Sess., c. 977, s. 4.)

Cross References. — As to immunity from liability of persons rendering first aid or emergency assistance at the scene of a motor vehicle accident, see § 20-166(d).

CASE NOTES

Quoted in Tatham v. Hoke, 469 F. Supp. 914 (W.D.N.C. 1979).

OPINIONS OF ATTORNEY GENERAL

Applicability of Subsection (a) to Emergency Medical Care Personnel. — Subsection (a) is inapplicable to emergency medical care personnel who are called to the scene of a medical emergency. Opinion of Attorney General to Mr. I.O. Wilkerson, Director, Division of Facility Services, Department of Human Resources, 46 N.C.A.G. 42 (1976).

§§ 90-21.15 to 90-21.19: Reserved for future codification purposes.

Article 1C.

Physicians and Hospital Reports.

§ 90-21.20. Reporting by physicians and hospitals of wounds, injuries and illnesses.

(a) Such cases of wounds, injuries or illnesses as are enumerated in subsection (b) shall be reported as soon as it becomes practicable before, during or after completion of treatment of a person suffering such wounds, injuries, or illnesses. If such case is treated in a hospital, sanitarium or other medical institution or facility, such report shall be made by the Director, Administrator, or other person designated by the Director or Administrator, or if such case is treated elsewhere, such report shall be made by the physician or surgeon treating the case, to the chief of police or the police authorities of the city or town of this State in which the hospital or other institution, or place of treatment is located. If such hospital or other institution or place of treatment is located outside the corporate limits of a city or town, then the report shall be made by the proper person in the manner set forth above to the sheriff of the respective county or to one of his deputies.

(b) Cases of wounds, injuries or illnesses which shall be reported by physicians, and hospitals include every case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by, or appearing to arise from or be caused by, the discharge of a gun or firearm, every case of illness apparently caused by poisoning, every case of a wound or injury caused, or apparently caused, by a knife or sharp or pointed instrument if it appears to the physician or surgeon treating the case that a criminal act was involved, and every case of a wound, injury or illness in which there is grave bodily harm or grave illness if it appears to the physician or surgeon treating the case that the wound, injury or illness resulted from a criminal act of violence.

(c) Each report made pursuant to subsections (a) and (b) above shall state the name of the wounded, ill or injured person, if known, and the age, sex, race, residence or present location, if known, and the character and extent of his injuries.

(d) Any hospital, sanitarium, or other like institution or Director, Administrator, or other designated person, or physician or surgeon participating in good faith in the making of a report pursuant to this section shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed as the result of the making of such report. (1971, c. 4; 1977, c. 31; c. 843, s. 2.)

Editor's Note. — This Article as enacted by Session Laws 1971, c. 4, and amended by Session Laws 1971, c. 594, was applicable to New Hanover and Alamance Counties only, and was therefore not codified. The 1971 act was amended by Session Laws 1977, c. 31, effective July 1, 1977, so as to make it applicable to eleven additional counties. The 1977 amendment having rendered the 1971 act general within the definition adopted for the General Statutes, this Article is now codified.

§ 90-21.21: Repealed by Session Laws 1979, c. 529, s. 1, effective July 1, 1979.

Editor's Note. — The repealed section was amended by Session Laws 1979, c. 105, s. 1.

Article 2.

Dentistry.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-22. Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board.

(a) The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice

of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene. The dental hygienist or the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled for the unexpired term by a majority vote of the remaining members of the Board, except that when the seat on the Board held by a person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental hygiene in North Carolina and is currently employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

(c) Nominations and elections of members of the North Carolina State Board of Dental Examiners shall be as follows:

(1) An election shall be held each year to elect successors to those members whose terms are expiring in the year of the election, each successor to take office on the first day of August following the election and to hold office for a term of three years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by August 1 of that year, then the said members elected that year shall take office immediately after the completion of the election and shall hold office until the first of August of the third year thereafter and until their successors are elected and qualified. Persons appointed to the Board by the Governor shall take office on the first day of August following their appointment and shall hold office for a term of three years and until such person's successor has been appointed and shall qualify; provided that if in any year the Governor shall not have appointed a person by August first of that year, then the said member appointed that year shall take office immediately after his appointment and shall hold office until the first of August of the third year thereafter and until such member's successor is appointed and qualified.

(2) Every dentist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dentists to the Board. Every dental hygienist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dental hygienists to the Board. The holding of such a license to practice dentistry or dental hygiene in North Carolina shall constitute registration to vote in such elections. The list of licensed dentists and dental hygienists shall constitute the registration list for elections to the appropriate seats on the Board.

(3) All elections shall be conducted by the Board of Dental Examiners which is hereby constituted a Board of Dental Elections. If a member of the Board of Dental Examiners whose position is to be filled at any election is nominated to succeed himself, and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Dental Elections for that election and the remaining members of the Board of Dental Elections shall proceed and function without his participation.

(4) Nomination of dentists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dentists licensed to practice in North Carolina and residing or practicing in North Carolina. Nomination of dental hygienists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dental hygienists licensed to practice in North Carolina and residing or practicing in North Carolina. Such petitions shall be filed with said Board of Dental Elections subsequent to January 1 of the year in which the election is to be held and not later than midnight of the twentieth day of May of such year, or not later than such earlier date (not before April 1) as may be set by the Board of Dental Elections: Provided, that not less than 10 days' notice of such earlier date shall be given to all dentists or dental hygienists qualified to sign a petition of nomination. The Board of Dental Elections shall, before preparing ballots, notify all persons who have been duly nominated of their nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Dental Elections or its designated secretary at any time prior to the closing of the polls in any election.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Dental Elections shall prescribe, ballots containing, in alphabetical order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Dental Elections. At such time as may be fixed by the Board of Dental Elections a ballot and a return official envelope addressed to said Board shall be mailed to each person entitled to vote in the election being conducted, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope . . . . . .
Signature of Voter . . . . . .
Address of Voter . . . . . .
. . . . . .

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)."

The Board of Dental Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless, within the time hereinafter provided, it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Dental Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Dental Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed dentists may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: Provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of the ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9) If more than two nominees receive a majority of the votes cast, the two receiving the highest number of votes shall be declared elected. If only two of the nominees receive a majority of the votes cast, they shall be declared elected. If only one of the nominees shall receive a majority of the votes cast, he shall be declared elected and the Board of Dental Elections shall thereupon order a second election to determine a contest between the two remaining nominees receiving the highest number of votes. If no candidate shall receive a majority of the votes cast, the said Board shall order a second election to determine a contest between the four candidates receiving the highest number of votes. In any election if there is a tie between candidates, the tie shall be resolved by the vote of the Board of Dental Examiners, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements: Provided, that if the second election is between four candidates, then the two receiving the highest number of votes shall be declared elected.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations because of lack of plural or proper nominations or death, or withdrawal, or disqualification or any other reason, there shall be (i) only two candidates for two positions, they shall be declared elected by the Board of Dental Elections, or (ii) only one candidate for one position, he shall be declared elected by the Board of Dental Elections, or (iii) no candidate for two positions, the two positions shall be filled by the Board of Dental Examiners, or (iv) no candidate for one position, the position shall be filled by the Board of Dental Examiners, or (v) one candidate for two positions, the one candidate shall be declared elected by the Board of Dental Elections and one qualified dentist shall be elected to the other position by the Board of Dental Examiners. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the Board of Dental Examiners. In the event of the death or resignation of a member of the Board of Dental Examiners, after taking office, his position shall be filled for the unexpired term by the Board of Dental Examiners.

(12) An official list of licensed dentists shall be kept at an office of the Board of Dental Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed dentist. As soon as the voting in any election begins a list of the licensed dentists shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned.

(13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Dental Elections for a period of six months following the close of an election.

(14) From any decision of the Board of Dental Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150A of the General Statutes of North Carolina.

(15) The Board of Dental Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed dentists residing in North Carolina.

(d) For service on the Board of Dental Elections, the members of such Board shall receive the per diem compensation and expenses allowed by this Article for service as members of the Board of Dental Examiners. The Board of Dental Elections is authorized and empowered to expend from funds collected under the provisions of this Article such sum or sums as it may determine necessary in the performance of its duties as a Board of Dental Elections, said expenditures to be in addition to the authorization contained in G.S. 90-43 and to be disbursed as provided therein.

(e) The Board of Dental Elections is authorized to appoint such secretary or secretaries and/or assistant secretary or assistant secretaries to perform such functions in connection with such nominations and elections as said Board shall determine, provided that any protestant or contestant shall have the right to a hearing by said Board in connection with any challenge of a voter, or an envelope, or a ballot or the counting of an election. Said Board is authorized to designate an office or offices for the keeping of lists of registered dentists, for the issuance and the receipt of envelopes and ballots. (1935, c. 66, s. 1; 1957, c. 592, s. 1; 1961, c. 213, s. 1; 1971, c. 755, s. 1; 1973, c. 1331, s. 3; 1979, 2nd Sess., c. 1195, ss. 1-5.)

Effect of Amendments. — The 1979, 2nd Sess., amendment rewrote subsection (b), substituted "successors to those members whose terms are expiring in the year of the election, each successor" for "two members of the Board of Dental Examiners, each" in the first sentence of subdivision (c)(1) and added the second sentence of subdivision (c)(1), rewrote subdivisions (c)(2) and (c)(4), making them applicable to dental hygienists as well as dentists and to dentists practicing in North Carolina as well as dentists residing in North Carolina, and substituted "person entitled to vote in the election being conducted" for "dentist licensed to practice in North Carolina and residing in North Carolina" in the second sentence of subdivision (c)(6).

CASE NOTES

Purpose of Article. — The whole purpose and tenor of this Article is to protect the public against unprofessional, improper, unauthorized, and unqualified practice of dentistry and to secure the services of competent, trustworthy practitioners. In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied, 283 N.C. 393, 196 S.E.2d 275, 414 U.S. 1001, 94 S. Ct. 355, 38 L. Ed. 2d 237 (1973).

The object of both granting and revoking a license is the same — to exclude the incompetent or unscrupulous from the practice of dentistry. In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied, 283 N.C. 393, 196 S.E.2d 275, 414 U.S. 1001, 94 S. Ct. 355, 38 L. Ed. 2d 237 (1973).

Board Serves Public Functions. — The Board of Dental Examiners, the Medical Care Commission (now Department of Human Resources) and the Mental Health Council are creatures of the State of North Carolina. The functions they serve are concededly public functions of the State. Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718 (4th Cir. 1966).

§ 90-23. Officers; common seal.

The North Carolina State Board of Dental Examiners shall, at each annual meeting thereof, elect one of its members president and one secretary-treasurer. The common seal which has already been adopted by said Board, pursuant to law, shall be continued as the seal of said Board. (1935, c. 66, s. 2.)

§ 90-24. Quorum; adjourned meetings.

Four members of said Board shall constitute a quorum for the transaction of business and at any meeting of the Board, if four members are not present at the time and the place appointed for the meeting, those members of the Board present may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1935, c. 66, s. 2.)

§ 90-25. Records and transcripts.

The said Board shall keep a record of its transactions at all annual or special meetings and shall provide a record book in which shall be entered the names and proficiency of all persons to whom licenses may be granted under the provisions of law. The said book shall show, also, the license number and the date upon which such license was issued and shall show such other matters as in the opinion of the Board may be necessary or proper. Said book shall be deemed a book of record of said Board and a transcript of any entry therein or a certification that there is not entered therein the name, proficiency and license number or date of granting such license, certified under the hand of the secretary-treasurer, attested by the seal of the North Carolina State Board of Dental Examiners, shall be admitted as evidence in any court of this State when the same shall otherwise be competent. (1935, c. 66, s. 2.)

§ 90-26. Annual and special meetings.

The North Carolina State Board of Dental Examiners shall meet annually on the fourth Monday in June of each year at such place as may be determined by the Board, and at such other times and places as may be determined by action of the Board or by any four members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given in writing, by registered or certified mail or personally, to each member of the Board at least 10 days prior to said meeting; provided the requirements of notice may be waived by any member of the Board. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 3; 1961, c. 446, s. 1.)

§ 90-27. Judicial powers; additional data for records.

The president of the North Carolina State Board of Dental Examiners, and/or the secretary-treasurer of said Board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said Board pursuant to its requirements and in the same manner as process issued by any court of record. The said Board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said Board or to produce books, records or documents shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

The Board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence. (1935, c. 66, s. 4.)

CASE NOTES

Applied in In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540 (1973).

§ 90-28. Bylaws and regulations.

The North Carolina State Board of Dental Examiners shall have the power to make necessary bylaws and regulations, not inconsistent with the provisions of this Article, regarding any matter referred to in this Article and for the purpose of facilitating the transaction of business by the said Board. (1935, c. 66, s. 5.)

§ 90-29. Necessity for license; dentistry defined; exemptions.

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

(1) Diagnoses, treats, operates, or prescribes for any disease, disorder, pain, deformity, injury, deficiency, defect, or other physical condition of the human teeth, gums, alveolar process, jaws, maxilla, mandible, or adjacent tissues or structures of the oral cavity;

(2) Removes stains, accretions or deposits from the human teeth;

(3) Extracts a human tooth or teeth;

(4) Performs any phase of any operation relative or incident to the replacement or restoration of all or a part of a human tooth or teeth with any artificial substance, material or device;

(5) Corrects the malposition or malformation of the human teeth;

(6) Administers an anesthetic of any kind in the treatment of dental or oral diseases or physical conditions, or in preparation for or incident to any operation within the oral cavity; provided, however, that this subsection shall not apply to a lawfully qualified nurse or anesthetist who administers such anesthetic under the supervision and direction of a licensed dentist or physician;

(7) Takes or makes an impression of the human teeth, gums or jaws;

(8) Makes, builds, constructs, furnishes, processes, reproduces, repairs, adjusts, supplies or professionally places in the human mouth any prosthetic denture, bridge, appliance, corrective device, or other structure designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, except to the extent the same may lawfully be performed in accordance with the provisions of G.S. 90-29.1 and 90-29.2;

(9) Uses a Roentgen or X-ray machine or device for dental treatment or diagnostic purposes, or gives interpretations or readings of dental Roentgenograms or X rays;

(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges;

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

(12) Uses, in connection with his name, any title or designation, such as "dentist," "dental surgeon," "doctor of dental surgery," "D.D.S.," "D.M.D.," or any other letters, words or descriptive matter which, in any manner, represents him as being a dentist able or qualified to do or perform any one or more of the acts or practices set forth in subdivisions (1) through (10) above;

(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

(c) The following acts, practices, or operations, however, shall not constitute the unlawful practice of dentistry:

(1) Any act by a duly licensed physician or surgeon performed in the practice of his profession;

(2) The practice of dentistry, in the discharge of their official duties, by dentists in any branch of the military service of the United States or in the full-time employ of any agency of the United States;

(3) The teaching or practice of dentistry, in dental schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners, by any person or persons licensed to practice dentistry anywhere in the United States or in any country, territory or other recognized jurisdiction;

(4) The practice of dentistry in dental schools or colleges in this State approved by the North Carolina State Board of Dental Examiners by students enrolled in such schools or colleges as candidates for a doctoral degree in dentistry when such practice is performed as a part of their course of instruction and is under direct supervision of a dentist who is either duly licensed in North Carolina or qualified under subdivision (3) above as a teacher; additionally, the practice of dentistry by such students at State or county institutions with resident populations, hospitals, State or county health departments, area health education centers and State or county-owned nursing homes; subject to review and approval or disapproval by the said Board of Dental Examiners when in the opinion of the dean of such dental school or college or his designee, the students' dental education and experience are adequate therefor, and such practice is a part of the course of instruction of such students, is performed under the direct supervision of a duly licensed dentist acting as a teacher or instructor, and is without remuneration except for expenses and subsistence all as defined and permitted by the rules and regulations of said Board of Dental Examiners. Should the Board disapprove a specific program, the Board shall within 90 days inform the dean of its actions. Nothing herein shall be construed to permit the teaching of, delegation to or performance by any dental hygienist, dental assistant, or other auxiliary relative to any program of extramural rotation, of any function not heretofore permitted by the Dental Practice Act, the Dental Hygiene Act or by the rules and regulations of the Board;

(5) The temporary practice of dentistry by licensed dentists of another state or of any territory or country when the same is performed, as clinicians, at meetings of organized dental societies, associations, colleges or similar dental organizations, or when such dentists appear in emergency cases upon the specific call of a dentist duly licensed to practice in this State;

(6) The practice of dentistry by a person who is a graduate of a dental school or college approved by the North Carolina State Board of Dental Examiners and who is not licensed to practice dentistry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Dental Examiners pursuant to the terms and provisions of this Article, and when such practice of dentistry complies with the conditions of said intern permit, or provisional license;

(7) Any act or acts performed by a dental hygienist when such act or acts are lawfully performed pursuant to the authority of Article 16 of this Chapter 90 or the rules and regulations of the Board promulgated thereunder;

(8) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college approved

by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(9) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board;

(10) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(11) The extraoral construction, manufacture, fabrication or repair of prosthetic dentures, bridges, appliances, corrective devices, or other structures designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, by a person or entity not licensed to practice dentistry in this State, when the same is done or performed solely upon a written work order in strict compliance with the terms, provisions, conditions and requirements of G.S. 90-29.1 and 90-29.2.

(12) The use of a dental x-ray machine in the taking of dental radiographs by a dental hygienist, certified dental assistant, or a dental assistant who can show evidence of satisfactory performance on an equivalency examination, recognized by the Board of Dental Examiners, based on seven hours of instruction in the production and use of dental x rays and an educational program of not less than seven hours in clinical dental radiology.

(13) A dental assistant, or dental hygienist who shows evidence of education and training in Nitrous Oxide — Oxygen Inhalant Conscious Sedation within a formal educational program may aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental assistant who can show evidence of having completed an educational program recognized by the Board of not less than seven clock hours on Nitrous Oxide — Oxygen Inhalant Conscious Sedation may also aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental hygienist or dental assistant who has been employed in a dental office where Nitrous Oxide — Oxygen Inhalant Conscious Sedation was utilized, and who can show evidence of performance and instruction of not less than one year prior to July 1, 1980, qualifies to aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. (1935, c. 66, s. 6; 1953, c. 564, s. 3; 1957, c. 592, s. 2; 1961, c. 446, s. 2; 1965, c. 163, ss. 1, 2; 1971, c. 755, s. 2; 1977, c. 368; 1979, 2nd Sess., c. 1195, ss. 10, 15.)

Effect of Amendments. — The 1979, 2nd Sess., amendment inserted "or practice" near the beginning of subdivision (3) of subsection (c), deleted a proviso in that subdivision relating to persons licensed outside the United States and added subdivisions (12) and (13) to subsection (c).

CASE NOTES

Legislature May Regulate Practice. — The legislature has constitutional authority to regulate the practice of dentistry. State v. Hicks, 143 N.C. 689, 57 S.E. 441 (1907).

Dentists Held Not Employees of Federal Agency within Meaning of Subsection (c)(2). — Dentists in general practice who performed dental services under a federally financed program of the local school board that furnished dental treatment to medically indigent school children were not employees of a federal agency "in the discharge of their official duties" within the meaning of subsection (c)(2) exempting such employees from statutory provisions regulating the practice of dentistry. In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied, 283 N.C. 393, 196 S.E.2d 275, 414 U.S. 1001, 94 S. Ct. 355, 38 L. Ed. 2d 237 (1973).

The mere want of a license does not raise any inference of negligence. If an unlicensed dentist exercises the requisite skill and care in administering treatment to a patient, he is not liable in damages for injury to the patient, merely because of his want of a license to practice dentistry. The failure to possess such license is immaterial on the question of due care. Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949).

OPINIONS OF ATTORNEY GENERAL

Regulation by Board of Dental Laboratory Engaged in Acts Described in Subsection (b). — The Board of Dental Examiners may not regulate a dental laboratory engaging in the acts described in subsection (b) so long as the laboratory is following the advertising and work order procedures established in G.S. 90-29.1 and 90-29.2. Opinion of Attorney General to Rep. W. S. Harris, 46 N.C.A.G. 203 (1977).

§ 90-29.1. Extraoral services performed for dentists.

Licensed dentists may employ or engage the services of any person, firm or corporation to construct or repair, extraorally, prosthetic dentures, bridges, or other replacements for a part of a tooth, a tooth, or teeth. A person, firm, or corporation so employed or engaged, when constructing or repairing such dentures, bridges, or replacements, exclusively, directly, and solely on the written work order of a licensed member of the dental profession as hereafter provided, and not for the public or any part thereof, shall not be deemed or considered to be practicing dentistry as defined in this Article. (1957, c. 592, s. 3; 1961, c. 446, ss. 3, 4; 1979, 2nd Sess., c. 1195, s. 6.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, deleted the former last four sentences of the section, relating to advertising and announcements by persons, etc., engaged in performing extraoral services for dentists.

§ 90-29.2. Requirements in respect to written work orders; penalty.

(a) Any licensed dentist who employs or engages the services of any person, firm or corporation to construct or repair, extraorally, prosthetic dentures, bridges, orthodontic appliance, or other replacements, for a part of a tooth, a tooth or teeth, shall furnish such person, firm or corporation with a written work order on forms prescribed by the North Carolina State Board of Dental Examiners which shall contain:

(1) The name and address of the person, firm, or corporation to which the work order is directed.

(2) The patient's name or identification number. If a number is used, the patient's name shall be written upon the duplicate copy of the work order retained by the dentist.

(3) The date on which the work order was written.

(4) A description of the work to be done, including diagrams if necessary.

(5) A specification of the type and quality of materials to be used.

(6) The signature of the dentist and the number of his license to practice dentistry.

(b) The person, firm or corporation receiving a work order from a licensed dentist shall retain the original work order and the dentist shall retain a duplicate copy thereof for inspection at any reasonable time by the North Carolina State Board of Dental Examiners or its duly authorized agents, for a period of two years in both cases.

(c) If the person, firm or corporation receiving a written work order from a licensed dentist engages another person, firm or corporation (hereinafter referred to as "subcontractor") to perform some of the services relative to such work order, he or it shall furnish a written subwork order with respect thereto on forms prescribed by the North Carolina State Board of Dental Examiners which shall contain:

(1) The name and address of the subcontractor.

(2) A number identifying the subwork order with the original work order, which number shall be endorsed on the work order received from the licensed dentist.

(3) The date on which the subwork order was written.

(4) A description of the work to be done by the subcontractor, including diagrams if necessary.

(5) A specification of the type and quality of materials to be used.

(6) The signature of the person, firm or corporation issuing the subwork order.

The subcontractor shall retain the subwork order and the issuer thereof shall retain a duplicate copy, attached to the work order received from the licensed dentist, for inspection by the North Carolina State Board of Dental Examiners or its duly authorized agents, for a period of two years in both cases.

(d) Any licensed dentist who:

(1) Employs or engages the services of any person, firm or corporation to construct or repair extraorally, prosthetic dentures, bridges, or other dental appliances without first providing such person, firm, or corporation with a written work order; or

(2) Fails to retain a duplicate copy of the work order for two years; or

(3) Refuses to allow the North Carolina State Board of Dental Examiners to inspect his files of work orders

is guilty of a misdemeanor and the North Carolina State Board of Dental Examiners may revoke or suspend his license therefor.

(e) Any such person, firm, or corporation, who:

(1) Furnishes such services to any licensed dentist without first obtaining a written work order therefor from such dentist; or

(2) Acting as a subcontractor as described in (c) above, furnishes such services to any person, firm or corporation, without first obtaining a written subwork order from such person, firm or corporation; or

(3) Fails to retain the original work order or subwork order, as the case may be, for two years; or

(4) Refuses to allow the North Carolina State Board of Dental Examiners or its duly authorized agents, to inspect his or its files of work orders or subwork orders shall be guilty of a misdemeanor. (1961, c. 446, s. 5.)

§ 90-29.3. Provisional license.

(a) The North Carolina State Board of Dental Examiners shall, subject to its rules and regulations, issue a provisional license to practice dentistry to any person who is licensed to practice dentistry anywhere in the United States or in any country, territory or other recognized jurisdiction, if the Board shall determine that said licensing jurisdiction imposed upon said person requirements for licensure no less exacting than those imposed by this State. A provisional licensee may engage in the practice of dentistry only in strict accordance with the terms, conditions and limitations of his license and with the rules and regulations of the Board pertaining to provisional license.

(b) A provisional license shall be valid until the date of the announcement of the results of the next succeeding Board examination of candidates for licensure to practice dentistry in this State, unless the same shall be earlier revoked or suspended by the Board.

(c) No person who has failed an examination conducted by the North Carolina State Board of Dental Examiners shall be eligible to receive a provisional license.

(d) Any person desiring to secure a provisional license shall make application therefor in the manner and form prescribed by the rules and regulations of the Board and shall pay the fee prescribed in G.S. 90-39 of this Article.

(e) A provisional licensee shall be subject to those various disciplinary measures and penalties set forth in G.S. 90-41 upon a determination of the Board that said provisional licensee has violated any of the terms or provisions of this Article. (1969, c. 804, s. 1.)

§ 90-29.4. Intern permit.

The North Carolina State Board of Dental Examiners may, in the exercise of the discretion of said Board, issue to a person who is not licensed to practice dentistry in this State and who is a graduate of a dental school, college, or institution approved by said Board, an intern permit authorizing such person to practice dentistry under the supervision or direction of a dentist duly licensed to practice in this State, subject to the following particular conditions:

(1) An intern permit shall be valid for no more than one year from the date of issue thereof; provided, however, that the Board may, in its discretion, renew such permit for not more than three additional one-year periods; and, provided, further, that no person shall be granted an intern permit or intern permits embracing or covering an aggregate time span of more than 48 calendar months;

(2) The holder of a valid intern permit may practice dentistry only under the supervision or direction of one or more dentists duly licensed to practice in this State;

(3) The holder of a valid intern permit may practice dentistry only (i) as an employee in a hospital, sanatorium, or a like institution which is licensed or approved by the State of North Carolina and approved by the North Carolina State Board of Dental Examiners; or (ii) as an employee of the State of North Carolina or an agency or political subdivision thereof, or any other governmental entity within the State of North Carolina, when said employment is approved by the North Carolina State Board of Dental Examiners;

(4) The holder of a valid intern permit shall receive no fee or fees or compensation of any kind or nature for dental services rendered by him other than such salary or compensation as might be paid to him by the entity specified in subdivision (3) above wherein or for which said services are rendered;

(5) The holder of a valid intern permit shall not, during the term of said permit or any renewal thereof, change the place of his internship without first securing the written approval of the North Carolina State Board of Dental Examiners;

(6) The practice of dentistry by the holder of a valid intern permit shall be strictly limited to the confines of and to the registered patients of the hospital, sanatorium or institution to which he is attached or to the persons officially served by the governmental entity by whom he is employed;

(7) Any person seeking an intern permit shall first file with the North Carolina State Board of Dental Examiners such papers and documents as are required by said Board, together with the application fee authorized by G.S. 90-39. A fee authorized by G.S. 90-39 shall be paid for any renewal of said intern permit. Such person shall further supply to the Board such other documents, materials or information as the Board may request;

(8) Any person seeking an intern permit or who is the holder of a valid intern permit shall comply with such limitations as the North Carolina State Board of Dental Examiners may place or cause to be placed, in writing, upon such permit, and shall comply with such rules and regulations as the Board might promulgate relative to the issuance and maintenance of said permit in the practice of dentistry relative to the same;

(9) The holder of an intern permit shall be subject to the provisions of G.S. 90-41. (1971, c. 755, s. 3.)

§ 90-29.5. Instructor's license.

The Board may issue an instructor's license to a person who is not otherwise licensed to practice dentistry in the State, but whom the Board finds to be qualified by professional training and experience and upon the same examination as that offered to licensed dentists in North Carolina plus an oral examination. An instructor's license will authorize him to teach and to practice dentistry in or on behalf of a dental school or college offering a doctoral degree in dentistry, operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners, but only within the confines of the principal facility of the school or college and of any teaching hospital adjacent thereto. Application for an instructor's license shall be made in accordance with rules and regulations of the North Carolina State Board of Dental Examiners. A person holding an instructor's license shall have, within the scope of his authorized practice, all the duties and responsibilities of any dentist who has been licensed upon examination by the North Carolina State Board of Dental Examiners, and shall be subject to those various disciplinary measures and penalties set forth in G.S. 90-41 upon a determination by the Board that he has violated any of the terms or provisions of this Article. An instructor's license shall be subject to annual renewal by the North Carolina State Board of Dental Examiners, as provided in G.S. 90-31. (1979, 2nd Sess., c. 1195, s. 11.)

§ 90-30. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses.

The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of

dentistry, subject, however, to the further provisions of this section and of the provisions of this Article.

The applicant shall be of good moral character, at least 21 years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said Board; that he is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the said Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception or fraud during such examination, or whose examination discloses to the satisfaction of the Board, a deficiency in academic education. The Board may employ such dentists found qualified therefor by the Board, in examining applicants for licenses as it deems appropriate.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect. (1935, c. 66, s. 7; 1971, c. 755, s. 4.)

CASE NOTES

Mandamus to Procure License. — Under former § 6631 of the Consolidated Statutes it was held that the courts cannot by a mandamus compel the Board of Dental Examiners to certify contrary to what they have declared to be true. If the Board refuses to examine an applicant, upon his compliance with the regulations, the court could by mandamus compel them to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by the Examining Board, is lacking. Burton v. Furman, 115 N.C. 166, 20 S.E. 443 (1894); Loughran v. City of Hickory, 129 N.C. 281, 40 S.E. 46 (1901); Ewbank v. Turner, 134 N.C. 77, 46 S.E. 508 (1903).

§ 90-31. Annual renewal of licenses.

The laws of North Carolina now in force, having provided for the annual renewal of any license issued by the North Carolina State Board of Dental Examiners, it is hereby declared to be the policy of this State, that all licenses heretofore issued by the North Carolina State Board of Dental Examiners or hereafter issued by said Board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina State Board of Dental Examiners is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each dentist engaged in the practice of dentistry in North Carolina shall make application to the North Carolina State Board of Dental Examiners and receive from said Board, subject to the further provisions of this section and of this Article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said Board from time to time may prescribe, at least six months prior to January 1 of any year.

If the application for such renewal certificate, accompanied by the fee required by this Article, is not received by the Board before January 31 of each year, an additional fee of ten dollars ($10.00) shall be charged for renewal certificate. If such application, accompanied by the renewal fee, plus the additional fee, is not received by the Board before March 31 of each year, every person thereafter continuing to practice dentistry without having applied for a certificate of renewal shall be guilty of the unauthorized practice of dentistry and shall be subject to the penalties prescribed by G.S. 90-40. (1935, c. 66, s. 8; 1953, c. 564, s. 5; 1961, c. 446, s. 6; 1971, c. 755, s. 5.)

§ 90-32. Contents of original license.

The original license granted by the North Carolina State Board of Dental Examiners shall bear a serial number, the full name of the applicant, the date of issuance and shall be signed by the president and the majority of the members of the said Board and attested by the seal of said Board and the secretary thereof. The certificate of renewal of license shall bear a serial number which need not be the serial number of the original license issued, the full name of the applicant and the date of issuance. (1935, c. 66, s. 8.)

§ 90-33. Displaying license and current certificate of renewal.

The license and the current certificate of renewal of license to practice dentistry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina State Board of Dental Examiners or to its authorized agents. (1935, c. 66, s. 8.)

§ 90-34. Refusal to grant renewal of license.

For nonpayment of fee or fees required by this Article, or for violation of any of the terms or provisions of G.S. 90-41, the North Carolina State Board of Dental Examiners may refuse to issue a certificate for renewal of license. As used herein the term "license" shall include license, provisional license or intern permit. (1935, c. 66, s. 8; 1971, c. 755, s. 6.)

§ 90-35. Duplicate licenses.

When a person is a holder of a license to practice dentistry in North Carolina or the holder of a certificate of renewal of license, he may make application to the North Carolina State Board of Dental Examiners for the issuance of a copy or a duplicate thereof accompanied by a fee of five dollars ($5.00). Upon the filing of the application and the payment of the fee, the said Board shall issue a copy or duplicate. (1935, c. 66, s. 8; 1961, c. 446, s. 7.)

§ 90-36. Licensing practitioners of other states.

The North Carolina State Board of Dental Examiners may, in its discretion, issue a license to practice dentistry in this State without an examination other than clinical to a legal and ethical practitioner of dentistry who moves into North Carolina from another state or territory of the United States, whose standard of requirements is equal to that of the State of North Carolina and in which such applicant has conducted a legal and ethical practice of dentistry for at least five years, next preceding his or her removal and who has not, during his period of practice, been found guilty by the state regulatory agency charged with the responsibility therefor of the violation of the ethics of his profession, nor found guilty by a court of competent jurisdiction of the violation of the laws of the state which issued license to him, or of the criminal laws of the United States, or whose license to practice dentistry has been revoked or suspended by a duly constituted authority.

Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the dental board or like board of the state from which said applicant removed, certifying that the applicant is the legal holder of a license to practice dentistry in that state, and for a period of five years immediately preceding the application has engaged in the practice of dentistry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the laws of the state or of the United States, or for the violation of the ethics of the profession of dentistry.

Application for a license under this section shall be made to the North Carolina State Board of Dental Examiners within the six months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from a reputable, recognized and approved dental college, school or dental department of a college or university.

Any license issued upon the application of any dentist from any other state or territory shall be subject to all of the provisions of this Article with reference to the license issued by the North Carolina State Board of Dental Examiners upon examination of applicants and the rights and privileges to practice the profession of dentistry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this Article on dentists originally examined by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 9; 1971, c. 755, s. 7.)

§ 90-37. Certificate issued to dentist moving out of State.

Any dentist duly licensed by the North Carolina State Board of Dental Examiners, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said Board, upon application to said Board and the payment to it of the fee in this Article provided, shall be issued a certificate showing his full name and address, the date of license originally issued to him, the date and number of his renewal of license, and whether any charges have been filed with the Board against him. The Board may provide forms for such certificate, requiring such additional information as it may determine proper. (1935, c. 66, s. 10.)

§ 90-38. Licensing former dentists who have moved back into State or resumed practice.

Any person who shall have been licensed by the North Carolina State Board of Dental Examiners to practice dentistry in this State who shall have retired from practice or who shall have moved from the State and shall have returned to the State, may, upon a satisfactory showing to said Board of his proficiency in the profession of dentistry and his good moral character during the period of his retirement, be granted by said Board a license to resume the practice of dentistry upon making application to the said Board in such form as it may require. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this Article. (1935, c. 66, s. 11; 1953, c. 564, s. 2.)

CASE NOTES

This section is constitutional and valid as an exercise of the police power of the State for the good and welfare of the people. Allen v. Carr, 210 N.C. 513, 187 S.E. 809 (1936).

And its provisions bear alike upon all classes of persons referred to. Hence the requirement made by the Board that the plaintiff make to it a satisfactory showing of his proficiency in the profession of dentistry is no discrimination against the plaintiff. Allen v. Carr, 210 N.C. 513, 187 S.E. 809 (1936).

Mandamus will not lie to control the decision of the Board in the exercise of its discretionary power under this section, the extent of mandamus in such cases being limited to compel the exercise of the discretionary power, but not to control the decision reached in its exercise. Allen v. Carr, 210 N.C. 513, 187 S.E. 809 (1936).

Licensed Dentist Removing from State Must Take Second Examination upon Return. — A dentist licensed by the State Board of Dental Examiners, who thereafter moves from this State and practices his profession successively in other states, upon examination and license by them, and then returns to this State, must obtain a license to resume practice here by passing a second examination by the State Board of Dental Examiners, although such dentist has continuously practiced dentistry since he was first licensed by the State Board. Allen v. Carr, 210 N.C. 513, 187 S.E. 809 (1936).

§ 90-39. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules and regulations not exceeding the following:

(1) Each application for general dentistry examination	$75.00
(2) Each general dentistry license renewal, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dentist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dentist	50.00
(3) Each provisional license	50.00
(4) Each intern permit or renewal thereof	50.00
(5) Each certificate of license to a resident dentist desiring to change to another state or territory	15.00
(6) Each license issued to a practitioner of another state or territory to practice in this State	75.00
(7) Each license to resume the practice issued to a dentist who has retired from the practice of dentistry or has removed from and returned to this State	75.00
(8) Each instructor's license or renewal thereof	50.00

(1935, c. 66, s. 12; 1953, c. 564, s. 1; 1961, c. 446, s. 8; 1965, c. 163, s. 3; 1971, c. 755, s. 8; 1979, 2nd Sess., c. 1195, s. 12.)

Effect of Amendments. — The 1979, 2nd Sess., amendment added subdivision (8).

§ 90-40. Unauthorized practice; penalty.

If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina Board of Dental Examiners or having obtained a provisional license from said Board; or if he shall practice dentistry after March 31 of each year without applying for a certificate of renewal of license, as provided in G.S. 90-31; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate any of the provisions of this Article for which no specific penalty has been provided; or shall practice or attempt to practice, dentistry in violation of the provisions of this Article; or shall practice dentistry under any name other than his own name, said person shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or imprisonment, or both, in the discretion of the court. Each day's violation of this Article shall constitute a separate offense. (1935, c. 66, s. 13; 1953, c. 564, s. 6; 1957, c. 592, s. 4; 1965, c. 163, s. 6; 1969, c. 804, s. 2.)

Cross References. — See notes under § 90-29.

CASE NOTES

Conviction Held Proper. — The legislature has constitutional authority to regulate the practice of dentistry, and a conviction for violating former law of similar import was held proper. State v. Hicks, 143 N.C. 689, 57 S.E. 441 (1907).

Cited in Grier v. Phillips, 230 N.C. 672, 55 S.E.2d 485 (1949); State v. Page, 32 N.C. App. 478, 232 S.E.2d 460 (1977).

§ 90-40.1. Enjoining unlawful acts.

(a) The practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked, or the doing, committing or continuing of any of the acts prohibited by this Article by any person or persons, whether licensed dentists or not, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance. The Attorney General for the State of North Carolina, the district attorney of any of the superior courts, the North Carolina State Board of Dental Examiners in its own name, or any resident citizen may maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry and from the doing, committing or continuing of such unlawful act. This proceeding shall be in addition to and not in lieu of criminal prosecutions or proceedings to revoke or suspend licenses as authorized by this Article.

(b) In an action brought under this section the final judgment, if in favor of the plaintiff, shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of

dentistry. The provisions of the statutes or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(c) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unlicensed or unlawful practice of dentistry are alleged to have been committed or in which there appear reasonable grounds to believe that they will be committed or in the county where the defendants in such action reside.

(d) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses before filing complaint and before trial in the same manner as provided by law for the examination of the parties. (1957, c. 592, s. 5; 1973, c. 47, s. 2.)

§ 90-41. Disciplinary action.

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to

(1) Refuse to issue a license to practice dentistry;
(2) Refuse to issue a certificate of renewal of a license to practice dentistry;
(3) Revoke or suspend a license to practice dentistry; and
(4) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
(2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice dentistry;
(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;
(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;
(7) Is mentally, emotionally, or physically unfit to practice dentistry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dentistry unless or until such person shall have been subsequently lawfully declared to be mentally competent;
(8) Has conducted in-person solicitation of professional patronage or has employed or procured any person to conduct such solicitation by personal contact with potential patients, except to the extent that informal advice may be permitted by regulations issued by the Board of Dental Examiners;
(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of dentistry or in attempting to fraudulently obtain a license to practice dentistry;

(10) Has engaged in such immoral conduct as to discredit the dental profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of dentistry;

(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;

(14) Is incompetent in the practice of dentistry;

(15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;

(16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;

(17) Has committed any fraudulent or misleading acts in the practice of dentistry;

(18) Has, directly or indirectly, published or caused to be published or disseminated any advertisement for professional patronage or business which is untruthful, fraudulent, misleading, or in any way inconsistent with rules and regulations issued by the Board of Dental Examiners governing the time, place, or manner of such advertisements;

(19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;

(20) Has used or permitted another to use his name, as a dentist, in promoting the sale or advertisement of any product or service;

(21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board;

(22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of dentistry;

(23) Has persistently maintained, in the practice of dentistry, unsanitary offices, practices, or techniques;

(24) Is a menace to the public health by reason of having a serious communicable disease;

(25) Has distributed or caused to be distributed any intoxicant, drug or narcotic for any other than a lawful purpose; or

(26) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(b) If any person engages in or attempts to engage in the practice of dentistry while his license is suspended, his license to practice dentistry in the State of North Carolina may be permanently revoked.

(c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article or of Article 16.

(d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or of Article 16 or any of the rules and regulations promulgated by the Board.

(e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.

(f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license and intern permit. (1935, c. 66, s. 14; 1957, c. 592, s. 7; 1965, c. 163, s. 4; 1967, c. 451, s. 1; 1971, c. 755, s. 9; 1979, 2nd Sess., c. 1195, ss. 7, 8.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, rewrote subdivisions (8) and (18) of subsection (a).

CASE NOTES

Former Statute Constitutional. — See In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540, cert. denied, 283 N.C. 393, 196 S.E.2d 275, 414 U.S. 1001, 94 S. Ct. 355, 38 L. Ed. 2d 237 (1973), decided under this section as it existed prior to 1971 amendment.

The Board is not a court and is not expected to know and observe the technicalities that trained attorneys and judges would demonstrate. North Carolina State Bd. of Dental Exmrs. v. Grady, 268 N.C. 541, 151 S.E.2d 25 (1966).

And Specific Findings of Fact Are Not Required. — Specific findings of fact, with minute details as to particulars, time and place entered in written form, are not required by this section. North Carolina State Bd. of Dental Exmrs. v. Grady, 268 N.C. 541, 151 S.E.2d 25 (1966).

On appeal to the superior court from order of the Board of Dental Examiners suspending the license of a dentist, the superior court should hear the accused in like manner as a consent reference, and the court should weigh the evidence and make its own independent determinations of the matters in dispute. North Carolina State Bd. of Dental Exmrs. v. Grady, 268 N.C. 541, 151 S.E.2d 25 (1966).

As to advertising under former law, see In re Owen, 207 N.C. 445, 177 S.E. 403 (1934).

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969); State v. Page, 32 N.C. App. 478, 232 S.E.2d 460 (1977).

§ 90-41.1. Hearings.

(a) With the exception of applicants for license by comity and applicants for reinstatement after revocation, every licensee, provisional licensee, intern, or applicant for license, shall be afforded notice and opportunity to be heard before the North Carolina State Board of Dental Examiners shall take any action, the effect of which would be:

(1) To deny permission to take an examination for licensing for which application has been duly made; or
(2) To deny a license after examination for any cause other than failure to pass an examination; or
(3) To withhold the renewal of a license for any cause other than failure to pay a statutory renewal fee; or
(4) To suspend a license; or
(5) To revoke a license; or
(6) To revoke or suspend a provisional license or an intern permit; or
(7) To invoke any other disciplinary measures, censure, or probative terms against a licensee, a provisional licensee, or an intern,

such proceedings to be conducted in accordance with the provisions of Chapter 150A of the General Statutes of North Carolina.

(b) In lieu of or as a part of such hearing and subsequent proceedings, the Board is authorized and empowered to enter any consent order relative to the discipline, censure, or probation of a licensee, provisional licensee, an intern, or an applicant for a license, or relative to the revocation or suspension of a license, provisional license, or intern permit.

(c) Following the service of the notice of hearing as required by Chapter 150A of the General Statutes, the Board and the person upon whom such notice

is served shall have the right to conduct adverse examinations, take depositions, and engage in such further discovery proceedings as are permitted by the laws of this State in civil matters. The Board is hereby authorized and empowered to issue such orders, commissions, notices, subpoenas, or other process as might be necessary or proper to effect the purposes of this subsection; provided, however, that no member of the Board shall be subject to examination hereunder. (1967, c. 451, s. 2; 1969, c. 804, s. 3; 1971, c. 755, s. 10; 1973, c. 1331, s. 3.)

§ 90-42. Restoration of revoked license.

Whenever any dentist has been deprived of his license, the North Carolina State Board of Dental Examiners, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate, before restoration. (1935, c. 66, s. 14.)

§ 90-43. Compensation and expenses of Board.

Each member of the North Carolina State Board of Dental Examiners shall receive as compensation for his services in the performance of his duties under this Article a sum not exceeding the amount provided in G.S. 93B-5(a) for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said Board, and all legitimate and necessary expenses incurred in attending meetings of the said Board.

All per diem allowances and all expenses paid as herein provided shall be paid upon voucher drawn by the secretary-treasurer of the Board who shall likewise draw voucher payable to himself for the salary fixed for him by the Board.

The Board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this Article, and employ such personnel as it may deem requisite to assist in carrying out the administrative functions required by this Article and by the Board. (1935, c. 66, s. 15; 1965, c. 163, s. 5; 1971, c. 755, s. 11; 1979, 2nd Sess., c. 1195, s. 9.)

Effect of Amendments. — The 1979, 2nd Sess., amendment substituted "the amount provided in G.S. 93B-5(a)" for "twenty dollars ($20.00)" near the middle of the first paragraph and deleted the former second paragraph, relating to compensation and expenses of the secretary-treasurer of the Board.

§ 90-44. Annual report of Board.

Said Board shall, on or before the fifteenth day of February in each year, make an annual report as of the thirty-first day of December of the year preceding, of its proceedings, showing therein the examinations given, the fees received, the expenses incurred, the hearings conducted and the result thereof, which said report shall be filed with the Governor of the State of North Carolina. (1935, c. 66, s. 15.)

§ 90-45: Repealed by Session Laws 1967, c. 218, s. 4.

§ 90-46. Filling prescriptions.

Legally licensed druggists of this State may fill prescriptions of dentists duly licensed by the North Carolina State Board of Dental Examiners. (1935, c. 66, s. 17.)

§ 90-47: Repealed by Session Laws 1979, 2nd Sess., c. 1195, s. 13.

§ 90-48. Rules and regulations of Board; violation a misdemeanor.

The North Carolina State Board of Dental Examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules and regulations are not inconsistent with the provisions of this Article. Such rules and regulations shall become effective 30 days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the Board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule, regulation, or bylaw shall be guilty of a misdemeanor, subject to a fine of not more than two hundred dollars ($200.00) or imprisonment for not more than 90 days for each offense, and each day that this section is violated shall be considered a separate offense.

The Board shall issue every two years to each licensed dentist a compilation or supplement of the Dental Practice Act and the Board rules and regulations, and upon written request therefor by such licensed dentist, a directory of dentists. (1935, c. 66, s. 19; 1957, c. 592, s. 6; 1971, c. 755, s. 12.)

§ 90-48.1. Free choice by patient guaranteed.

No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed dentist as the provider of care or services which are within the scope of practice of the profession of dentistry as defined in this Chapter. (1965, c. 1169, s. 3.)

§§ 90-48.2 to 90-48.6: Reserved for future codification purposes.

ARTICLE 2A.

Dental Peer Review Protection Act.

§ 90-48.7. Title.

General Statutes 90-48.7 through G.S. 90-48.11 may be cited as the "Dental Peer Review Protection Act." (1979, 2nd Sess., c. 1192, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1192, s. 2, provides: "This act is effective January 1, 1981, and does not apply to actions taken or recommendations made prior to that ratification."

§ 90-48.8. Immunity of a member.

No member of a dental peer review committee of a State or local dental society shall be held liable in damages to any person for any action taken or recommendation made within the scope of the functions of that committee, except with regard to Medicare and Medicaid charges or payments if the committee member acts without malice and in reasonable belief that the action or recommendation was warranted by the facts known to him after reasonable effort to obtain the facts of the matter as to which the action was taken or recommendation was made. (1979, 2nd Sess., c. 1192, s. 1.)

§ 90-48.9. Immunity of witnesses before dental peer review committee.

Notwithstanding any other provision of law, no person providing information to any dental peer review committee or organization shall be held, by reason of having provided such information, to have violated any criminal law, or to be civilly liable under any law unless:

(1) The information is unrelated to the performance of the duty or function of the peer review committee or organization, or

(2) The information is false, and the person providing the information knew, or had good reason to believe that the information was false. (1979, 2nd Sess., c. 1192, s. 1.)

§ 90-48.10. Confidentiality of review organization's proceedings and records.

The proceedings and records of a dental review committee except those concerning the investigation and consideration of Medicare and Medicaid charges or payments, shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action arising out of the matters which are the subject of evaluation and review by the committee; and no person who was in attendance at a meeting of the committee shall be permitted or required to testify in any civil action as to any evidence or other matters produced or presented during the proceedings of the committee or as to any findings, recommendations, evaluations, opinions, or other actions of the committee or any members thereof, except with regard to Medicare and Medicaid charges or payments: Provided, however, that information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any civil action merely because they were presented during proceedings of a committee, nor should any person who testifies before a committee or who is a member of a committee be prevented from testifying as to matters within his knowledge, but the witness shall not be asked about his testimony before a committee or opinions formed by him as a result of the committee hearings, except with regard to Medicare and Medicaid charges or payments. (1979, 2nd Sess., c. 1192, s. 1.)

§ 90-48.11. No limitation on previous privileges and immunities.

Nothing in this G.S. 90-48.7 through G.S. 90-48.11 shall be deemed to annul, abridge, or limit in any manner any privileges or immunities heretofore existing under the laws of this State. (1979, 2nd Sess., c. 1192, s. 1.)

Article 3.

The Licensing of Mouth Hygienists to Teach and Practice Mouth Hygiene in Public Institutions.

§§ 90-49 to 90-52: Repealed by Session Laws 1945, c. 639, s. 14.

Cross References. — As to dental hygiene, see §§ 90-221 through 90-233.1.

Article 4.

Pharmacy.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

Part 1. Practice of Pharmacy.

§ 90-53. North Carolina Pharmaceutical Association.

The North Carolina Pharmaceutical Association, and the persons composing the same, shall continue to be a body politic and corporate under the name and style of the North Carolina Pharmaceutical Association, and by said name have the right to sue and be sued, to plead and be impleaded, to purchase and hold real estate and grant the same, to have and to use a common seal, and to do such other things and perform such other acts as appertain to bodies corporate and politic not inconsistent with the Constitution and laws of the State. (1881, c. 355, s. 1; Code, s. 3135; Rev., s. 4471; C. S., s. 6650.)

§ 90-54. Object of Pharmaceutical Association.

The object of the Association is to unite the pharmacists and druggists of this State for mutual aid, encouragement, and improvement; to encourage scientific research, develop pharmaceutical talent, to elevate the standard of professional thought, and ultimately restrict the practice of pharmacy to

properly qualified druggists and apothecaries. (1881, c. 355, s. 2; Code, s. 3136; Rev., s. 4472; C. S., s. 6651.)

§ 90-55. Board of Pharmacy; election; terms; vacancies.

The Board of Pharmacy shall consist of five persons licensed as pharmacists within this State, who shall be elected and commissioned by the Governor as hereinafter provided. The members of the present Board of Pharmacy shall continue in office until the expiration of their respective terms, and the rules, regulations, and bylaws of said Board, so far as they are not inconsistent with the provisions of this Article, shall continue in effect. The North Carolina Pharmaceutical Association shall annually elect a resident pharmacist from its number to fill the vacancy annually occurring in said Board, and the pharmacist so elected shall be commissioned by the Governor and shall hold office for the term of five years and until his successor has been duly elected and qualified. In case of death, resignation, or removal from the State of any member of said Board of Pharmacy, the said Board shall elect in his place a pharmacist who is a member of said North Carolina Pharmaceutical Association, who shall be commissioned by the Governor as a member of the said Board of Pharmacy for the remainder of the term. It shall be the duty of a member of the Board of Pharmacy, within 10 days after receipt of notification of his appointment and commission, to appear before the clerk of the superior court of the county in which he resides and take and subscribe an oath to properly and faithfully discharge the duties of his office according to law. (1905, c. 108, ss. 5-7; Rev., s. 4473; C. S., s. 6652.)

§ 90-56. Election of officers; bonds; annual meetings.

The Board of Pharmacy shall elect two officers, a president and a secretary-treasurer, who shall hold their offices until their successors shall have been elected and qualified. The president shall be elected from the membership of the Board. The secretary-treasurer may or may not be a member of the Board, as the Board shall determine. The secretary-treasurer shall give bond in such sum as may be prescribed by the Board, conditioned for the faithful discharge of the duties of his office according to law, and said bond shall be made payable to the North Carolina Board of Pharmacy and approved by said Board. The said Board shall hold an annual meeting at such time and place as it may provide by rule for the examination of candidates and for the discharge of such other business as may legally come before it, and said Board may hold such additional meetings as may be necessary for the examination of candidates and for the discharge of any other business. (1905, c. 108, s. 8; Rev., s. 4474; C. S., s. 6653; 1923, c. 82.)

§ 90-57. Powers of Board; reports; quorum; records.

The Board of Pharmacy shall have a common seal, and shall have the power and authority to define and designate nonpoisonous domestic remedies, to adopt such rules, regulations, and bylaws, not inconsistent with this Article, as may be necessary for the regulation of its proceedings and for the discharge of the duties imposed under this Article, and shall have power and authority to employ inspectors, chemists, and an attorney to conduct prosecutions and to assist in the conduct of prosecutions under this Article, and for any other purposes which said Board may deem necessary. The said Board of Pharmacy shall keep a record of its proceedings and a register of all persons to whom certificates of license as pharmacists and permits have been issued, and of all renewals thereof; and the books and register of the said Board, or a copy of any part thereof, certified by the secretary, attested by the seal of said Board, shall

be taken and accepted as competent evidence in all the courts of the State. The said Board of Pharmacy shall make annually to the Governor and to the North Carolina Pharmaceutical Association written reports of its proceedings and of its receipts and disbursements under this Article, and of all persons licensed to practice as pharmacists in this State. A majority of the Board shall constitute a quorum for the transaction of all business. (1905, c. 108, s. 9; Rev., s. 4475; 1907, c. 113, s. 1; C. S., s. 6654; 1945, c. 572, s. 1.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

§ 90-57.1. Powers of the Board; professional standards.

The Board of Pharmacy shall by regulation and after due notice and hearing, adopt a code of professional conduct appropriate to the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession of pharmacy. In adopting such a code, or any amendment thereto, the Board shall consider the recommendations of the North Carolina Pharmaceutical Association. (1969, c. 533.)

CASE NOTES

Section Held Unconstitutional. — Without guidelines meeting the constitutional standards of certainty, this section is an unlawful attempt to delegate legislative authority and is in violation of the North Carolina Constitution. Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. Where such a power is left to the limited discretion of a board, to be exercised without the guide of legislative standards, the statute is not only discriminatory, but must be regarded as an attempted delegation of the legislative function offensive both to the State and the federal Constitution. This section contains no specific guidelines for the Board to follow. It merely refers to the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession. Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

The guidelines under this section, if they can be considered guidelines, do not meet the constitutional standards of certainty to allow the Board to adopt such rules. Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

§ 90-58. Compensation of secretary and Board.

The secretary of the Board of Pharmacy shall receive such salary as may be prescribed by the Board, and shall be paid his necessary expenses while engaged in the performance of his official duties. The other members of the said Board shall receive the sum of fifteen dollars ($15.00) for each day actually employed in the discharge of their official duty and their necessary expenses while engaged therein: Provided, that the compensation and expenses of the secretary and members of the said Board of Pharmacy and all disbursements for expenses incurred by the said Board in carrying into effect and executing the provisions of this Article shall be paid out of the fees received by the said Board. (1905, c. 108, s. 10; Rev., s. 4476; C. S., s. 6655; 1921, c. 57, s. 2; 1965, c. 676, s. 2.)

§ 90-59. Secretary to investigate and prosecute.

Upon information that any provision of this Article has been or is being violated by any member, the secretary of the Board of Pharmacy or anyone appointed by the said Board of Pharmacy shall promptly make investigations of such matters, and, upon probable cause appearing, shall file complaint and prosecute the offender. All fines and penalties prescribed in this Article shall be recoverable by suit in the name of the people of the State. In all prosecutions for the violation of any of the provisions of this Article, a certificate under oath by the secretary of the Board of Pharmacy shall be competent and admissible as evidence in any court of the State that the person so charged with the violation of this Article is not a registered pharmacist or assistant pharmacist, as required by law. (1905, c. 108, s. 11; Rev., s. 4477; C. S., s. 6656; 1923, c. 74, s. 1.)

§ 90-60. Fees collectible by Board.

The Board of Pharmacy shall be entitled to charge and collect not more than the following fees: for the examination of an applicant for license as a pharmacist, forty dollars ($40.00); for renewing the license as a pharmacist, twenty-five dollars ($25.00); for renewing the license of an assistant pharmacist, ten dollars ($10.00); for licenses without examination as provided in G.S. 90-64, original, one hundred dollars ($100.00), and renewal thereof, twenty-five dollars ($25.00); for original registration of a drugstore, one hundred dollars ($100.00), and renewal thereof, fifty dollars ($50.00); for issuing a permit to a physician to conduct a drugstore in a village of not more than 500 inhabitants, ten dollars ($10.00); for the renewal of permit to a physician to conduct a drugstore in a village of not more than 500 inhabitants, five dollars ($5.00). All fees shall be paid before any applicant may be admitted to examination or his name placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C. S., s. 6657; 1921, c. 57, s. 3; 1945, c. 572, s. 3; 1953, c. 183, s. 1; 1965, c. 676, s. 1; 1973, c. 1183.)

§ 90-61. Application and examination for license; prerequisites.

Every person licensed or registered as a pharmacist on February 4, 1905, under the laws of this State shall be entitled to continue in the practice of his profession until the expiration of the term for which his certificate of registration or license was issued. Every person who shall desire to be licensed as a pharmacist shall file with the secretary of the Board of Pharmacy an application, duly verified under oath, setting forth the name and age of the applicant, the place or places at which and the time he has spent in the study of the science and art of pharmacy, the experience in the compounding of physicians' prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and such applicant shall appear at a time and place designated by the Board of Pharmacy and submit to an examination as to his qualifications for registration as a licensed pharmacist. The application referred to above shall be prepared and furnished by the Board of Pharmacy.

In order to become licensed as a pharmacist within the meaning of this Article, an applicant shall be not less than 21 years of age; he shall present to the Board of Pharmacy satisfactory evidence that he is a graduate of a duly accredited school or college of pharmacy and that he has had practical experience in pharmacy under the supervision of a licensed pharmacist, which experience shall be approved by the Board of Pharmacy and shall not be required

to exceed one year as may be determined by the Board of Pharmacy; and he shall also pass satisfactorily an examination of the Board of Pharmacy; provided, that any person who has had two years of college training, and has been filling prescriptions in a drugstore or stores in North Carolina under the supervision of a licensed pharmacist for 15 years or longer, may take the examination as provided above. (1905, c. 108, s. 13; Rev., ss. 4479, 4480; 1915, c. 165; C. S., s. 6658; 1921, c. 52; 1933, c. 206, ss. 1, 2; 1935, c. 181; 1937, c. 94; 1971, c. 481.)

CASE NOTES

The General Assembly has prescribed the requirements an applicant must meet to become licensed as a registered pharmacist in this section and §§ 90-63 and 90-64. North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

Cited in Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978).

§ 90-61.1. Pharmacist intern license.

The Board of Pharmacy may license pharmacist interns with the period of such license not to exceed two years. To be licensed as a pharmacist intern, an applicant shall be not less than 20 years of age, shall present to the Board of Pharmacy satisfactory evidence that he is a graduate of a duly accredited school or college of pharmacy, shall have had at least three months of practical experience in pharmacy under the instruction of a licensed pharmacist, which experience shall be approved by the Board of Pharmacy, and shall pass a satisfactory examination by the Board of Pharmacy. A licensed pharmacist intern shall be entitled to the same practice privileges and responsibilities as an assistant registered pharmacist pursuant to Article 4 of Chapter 90 of the General Statutes except that a licensed pharmacist intern may not supervise the rendering of pharmaceutical services by an unlicensed person as provided in G.S. 90-71 or manage a pharmacy as provided in G.S. 90-73. (1971, c. 482, s. 1.)

CASE NOTES

Cited in Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 25 N.C. App. 131, 212 S.E.2d 657 (1975).

§ 90-62. When license issued.

If an applicant for license as pharmacist has complied with all the requirements of G.S. 90-60 and 90-61, the Board of Pharmacy shall enroll his name upon the register of pharmacists and issue to him a license, which shall entitle him to practice as a pharmacist up to the first day of January next ensuing, as provided in this Article for the annual renewal of every registration. (1905, c. 108, s. 15; Rev., s. 4481; C. S., s. 6659; 1921, c. 68, s. 1.)

§ 90-63. Certain assistant pharmacists may take registered pharmacist's examination; no original assistants' certificates issued after January 1, 1939.

Every person who is the holder of a certificate as a registered assistant pharmacist, issued prior to January 1, 1939, shall be admitted to the registered pharmacist examination. After January 1, 1939, the Board shall not issue an original certificate to any person as a registered assistant pharmacist: Provided, however, that nothing in this section shall prevent any person who was registered as an assistant pharmacist prior to January 1, 1939, from continuing to practice as a registered assistant pharmacist. (1937, c. 402.)

Cross References. — See note to § 90-61.

§ 90-64. Pharmacist licensed by reciprocity.

(a) The Board of Pharmacy may issue a temporary or probationary license to practice pharmacy in this State for a period of not less than one year, without examination, to any person who has been legally registered or licensed as a pharmacist by a board of pharmacy of another state, if the applicant shall present satisfactory evidence of the same qualifications as are required from licentiates in this State and that he was registered or licensed by examination by such other board of pharmacy, and that the standard of competence required by such other board of pharmacy is not lower than that required in this State; provided, that the Board, pursuant to regulations adopted by it, may issue a regular license as a pharmacist to an applicant who has practiced for one year in this State as a temporary or probationary pharmacist.

(b) An applicant who has taken and failed to pass the examinations of the North Carolina Board of Pharmacy given pursuant to G.S. 90-61 after July 1, 1977, shall not be granted reciprocal licensure until at least five years of active practice in pharmacy, provided that nothing in this section nor in the rules and regulations of the Board shall prevent any person who has taken and failed to pass the examinations of the North Carolina Board of Pharmacy prior to July 1, 1977, from being licensed by reciprocity pursuant to Board rules and regular regulations. An applicant for the licensure examinations in this State after July 1, 1977, who has registered as a candidate for licensure in another state shall appear before the Board of Pharmacy for explanation and clarification of the effect of this provision on eligibility for reciprocity in the event that the candidate is unsuccessful on the North Carolina examinations. (1905, c. 108, s. 16; Rev., s. 4482; C. S., s. 6660; 1945, c. 572, s. 2; 1971, c. 468; 1977, c. 598.)

Cross References. — See note to § 90-61.

§ 90-65. Denial, suspension, revocation or refusal to renew pharmacist's license or drugstore permit.

(a) The Board of Pharmacy may, after due notice and hearing, refuse to grant any license, or may suspend, revoke, or refuse to renew any license issued by it to any pharmacist or assistant pharmacist, or any permit to a physician to conduct a drugstore in a village of not more that 800 inhabitants upon any of the following grounds:

(1) Fraud or false representations made in connection with securing such license or any renewal thereof;

(2) Being guilty of any felony or any offense involving moral turpitude if the felony or offense affects his fitness to practice pharmacy;
(3) Habitual indulgence in the use of narcotic or other drugs or intoxicating liquors to such a degree as renders him unfit to practice pharmacy;
(4) Fraud or false representation made in connection with the practice of pharmacy which endangers or is likely to endanger the health or safety of the public, or which defrauds the State or any person, firm or corporation;
(5) Gross immorality;
(6) Physical or mental disability, when shown by affidavit or sworn testimony of three physicians that such conditions exist and the Board determines that it is in the interest of the public health and safety that the license should not remain in force, or be renewed, as the case might be;
(7) Willful failure to comply with the laws governing the practice of pharmacy and the distribution of drugs;
(8) Willful failure to comply with the rules and regulations of the Board of Pharmacy where such failure is found to endanger or is likely to endanger the health and safety of the public.

(b) The Board of Pharmacy may, after due notice and hearing, refuse to grant any permit to any person or party for the operation of a drugstore or pharmacy, or may suspend, revoke or refuse to renew the permit of any holder for the operation of any drugstore or pharmacy upon the same grounds as stated in subsection (a).

(c) Any license or permit or renewal thereof obtained through fraud or by any fraudulent or false representations shall be void and of no effect in law. (1905, c. 108, ss. 17, 25; Rev., s. 4483; C. S., s. 6661; 1967, c. 807; 1973, c. 138.)

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969); White v. North Carolina Bd. of Pharmacy, 35 N.C. App. 554, 241 S.E.2d 730 (1978).

§ 90-66. Expiration and renewal of license; failure to renew misdemeanor.

Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of his profession, and every physician holding a permit to sell drugs in a village of not more than 800 inhabitants, shall within 30 days next preceding the expiration of his license or permit, file with the secretary and treasurer of the Board of Pharmacy an application for the renewal thereof, which application shall be accompanied by the fee hereinbefore prescribed. If the Board of Pharmacy shall find that an applicant has been legally licensed in this State, and is entitled to a renewal thereof, or to a renewal of a permit, it shall issue to him a certificate attesting that fact. And if any pharmacist or assistant pharmacist shall fail, for a period of 60 days after the expiration of his license, to make application to the Board for its renewal, his name shall be erased from the register of licensed pharmacists and assistant pharmacists and such person, in order to again become registered as a licensed pharmacist or assistant pharmacist shall be required to pay the same fee as in the case of

original registration. And if any holder of a permit to sell drugs in a village of not more than 600 inhabitants shall fail, for a period of 60 days after the expiration of his permit, to make application for the renewal thereof, his name shall be erased from the register of persons holding such permits, and he may be restored thereto only upon the payment of the fee required for the granting of original permit. The registration of every license and every permit issued by the Board shall expire on the thirty-first day of December next ensuing the granting thereof: Provided that the Board of Pharmacy, in its discretion, shall have the power to issue a license or permit, or renewals thereof, to any person whose license or permit has been revoked by operation of law or by the Board of Pharmacy, or whose renewal thereof has been refused by the Board of Pharmacy, after the expiration of one year from the date of such revocation of license or permit, or refusal of a renewal thereof, upon satisfactory proof that such person is entitled to such license, or permit, or to a renewal thereof.

Every holder of a license or permit as a pharmacist or assistant pharmacist, who after the expiration thereof continues to carry on the business for which the license or permit was granted, without renewing the same as required by this section, shall be guilty of a misdemeanor, and fined not less than five ($5.00) nor more than twenty-five dollars ($25.00). (1905, c. 108, ss. 18, 19, 27; Rev., ss. 3653, 4484; 1911, c. 48; C. S., s. 6662; 1921, c. 68, s. 2; 1947, c. 781; 1953, c. 1051.)

§ 90-67. License to be displayed; penalty.

Every certificate or license to practice as a pharmacist or assistant pharmacist and every permit to a practicing physician to conduct a pharmacy or drugstore in a village of not more than 800 inhabitants, and every last renewal of such license or permit, shall be conspicuously exposed in the pharmacy or drugstore or place of business of which the pharmacist, or other person to whom it is issued, is the owner or manager, or in which he is employed.

The holder of such license, permit, or renewal who fails to expose it as required by this section shall be guilty of a misdemeanor, and fined not less than five ($5.00) nor more than twenty-five dollars ($25.00), and each day that such license, permit, or renewal thereof shall not be exposed shall be held to constitute a separate and distinct offense. (1905, c. 108, ss. 18, 26; Rev., ss. 3651, 4485; C. S., s. 6663; 1921, c. 68, s. 3; 1953, c. 1051.)

§ 90-68. Unlicensed person not to use title of pharmacist; penalty.

It shall be unlawful for any person not legally licensed as a pharmacist or assistant pharmacist to take, use or exhibit the title of pharmacist or assistant pharmacist or licensed or registered pharmacist, or the title druggist or apothecary, or any other title, name, or description of like import.

Every person who violates this section shall be guilty of a misdemeanor and be fined not less than twenty-five ($25.00) nor more than one hundred dollars ($100.00). (1905, c. 108, ss. 22, 29; Rev., ss. 3652, 4486; C. S., s. 6664; 1921, c. 68, s. 4.)

§ 90-69. Purity of drugs protected; seller responsible; adulteration misdemeanor.

Every person who shall engage in the sale of drugs, chemicals, and medicines shall be held responsible for the quality of all drugs, chemicals, and medicines he may sell or dispense, with the exception of those sold in the original packages of the manufacturers, and also those known as "patent or proprietary medicines."

If any person engaged in the sale of drugs, chemicals, and medicines shall intentionally adulterate, or cause to be adulterated, or exposed to sale knowing the same to be adulterated, any drugs, chemicals, or medical preparations, he shall be guilty of a misdemeanor and liable to a fine not exceeding one hundred dollars ($100.00), and if he is a licensed pharmacist or assistant pharmacist his name shall be stricken from the register of licensed pharmacists and assistant pharmacists. (1881, c. 355, s. 11; Code, s. 3145; 1897, c. 182, s. 7; 1905, c. 108, s. 3; Rev., ss. 3648, 4488; C. S., s. 6665; 1921, c. 68, s. 5.)

§ 90-70. Prescriptions preserved; copies furnished.

Every proprietor or manager of a drugstore or pharmacy shall keep in his place of business a suitable book or file, in which shall be preserved for a period of not less than five years the original of every prescription compounded or dispensed at such drugstore or pharmacy. Upon the request of the prescribing physician, or of the person for whom such prescription was compounded or dispensed, the proprietor or manager of such drugstore or pharmacy shall furnish a true and correct copy of such prescription, and said book or file of original prescriptions shall at all times be open to the inspection and examination of duly authorized officers of the law or other persons authorized and directed by the Board of Pharmacy to make such inspection and examination. (1905, c. 108, s. 21; Rev., s. 4490; C. S., s. 6666.)

§ 90-71. Selling drugs without license prohibited; drug trade regulated.

It shall be unlawful for any person not licensed as a pharmacist or assistant pharmacist within the meaning of this Article to conduct or manage any pharmacy, drug or chemical store, apothecary shop or other place of business for the retailing, compounding, or dispensing of any drugs, chemicals, or poison, or for the compounding of physicians' prescriptions, or to keep exposed for sale at retail any drugs, chemicals, or poison, except as hereinafter provided, or for any person not licensed as a pharmacist within the meaning of this Article to compound, dispense, or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this Article. Provided, that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug or chemical store, a licensed assistant pharmacist may conduct or have charge of said store. And it shall be unlawful for any owner or manager of a pharmacy or drugstore or other place of business to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any drug, medicine, or poison, except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist.

Nothing in this section shall be construed to interfere with any legally registered practitioner of medicine in the compounding of his own prescriptions, nor with the exclusively wholesale business of any dealer who shall be licensed as a pharmacist or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the selling at retail of nonpoisonous domestic remedies, nor with the sale of patent or proprietary preparations which do not contain poisonous ingredients, nor, except in cities and towns wherein there is located an established drugstore, and except in the Counties of Bertie, Cabarrus, Cleveland, Cumberland, Duplin, Forsyth, Gaston, Guilford, Halifax, Harnett, Henderson, Iredell, Mecklenburg, Montgomery, Moore, New Hanover, Orange, Pender, Richmond, Robeson, Rockingham,

Rowan, Scotland and Wilson, shall this section be construed to interfere with the sale of paregoric, Godfrey's Cordial, aspirin, alum, borax, bicarbonate of soda, calomel tablets, castor oil, compound cathartic pills, copperas, cough remedies which contain no poison or narcotic drugs, cream of tartar, distilled extract witch hazel, epsom salts, harlem oil, gum asafetida, gum camphor, glycerin, peroxide of hydrogen, petroleum jelly, saltpetre, spirit of turpentine, spirit of camphor, sweet oil, and sulphate of quinine, nor with the sale of poisonous substances which are sold exclusively for use in the arts or for use as insecticides when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word "Poison," the vignette of the skull and crossbones, and the name of at least two readily obtainable antidotes.

In any village of not more than 800 inhabitants the Board of Pharmacy may, after due investigation, grant any legally registered practicing physician a permit to conduct a drugstore or pharmacy in such village, which permit shall not be valid in any other village than the one for which it was granted, and shall cease and terminate when the population of the village for which such permit was granted shall become greater than 800. (1905, c. 108, s. 4; Rev., s. 4487; C. S., s. 6667; 1921, c. 68, s. 6; Ex. Sess. 1924, c. 116; 1953, c. 1051; 1957, c. 617; 1959, c. 1222.)

Local Modification. — Johnston: 1929, c. 249; McDowell, Onslow: 1925, c. 27.

Legal Periodicals. — For comment on this section and the 1924 amendment, see 3 N.C.L. Rev. 29.

CASE NOTES

I. General Consideration.
II. Dispensing Drugs Without License.

I. GENERAL CONSIDERATION.

This Section and § 90-72 Construed in Pari Materia. — This section and § 90-72, which relate to the same subject matter, are to be construed in pari materia. North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

II. DISPENSING DRUGS WITHOUT LICENSE.

Drug Prepared by Manufacturer and Prescribed by Trade Name. — It is immaterial to the application of this section and § 90-72 that the drug is prescribed by the trade name of the manufacturer and that an unlicensed person, in dispensing the drug to a customer on prescription in the absence of a licensed pharmacist or assistant pharmacist, merely takes the designated number of tablets prepared by the manufacturer from a duly labeled stock bottle and places them in a small container and delivers them to the customer. North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

Dispensing Drug "as an Aid to and under the Immediate Supervision of" Licensed Person. — This section and § 90-72, construed in pari materia, provide that it shall be unlawful under this section and a misdemeanor under § 90-72 for any person not licensed as a pharmacist or assistant pharmacist to compound, dispense or sell at retail any drug, etc., upon the prescription of a physician or otherwise, "or to compound physicians' prescriptions except as an aid to and under the immediate supervision of a person licensed as a pharmacist or assistant pharmacist under this Article." Although the punctuation is inexact, it is clear that the exception applies to dispensing drugs and selling drugs at retail as well as to compounding physicians' prescriptions. This view is supported by the last sentence of the first paragraph of this section. North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

This section and § 90-72 make it unlawful for an unlicensed person either to compound or to dispense or to sell at retail any drug, either upon a physician's prescription or otherwise, unless he acts in the immediate physical presence of a licensed pharmacist or assistant pharmacist and under his personal supervision and direction. North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

The fact that an unlicensed person, in the absence of any licensed pharmacist or assistant pharmacist, in dispensing drugs on a prescription to a customer, has access by telephone to licensed pharmacists in other stores owned by the same employer, does not render his dispensing the drugs permissible under this

section. North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

Dispensing Drug During Temporary Absence of Licensed Pharmacist. — The proviso to this section "that during the temporary absence of the licensed pharmacist in charge of any pharmacy, drug, or chemical store, a licensed assistant pharmacist may conduct or have charge of said store" cannot be construed to the effect that during the temporary absence of the licensed pharmacist an unlicensed person may conduct or have charge of the store. North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

When a drug is sold under circumstances which render the sale unlawful under this section and § 90-72, there is also a violation of § 90-95 if the drug involved is a controlled substance. State v. Austin, 31 N.C. App. 20, 228 S.E.2d 507 (1976).

§ 90-72. Compounding prescriptions without license.

If any person, not being licensed as a pharmacist or assistant pharmacist, shall compound, dispense, or sell at retail any drug, medicine, poison, or pharmaceutical preparation, either upon a physician's prescription or otherwise, and if any person being the owner or manager of a drugstore, pharmacy, or other place of business, shall cause or permit anyone not licensed as a pharmacist or assistant pharmacist to dispense, sell at retail, or compound any drug, medicine, poison, or physician's prescription contrary to the provisions of this Article, he shall be deemed guilty of a misdemeanor, and fined not less than twenty-five ($25.00) nor more than one hundred dollars ($100.00). (1905, c. 108, s. 24; Rev., s. 3649; C. S., s. 6668; 1921, c. 68, s. 7.)

Cross References. — See notes to § 90-71.

CASE NOTES

Owner's Liability for Employee's Unauthorized Act. — Where a clerk in a drugstore unlawfully sells intoxicating liquor without the knowledge and against the orders of the owner, the owner is not liable for the act of the clerk. State v. Neal, 133 N.C. 689, 45 S.E. 756 (1903).

When a drug is sold under circumstances which render the sale unlawful under § 90-71 and this section, there is also a violation of § 90-95 if the drug involved is a controlled substance. State v. Austin, 31 N.C. App. 20, 228 S.E.2d 507 (1976).

Stated in McNair v. North Carolina Bd. of Pharmacy, 208 N.C. 279, 180 S.E. 78 (1935).

§ 90-73. Conducting pharmacy without license.

If any person, not being licensed as a pharmacist, shall conduct or manage any drugstore, pharmacy, or other place of business for the compounding, dispensing, or sale at retail of any drugs, medicines, or poisons, or for the compounding of physicians' prescriptions contrary to the provisions of this Article, he shall be deemed guilty of a misdemeanor, and be fined not less than twenty-five ($25.00) nor more than one hundred dollars ($100.00), and each week such drugstore or pharmacy or other place of business is so unlawfully conducted shall be held to constitute a separate and distinct offense. (1905, c. 108, s. 23; Rev., s. 3650; C. S., s. 6669.)

§ 90-74. Pharmacist obtaining license fraudulently.

If any person shall make any fraudulent or false representations for the purpose of procuring a license or permit, or renewal thereof, either for himself or for another, he shall be guilty of a misdemeanor, and fined not less than twenty-five ($25.00) nor more than one hundred dollars ($100.00); and if any person shall willfully make a false affidavit or any other false or fraudulent representation for the purpose of procuring a license or permit, or renewal

thereof, either for himself or for another, he shall be deemed guilty of perjury, and upon conviction thereof shall be subject to like punishment as is now prescribed for the crime of perjury. (1905, c. 108, s. 25; Rev., s. 3654; C. S., s. 6670.)

§ 90-75. Registration of drugstores and pharmacies.

The Board of Pharmacy shall require and provide for the annual registration of every drugstore and pharmacy doing business in this State. The proprietor of every drugstore or pharmacy opening for business after January 1, 1928, shall apply to the Board of Pharmacy for registration, and it shall be unlawful for any drugstore or pharmacy to do business until so registered. All permits issued under this section shall expire on December 31 of each year.

The terms "drugstore" and "pharmacy" as used herein shall mean any store or other place in which drugs, medicines, chemicals, poisons, or prescriptions are compounded, dispensed, or sold at retail, or which uses the title "drugstore," "pharmacy" or "apothecary" or any combination of such titles, or any title or description of like import: Provided, that nothing in this section shall apply to the sale of domestic remedies, patent and proprietary preparations, and insecticides as set out and provided for in paragraph two of G.S. 90-71. (1927, c. 28, s. 1; 1953, c. 183, s. 2.)

§ 90-76: Repealed by Session Laws 1979, c. 1017, s. 1, effective January 1, 1980.

Cross References. — For present provisions as to substitution of equivalent product for drug prescribed by brand name, see § 90-76.2.

Part 1A. Drug Product Selection.

§ 90-76.1. Definitions.

As used in this Part:

(1) "Equivalent drug product" means a drug product which has the same established name, active ingredient, strength, quantity, and dosage form, and which is therapeutically equivalent to the drug product identified in the prescription;

(2) "Established name" has the meaning given in section 502(e)(3) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 352(e)(3);

(3) "Good manufacturing practice" has the meaning given it in Part 211 of Chapter 1 of Title 21 of the Code of Federal Regulations;

(4) "Manufacturer" means the actual manufacturer of the finished dosage form of the drug;

(5) "Prescriber" means anyone authorized to prescribe drugs pursuant to the laws of this State. (1979, c. 1017, s. 1.)

Editor's Note. — Session Laws 1979, c. 1017, s. 2, provides: "This act shall become effective January 1, 1980, and shall apply only to prescriptions written or ordered orally after January 1, 1980."

§ 90-76.2. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.

(a) A pharmacist dispensing a prescription for a drug product prescribed by its brand name may select any equivalent drug product which meets the following standards:

(1) The manufacturer's name and the distributor's name, if different from the manufacturer's name, shall appear on the label of the stock package;

(2) It shall be manufactured in accordance with current good manufacturing practices;

(3) Effective January 1, 1982, all oral solid dosage forms shall have a logo, or other identification mark, or the product name to identify the manufacturer or distributor;

(4) The manufacturer shall have adequate provisions for drug recall; and

(5) The manufacturer shall have adequate provisions for return of outdated drugs, through his distributor or otherwise.

(b) The pharmacist shall not select an equivalent drug product if the prescriber instructs otherwise by one of the following methods:

(1) A prescription form shall be preprinted or stamped with two signature lines at the bottom of the form which read:

"..... .....

Product Selection Permitted Dispense as Written"

On this form, the prescriber shall communicate his instructions to the pharmacist by signing the appropriate line.

(2) In the event the preprinted or stamped prescription form specified in (b)(1) is not readily available, the prescriber may handwrite "Dispense as Written" or words or abbreviations of the same meaning on a prescription form.

(3) When ordering a prescription orally, the prescriber shall specify either that the prescribed drug product be dispensed as written or that product selection is permitted. The pharmacist shall note the instructions on the file copy of the prescription and retain the prescription form for the period prescribed by law.

(c) The pharmacist shall not select an equivalent drug product unless its price to the purchaser is less than the price of the prescribed drug product. (1979, c. 1017, s. 1.)

§ 90-76.3. Prescription label.

The prescription label of every drug product dispensed shall contain the brand name of any drug product dispensed, or in the absence of a brand name, the established name. (1979, c. 1017, s. 1.)

§ 90-76.4. Prescription record.

The pharmacy file copy of every prescription shall include the brand or trade name, if any, or the established name and the manufacturer of the drug product dispensed. (1979, c. 1017, s. 1.)

§ 90-76.5. Prescriber and pharmacist liability not extended.

The selection of an equivalent drug product pursuant to this Part shall impose no greater liability upon the pharmacist for selecting the dispensed drug product or upon the prescriber of the same than would be incurred by either for dispensing the drug product specified in the prescription. (1979, c. 1017, s. 1.)

§ 90-76.6. Violation a misdemeanor.

Violation of this Part is a misdemeanor and shall be punishable by a fine or imprisonment, or both, at the discretion of the court. (1979, c. 1017, s. 1.)

Part 2. Dealing in Specific Drugs Regulated.

§ 90-77. Poisons; sales regulated; label; penalties.

It shall be unlawful for any person to sell or deliver to any person any of the following described substances or any poisonous compound, combination, or preparation thereof, to wit: the compounds and salts of arsenic, antimony, lead, mercury, silver and zinc, oxalic and hydrocyanic acids and their salts, the concentrated mineral acids, carbolic acid, the essential oils of almonds, pennyroyal, tansy and savine, croton oil, creosote, chloroform, chloral hydrate, cantharides, or any aconite, belladonna, bitter almonds, colchicum, cotton root, conium, cannabis indica, digitalis, hyoscyamus, nux vomica, opium, ergot, cannabis stramonius, or any of the poisonous alkaloids or alkaloidal salts or other poisonous principles derived from the foregoing, or cocaine or any other poisonous alkaloids or their salts, or any other virulent poisons, except in the manner following: It shall first be learned by due inquiry that the person to whom delivery is made is aware of the poisonous character of the substance, and that it is desired for a lawful purpose, and the box, bottle, or other package shall be plainly labeled with the name of the substance, the word "Poison," and the name of the person or firm dispensing the substance.

Before a delivery is made of any of the following substances, to wit, the compounds and salts of arsenic, antimony and mercury, hydrocyanic acid and its salts, strychnine and its salts, and the essential oil of bitter almonds, there shall be recorded in a book kept for the purpose the name of the article, the quantity delivered, the purpose for which it is required as represented by the purchaser, the date of delivery, the name and address of the purchaser, the name of the dispenser, which book shall be preserved for at least five years and shall at all times be open to the inspection of the proper officers of the law: Provided, that the foregoing provision shall not apply to articles dispensed upon the order of persons believed by the dispenser to be lawfully authorized practitioners of medicine or dentistry: Provided, also, that the record of sale and delivery above mentioned shall not be required of manufacturers and wholesalers who shall sell any of the foregoing substances at wholesale; but the box, bottle, or other package containing such substances, when sold at wholesale, shall be properly labeled with the name of the substance, the word "Poison," and the name and address of the manufacturer or wholesaler: Provided further, that it shall not be necessary to place a poison label upon, or to record the delivery of, the sulphide of antimony or the dioxide or carbonate of zinc or lead, or of colors ground in oil and intended for use as paint, or Paris green, when dispensed in the original package of the manufacturer or wholesaler, or calomel, paregoric, or other preparation of opium containing less than two grains of opium to the fluid ounce, nor in the case of preparations containing any of the substances named in this section when in a single box,

bottle, or other package, or when the bulk of two fluid ounces or the weight of two avoirdupois ounces does not contain more than an adult medicinal dose of such poisonous substance.

If any person shall sell or deliver to any person any poisonous substance specified in this section without labeling the same and recording the delivery thereof in the manner prescribed, he shall be guilty of a misdemeanor, and fined not less than twenty-five ($25.00) nor more than one hundred dollars ($100.00). (1905, c. 108, ss. 20, 28; Rev., ss. 3655, 4489; C. S., s. 6671.)

CASE NOTES

Section Is Restricted to Pharmaceutics. — The history of this section considered in context indicates a legislative intent to restrict its provisions to the profession of pharmacy, and its relation to pharmaceutics — the science of preparing, using and dispensing of medicines — and not to manufacture and sale of paint products for commercial purposes. Porter v. Yoder & Gordon Co., 246 N.C. 398, 98 S.E.2d 497 (1957). For comment, see 36 N.C.L. Rev. 361 (1958).

§ 90-78. Certain patent cures and devices — sale and advertising forbidden.

It shall be unlawful for any person, firm, association, or corporation in the State, or any agent thereof, to sell or offer for sale any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device whose claims for the cure or treatment of disease are false or fraudulent; and it shall be unlawful for any person, firm, association, or corporation in the State, or agent thereof, to publish in any manner, or by any means, or cause to be published, circulated, or in any way placed before the public any advertisement in a newspaper or other publication or in the form of books, pamphlets, handbills, circulars, either printed or written, or by any drawing, map, print, tag, or by any other means whatsoever, any advertisement of any kind or description offering for sale or commending to the public any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device for the treatment of disease, when the Commission for Health Services shall declare that such device is without value in the treatment of disease.

Any person, firm, association, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars ($100.00) for each offense. Each sale, offer for sale, or publication of any advertisement for sale of any of the medicines, remedies, or devices mentioned in this section shall constitute a separate offense. (1917, c. 27, ss. 1, 2, 3; C. S., s. 6684; 1973, c. 476, s. 128.)

§ 90-79. Certain patent cures and devices — enforcement of law.

To provide for the efficient enforcement of G.S. 90-78, the same shall be under the supervision and management of the North Carolina Board of Pharmacy, and it shall be the duty of all registered pharmacists to report immediately any violations thereof to the secretary of the Board of Pharmacy, and any willful failure to make such report shall have the effect of revoking his license to practice pharmacy in this State. (1917, c. 27, ss. 4, 5; C. S., s. 6685.)

§ 90-80. Department of Agriculture to analyze patent medicines.

The chemists and other experts of the Department of Agriculture shall, under such rules and regulations as may be prescribed by the Board of Pharmacy, and upon request of the secretary of said Board, make an analytical examination of all samples of drugs, preparations, and compounds sold or offered for sale in violation of G.S. 90-78 and 90-79. (1917, c. 27, s. 6; C. S., s. 6686.)

§ 90-80.1. Unauthorized sale of Salk vaccine.

The sale of Salk vaccine is prohibited except when sold by wholesale drug distributors, licensed medical doctors, registered pharmacists or the Department of Human Resources.

Any person found guilty of violating the provisions of this section by selling authentic vaccines shall be fined five hundred dollars ($500.00) or shall be imprisoned in the State Prison or county jail not less than four months nor more than 10 years, or both. Any persons found guilty of violating the provisions of this section by selling substances that are misrepresented as being authentic vaccines shall be fined one thousand dollars ($1,000), or be imprisoned in the State Prison or county jail not less than four months nor more than 10 years, or both. (1955, c. 1358; 1973, c. 476, s. 128.)

§§ 90-81 to 90-85: Repealed by Session Laws 1955, c. 1330, s. 8.

§ 90-85.1. Enjoining illegal practices.

The Board of Pharmacy may, if it shall find that any person is violating any of the provisions of this Article, and after notice to such person of such violation, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this Article, the court may issue an order restraining any further violations thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of Article 37 of the Chapter on "Civil Procedure" [Chapter 1]: Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under any of the provisions of this Article. (1947, c. 229.)

Legal Periodicals. — For brief comment on this section, see 25 N.C.L. Rev. 429.

CASE NOTES

Constitutionality. — The validity of this section is not impaired by the fact that the same acts that would constitute willful violations of the injunction would also constitute a basis for criminal prosecutions. North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

Although this section expressly provides that the violation of its provisions shall constitute a misdemeanor and also provides that the acts therein prescribed may be enjoined, the contention that the violation of an injunction issued under the statute would subject the offender to punishment for a criminal offense without the constitutional safeguards of indictment, trial by jury, etc., is untenable, since the punishment for violation of the injunction would be for violating an order of the court and not punishment for a crime. North Carolina Bd. of Pharmacy v. Lane, 248 N.C. 134, 102 S.E.2d 832 (1958).

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-86. Title of Article.

This Article shall be known and may be cited as the "North Carolina Controlled Substances Act." (1971, c. 919, s. 1.)

Cross References. — As to enforcement of this Article by the Alcohol Law Enforcement Division of the Department of Crime Control and Public Safety, see § 18A-19.

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

CASE NOTES

Indictment for Sale of Narcotics to Allege Name of Purchaser. — In a count charging the sale of narcotics, the indictment must allege the name of the purchaser. State v. Martindale, 15 N.C. App. 216, 189 S.E.2d 549 (1972).

Applied in State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972); State v. McCuien, 17 N.C. App. 109, 193 S.E.2d 349 (1972).

Cited in State v. McIntyre, 281 N.C. 304, 188 S.E.2d 304 (1972); State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972); State v. Wood, 17 N.C. App. 352, 194 S.E.2d 205 (1973).

§ 90-87. Definitions.

As used in this Article:

(1) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means to the body of a patient or research subject by:
   a. A practitioner (or, in his presence, by his authorized agent), or
   b. The patient or research subject at the direction and in the presence of the practitioner.

(2) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser but does not include a common or contract carrier, public warehouseman, or employee thereof.

(3) "Bureau" means the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice or its successor agency.

(4) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor included in Schedules I through VI of this Article.

(5) "Controlled substance" means a drug, substance, or immediate precursor included in Schedules I through VI of this Article.

(6) "Counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports, or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

(7) "Deliver" or "delivery" means the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

(8) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner,

including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

(9) "Dispenser" means a practitioner who dispenses.

(10) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

(11) "Distributor" means a person who distributes.

(12) "Drug" means a. substances recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; b. substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; c. substances (other than food) intended to affect the structure or any function of the body of man or other animals; and d. substances intended for use as a component of any article specified in a, b, or c of this subdivision; but does not include devices or their components, parts, or accessories.

(13) "Drug dependent person" means a person who is using a controlled substance and who is in a state of psychic or physical dependence, or both, arising from use of that controlled substance on a continuous basis. Drug dependence is characterized by behavioral and other responses which include a strong compulsion to take the substance on a continuous basis in order to experience its psychic effects, or to avoid the discomfort of its absence.

(14) "Immediate precursor" means a substance which the North Carolina Drug Authority has found to be and by regulation designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit such manufacture.

(14a) The term "isomer" means, except as used in G.S. 90-89(c), the optical isomer. As used in G.S. 90-89(c) the term "isomer" means the optical, position, or geometric isomer.

(15) "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally, or by extraction from substances of a natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; and "manufacture" further includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging, or labeling of a controlled substance:

a. By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or

b. By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to research, teaching, or chemical analysis and not for sale.

(16) "Marijuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, but shall not include the mature stalks of such plant, fiber produced from such stalks, oil, or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or

cake, or the sterilized seed of such plant which is incapable of germination.

(17) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

a. Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

b. Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause a, but not including the isoquinoline alkaloids of opium.

c. Opium poppy and poppy straw.

d. Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(18) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under G.S. 90-88, the dextrorotatory isomer of 3-methoxy-n-methyl-morphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

(19) "Opium poppy" means the plant of the species Papaver somniferum L., except its seeds.

(20) "Person" means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

(21) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(22) "Practitioner" means:

a. A physician, dentist, optometrist, veterinarian, scientific investigator, or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State.

b. A pharmacy, hospital or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance so long as such activity is within the normal course of professional practice or research in this State.

(23) "Prescription" means:

a. A written order or other order which is promptly reduced to writing for a controlled substance as defined in this Article, or for a preparation, combination, or mixture thereof, issued by a practitioner who is licensed in this State to administer or prescribe drugs in the course of his professional practice; a prescription does not include an order entered in a chart or other medical record of a patient by a practitioner for the administration of a drug; or

b. A drug or preparation, or combination, or mixture thereof furnished pursuant to a prescription order.

(24) "Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(25) "Registrant" means a person registered by the North Carolina Drug Authority to manufacture, distribute, or dispense any controlled substance as required by this Article.
(26) "State" means the State of North Carolina.
(27) "Ultimate user" means a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household, or for administration to an animal owned by him or by a member of his household. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, ss. 2-4; c. 1358, ss. 1, 15; 1977, c. 482, s. 6.)

Editor's Note. — Pursuant to Session Laws 1973, c. 1358, s. 15, as interpreted by the opinion of the Attorney General to Mr. F.E. Epps, Director, North Carolina Drug Authority, June 24, 1974, "Drug Authority" has been substituted for "Commission for Health Services" in subdivision (14).

CASE NOTES

I. General Consideration.
II. "Deliver" or "Delivery."
III. "Manufacture."
IV. "Marijuana."
V. "Practitioner."
VI. "Prescription."

I. GENERAL CONSIDERATION.

Quoted in State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654 (1979).

Stated in State v. Phillips, 15 N.C. App. 597, 190 S.E.2d 433 (1972); State v. Bell, 33 N.C. App. 607, 235 S.E.2d 886 (1977); State v. Shufford, 34 N.C. App. 115, 237 S.E.2d 481 (1977).

Cited in State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974).

II. "DELIVER" OR "DELIVERY."

"Delivery" Means "Transfer". — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under this section. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

III. "MANUFACTURE."

The plain meaning of the exception in subdivision (15) which excepts "preparation or compounding of a controlled substance by an individual for his own use," is to avoid making an individual liable for the felony of manufacturing controlled substance in the situation where, being already in possession of a controlled substance, he makes it ready for use (i.e., rolling marijuana into cigarettes for smoking) or combines it with other ingredients for use (i.e., making the so-called "Alice B. Toklas" brownies containing marijuana). State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

Evidence Sufficient to Show Manufacture of Marijuana. —

Evidence was sufficient to withstand a motion for judgment as of nonsuit on a charge of manufacture of marijuana where stripped stalks of marijuana were found growing behind a television antenna connected to the defendant's residence and marijuana plants were found growing in flower pots on a table in the defendant's yard 32 feet from his residence. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

IV. "MARIJUANA."

The exception in subdivision (16) relating to sterilized seeds implies an affirmative act by which presumptively vital seeds are rendered sterile, rather the naturally occurring sterile seeds resulting from a lack of fertilization by pollination. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

State Entitled to Assume Marijuana Seeds Are Vital. — Where the defendant does not make any showing as to the fertility of the marijuana seeds, and offers no proof that they were in any different state from that in which they naturally occurred, the State is entitled to assume that the seeds are vital and to proceed upon that assumption until the contrary is shown by defendant's evidence. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

V. "PRACTITIONER."

The term "within the normal course of professional practice" in subdivision (22)a is not vague. It gives every practitioner fair notice of the standard he must follow if his conduct is to come within the exception of the statute. That is all the Constitution requires. State v. Best, 31 N.C. App. 250, 229 S.E.2d 581 (1976), rev'd on other grounds, 292 N.C. 294, 233 S.E.2d 544 (1977).

VI. "PRESCRIPTION."

The clause "who is licensed . . . to . . . prescribe drugs in the course of his professional practice" in subdivision (23)a is an adjective clause modifying the preceding noun "practitioner." It describes the one issuing the prescription. It does not change the definition of practitioner as given in subdivision (22)a. State v. Best, 31 N.C. App. 250, 229 S.E.2d 581 (1976), rev'd on other grounds, 292 N.C. 294, 233 S.E.2d 544 (1977).

Thus a practitioner who is licensed to issue a prescription in the course of "his" professional practice may not do so unless that "activity is within the normal course of professional practice." State v. Best, 31 N.C. App. 250, 229 S.E.2d 581 (1976), rev'd on other grounds, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-88. Authority to control.

(a) The North Carolina Drug Commission may add, delete, or reschedule substances within Schedules I through VI of this Article on the petition of any interested party, or its own motion. In every case the North Carolina Drug Commission shall give notice of and hold a public hearing prior to adding, deleting or rescheduling a controlled substance within Schedules I through VI of this Article. A petition by the North Carolina Drug Commission, the North Carolina Department of Justice, or the North Carolina Board of Pharmacy to add, delete, or reschedule a controlled substance within Schedules I through VI of this Article shall be placed on the agenda, for consideration, at the next regularly scheduled meeting of the North Carolina Drug Commission, as a matter of right. Notice as required by this section shall consist of notice by one publication in three newspapers of statewide circulation qualified for legal advertising in accordance with G.S. 1-597 and 1-598. In addition, the North Carolina Department of Human Resources shall mail a notice of the proposed change and the date and place of the public hearing to each registrant under this Article. In making a determination regarding a substance, the North Carolina Drug Commission shall consider the following:

(1) The actual or relative potential for abuse;
(2) The scientific evidence of its pharmacological effect, if known;
(3) The state of current scientific knowledge regarding the substance;
(4) The history and current pattern of abuse;
(5) The scope, duration, and significance of abuse;
(6) The risk to the public health;
(7) The potential of the substance to produce psychic or physiological dependence liability; and
(8) Whether the substance is an immediate precursor of a substance already controlled under this Article.

(b) After considering the required factors, the North Carolina Drug Commission shall make findings with respect thereto and shall issue an order adding, deleting or rescheduling the substance within Schedules I through VI of this Article.

(c) If the North Carolina Drug Commission designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor.

(d) If any substance is designated, rescheduled or deleted as a controlled substance under federal law, the North Carolina Drug Commission shall similarly control, or cease control of, the substance under this Article after the expiration of 30 days from publication in the Federal Register of a final order

designating a substance as a controlled substance unless, within 180 days, the North Carolina Drug Commission objects to such inclusion. In such case, the North Carolina Drug Commission shall cause to be published and made public the reason for such objection and shall afford all interested parties an opportunity to be heard. At the conclusion of such meeting, the North Carolina Drug Commission shall make public its decision, which shall be final unless specifically acted upon by the North Carolina General Assembly. Upon publication of objection to inclusion under this Article by the North Carolina Drug Commission, control under this section shall automatically be stayed until such time as the North Carolina Drug Commission makes public its decision.

(e) The North Carolina Drug Commission shall exclude any nonnarcotic substance from the provisions of this Article if such substance may, under the federal Food, Drug and Cosmetic Act, lawfully be sold over-the-counter without prescription.

(f) Authority to control under this Article does not include distilled spirits, wine, malt beverages, or tobacco.

(g) The North Carolina Drug Commission shall similarly exempt from the provisions of this Article any chemical agents and diagnostic reagents not intended for administration to humans or other animals, containing controlled substances which either (i) contain additional adulterant or denaturing agents so that the resulting mixture has no significant abuse potential, or (ii) are packaged in such a form or concentration that the particular form as packaged has no significant abuse potential, where such substance was exempted by the Federal Bureau of Narcotics and Dangerous Drugs.

(h) When any substance is designated, rescheduled or deleted as a controlled substance pursuant to this section, the North Carolina Department of Human Resources shall mail a notice of this change to each registrant, to the State Bureau of Investigation, North Carolina Board of Pharmacy and to each district attorney within 30 days of this change.

(i) The North Carolina Department of Human Resources shall maintain a list of all preparations, compounds, or mixtures which are excluded, exempted and excepted from control under any schedule of this Article by the United States Drug Enforcement Administration and/or the North Carolina Drug Commission. This list and any changes to this list shall be mailed to the North Carolina Board of Pharmacy, the State Bureau of Investigation and each district attorney of this State. (1971, c. 919, s. 1; 1973, c. 476, s. 128; cc. 524, 541; c. 1358, ss. 2, 3, 15; 1977, c. 667, s. 3.)

Cross References. — As to the creation and organization of the North Carolina Drug Commission, see §§ 143B-210 to 143B-212.

CASE NOTES

This section is constitutional. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

This section does not delegate the authority to define crimes; rather it is a delegation of authority to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

An examination of this section reveals that the legislature has imposed guidelines upon the rescheduling of controlled substances that are more than adequate. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

Applied in McLawhorn v. North Carolina, 484 F.2d 1 (4th Cir. 1973); State v. Wooten, 20 N.C. App. 499, 201 S.E.2d 696 (1974); State v. Baxter, 21 N.C. App. 81, 203 S.E.2d 93 (1974); State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974).

Quoted in State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974).

Stated in State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Cited in State v. Aikens, 22 N.C. App. 310, 206 S.E.2d 348 (1974); State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-89. Schedule I controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the North Carolina Drug Commission shall find: a high potential for abuse, no currently accepted medical use in the United States, or a lack of accepted safety for use in treatment under medical supervision. The following controlled substances are included in this schedule:

(a) Any of the following opiates, including the isomers, esters, ethers, salts and salts of isomers, esters, and ethers, unless specifically excepted, or listed in another schedule, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

1. Acetylmethadol.
2. Allylprodine.
3. Alphacetylmethadol.
4. Alphameprodine.
5. Alphamethadol.
6. Benzethidine.
7. Betacetylmethadol.
8. Betameprodine.
9. Betamethadol.
10. Betaprodine.
11. Clonitazene.
12. Dextromoramide.
13. Diampromide.
14. Diethylthiambutene.
15. Difenoxin.
16. Dimenoxadol.
17. Dimepheptanol.
18. Dimethylthiambutene.
19. Dioxaphetyl butyrate.
20. Dipipanone.
21. Ethylmethylthiambutene.
22. Etonitazene.
23. Etoxeridine.
24. Furethidine.
25. Hydroxypethidine.
26. Ketobemidone.
27. Levomoramide.
28. Levophenacylmorphan.
29. Morpheridine.
30. Noracymethadol.
31. Norlevorphanol.
32. Normethadone.
33. Norpipanone.
34. Phenadoxone.
35. Phenampromide.
36. Phenomorphan.
37. Phenoperidine.
38. Piritramide.

39. Proheptazine.
40. Properidine.
41. Propiram.
42. Racemoramide.
43. Trimeperidine.

(b) Any of the following opium derivatives, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Acetorphine.
2. Acetyldihydrocodeine.
3. Benzylmorphine.
4. Codeine methylbromide.
5. Codeine-N-Oxide.
6. Cyprenorphine.
7. Desomorphine.
8. Dihydromorphine.
9. Etorphine (except hydrochloride salt).
10. Heroin.
11. Hydromorphinol.
12. Methyldesorphine.
13. Methylhydromorphine.
14. Morphine methylbromide.
15. Morphine methylsulfonate.
16. Morphine-N-Oxide.
17. Myrophine.
18. Nicocodeine.
19. Nicomorphine.
20. Normorphine.
21. Pholcodine.
22. Thebacon.
23. Drotebanol.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. 3, 4-methylenedioxyamphetamine.
2. 5-methoxy-3, 4-methylenedioxyamphetamine.
3. 3, 4, 5-trimethoxyamphetamine.
4. Bufotenine.
5. Diethyltryptamine.
6. Dimethyltryptamine.
7. 4-methyl-2, 5-dimethoxyamphetamine.
8. Ibogaine.
9. Lysergic acid diethylamide.
10. Mescaline.
11. Peyote, meaning all parts of the plant presently classified botanically as Lophophora Williamsii Lemaire, whether growing or not; the seeds thereof; any extract from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seed or extracts.
12. N-ethyl-3-piperidyl benzilate.
13. N-methyl-3-piperidyl benzilate.
14. Psilocybin.
15. Psilocyn.

16. 2, 5-dimethoxyamphetamine.
17. 4-bromo-2, 5-dimethoxyamphetamine.
18. 4-methoxyamphetamine.
19. Ethylamine analog of phencyclidine. Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclohexyl) ethylamine, cyclohexamine, PCE.
20. Pyrrolidine analog of phencyclidine. Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.
21. Thiophene analog of phencyclidine. Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.

(d) Any material compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excepted or unless listed in another schedule:

1. Mecloqualone. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 844; c. 1358, ss. 4, 5, 15; 1975, c. 443, s. 1; c. 790; 1977, c. 667, s. 3; c. 891, s. 1; 1979, c. 434, s. 1.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote item 19 of subdivision (c), which formerly read "Thiophene Analog of Phencyclidine," and added items 20 and 21 to subdivision (c).

CASE NOTES

Evidence. — Testimony by a special agent that, "Two of the three substances that I purchased were MDA" did not constitute substantial evidence that the drug possessed and sold by defendant was in fact 3, 4-methylenedioxyamphetamine as charged in the bills of indictment. State v. Board, 296 N.C. 652, 252 S.E.2d 803 (1979).

Applied in State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976).

Cited in State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Hart, 33 N.C. App. 235, 234 S.E.2d 430 (1977); State v. Board, 37 N.C. App. 581, 246 S.E.2d 581 (1978); State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979).

§ 90-90. Schedule II controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the North Carolina Drug Commission shall find: a high potential for abuse; currently accepted medical use in the United States, or currently accepted medical use with severe restrictions; and the abuse of the substance may lead to severe psychic or physical dependence. The following controlled substances are included in this schedule:

(a) Any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, unless specifically excepted or unless listed in another schedule:

1. Opium and opiate, and any salt, compound, derivative, or preparation of opium and opiate, excluding apomorphine, nalbuphine, naloxone, and naltrexone, and their respective salts, but including the following:
   (i) Raw opium.
   (ii) Opium extracts.

(iii) Opium fluid extracts.
(iv) Powdered opium.
(v) Granulated opium.
(vi) Tincture of opium.
(vii) Codeine.
(viii) Ethylmorphine.
(ix) Etorphine hydrochloride.
(x) Hydrocodone.
(xi) Hydromorphone.
(xii) Metopon.
(xiii) Morphine.
(xiv) Oxycodone.
(xv) Oxymorphone.
(xvi) Thebaine.

2. Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph 1 of this subdivision, except that these substances shall not include the isoquinoline alkaloids of opium.
3. Opium poppy and poppy straw.
4. Coca leaves and any salts, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.
5. Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrine alkaloids of the opium poppy).

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation unless specifically exempted or listed in other schedules:

1. Alphaprodine.
2. Anileridine.
3. Bezitramide.
4. Dihydrocodeine.
5. Diphenoxylate.
6. Fentanyl.
7. Isomethadone.
8. Levomethorphan.
9. Levorphanol.
10. Metazocine.
11. Methadone.
12. Methadadone — Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
13. Moramide—Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
14. Pethidine.
15. Pethidine—Intermediate—A, 4-cyano-1-methyl-4-phenylpiperidine.
16. Pethidine—Intermediate—B, ethyl-4-phenylpiperidine-4-carboxylate.
17. Pethidine—Intermediate—C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
18. Phenazocine.
19. Piminodine.
20. Racemethorphan.

21. Racemorphan.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Amphetamine, its salts, optical isomers, and salts of its optical isomers.
2. Phenmetrazine and its salts.
3. Methamphetamine, including its salts, isomers, and salts of isomers.
4. Methylphenidate.

(d) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically exempted by the Drug Commission or listed in another schedule:

1. Amobarbital
2. Methaqualone
3. Pentobarbital
4. Phencyclidine
5. Phencyclidine immediate precursors:
   a. 1-Phenylcyclohexylamine
   b. 1-Piperidinocyclohexanecarbonitrile (PCC)
6. Secobarbital. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 6; c. 1358, ss. 6, 15; 1975, c. 443, s. 2; 1977, c. 667, s. 3; c. 891, s. 2; 1979, c. 434, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, added items 4 and 5 of subdivision (d) and renumbered former items 2, 1, 4, and 3 of subdivision (d) as present items 1, 2, 3, and 6.

CASE NOTES

Desoxyn. — Desoxyn is a trade name used by Abbott Laboratories, North Chicago, Illinois, for methamphetamine hydrochloride. State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974).

Desoxyn is a controlled substance. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Butacaps, or Butasol capsules, are Butabarbital, a controlled substance, apparently somewhat less dangerous than Didrex and Desoxyn. In re Wilkins, 294 N.C. 528, 242 S.E.2d 829 (1978).

Cited in State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974).

§ 90-91. Schedule III controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the North Carolina Drug Commission shall find: a potential for abuse less than the substances listed in Schedules I and II; currently accepted medical use in the United States; and abuse may lead to moderate or low physical dependence or high psychological dependence. The following controlled substances are included in this schedule:

(a) Repealed by Session Laws 1973, c. 540, s. 5.

(b) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.

2. Chlorhexadol.
3. Glutethimide.
4. Lysergic acid.
5. Lysergic acid amide.
6. Methyprylon.
7. Sulfondiethylmethane.
8. Sulfonethylmethane.
9. Sulfonmethane.
10. Any compound, mixture or preparation containing
    (i) Amobarbital.
    (ii) Secobarbital.
    (iii) Pentobarbital.
    or any salt thereof and one or more active ingredients which are not included in any other schedule.
11. Any suppository dosage form containing
    (i) Amobarbital.
    (ii) Secobarbital.
    (iii) Pentobarbital.
    or any salt of any of these drugs and approved by the federal Food and Drug Administration for marketing as a suppository.

(c) Nalorphine.

(d) Any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof unless specifically exempted or listed in another schedule:

1. Not more than 1.80 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit with an equal or greater quantity of an isoquinoline alkaloid of opium.
2. Not more than 1.80 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
3. Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit with a four-fold or greater quantity of an isoquinoline alkaloid of opium.
4. Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
5. Not more than 1.80 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
6. Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
7. Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
8. Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(e) Any compound, mixture or preparation containing limited quantities of the following narcotic drugs, which shall include one or more active, nonnarcotic, medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:

1. Paregoric, U.S.P.; provided, that no person shall purchase or receive by any means whatsoever more than one fluid ounce of paregoric within a consecutive 24-hour period, except on prescription issued by a duly licensed physician.

(f) Paregoric, U.S.P., may be dispensed at retail as permitted by federal law or administrative regulation without a prescription only by a registered pharmacist and no other person, agency or employee may dispense paregoric, U.S.P., even if under the direct supervision of a pharmacist.

(g) Notwithstanding the provisions of G.S. 90-91(f), after the pharmacist has fulfilled his professional responsibilities and legal responsibilities required of him in this Article, the actual cash transaction, credit transaction, or delivery of paregoric, U.S.P., may be completed by a nonpharmacist. A pharmacist may refuse to dispense a paregoric, U.S.P., substance until he is satisfied that the product is being obtained for medicinal purposes only.

(h) Paregoric, U.S.P., may only be sold at retail without a prescription to a person at least 18 years of age. A pharmacist must require every retail purchaser of a paregoric, U.S.P., substance to furnish suitable identification, including proof of age when appropriate, in order to purchase paregoric, U.S.P. The name and address obtained from such identification shall be entered in the record of disposition to consumers.

(i) The North Carolina Drug Commission may by regulation except any compound, mixture, or preparation containing any stimulant or depressant substance listed in paragraphs (a)1 and (a)2 of this schedule from the application of all or any part of this Article if the compound, mixture, or preparation contains one or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system; and if the ingredients are included therein in such combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

(j) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of said isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excluded or listed in some other schedule.

1. Benzphetamine.
2. Chlorphentermine.
3. Chlortermine.
4. Mazindol.
5. Phendimetrazine. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 5; c. 1358, ss. 7, 15; 1975, c. 442; 1977, c. 667, s. 3; 1979, c. 434, s. 3.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted former item 7 of subdivision (b), which read "Phencyclidine," and renumbered former items 8 through 12 of subdivision (b) as present items 7 through 11 of subdivision (b).

CASE NOTES

Methamphetamine. — Before the second 1973 amendment, this section classed methamphetamine as a controlled substance. State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974). See now § 90-90 and the note thereto.

Applied in State v. Guy, 13 N.C. App. 637, 186 S.E.2d 663 (1972); State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974).

Cited in State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974).

§ 90-92. Schedule IV controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the North Carolina Drug Commission shall find: a low potential for abuse relative to the substances listed in Schedule III of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule III of this Article. The following controlled substances are included in this schedule:

(a) Depressants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Barbital
2. Chloral betaine
3. Chloral hydrate
4. Chlorazepate
5. Chlordiazepoxide
6. Clonazepam
7. Diazepam
8. Ethchlorvynol
9. Ethinamate
10. Flurazepam
11. Lorazepam
12. Mebutamate
13. Metprobamate
14. Methohexital
15. Methylphenobarbital
16. Oxazepam
17. Paraldehyde
18. Petrichloral
19. Phenobarbital
20. Prazepam

(b) The North Carolina Drug Commission may by regulation except any compound, mixture, or preparation containing any stimulant or depressant substance listed in this schedule from the application of all or any part of this Article if the compound, mixture, or preparation contains one or more active, nonnarcotic, medicinal ingredients not having a stimulant or depressant effect on the central nervous system; provided, that such admixtures shall be included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a stimulant or depressant effect on the central nervous system.

(c) Any material, compound, mixture, or preparation which contains any of the following substances, including its salts, or isomers and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible:

1. Fenfluramine.
2. Pentazocine.

(d) Stimulants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts,

isomers, and salts of isomers is possible within the specific chemical designation:

1. Diethylpropion.
2. Pemoline (including organometallic complexes and chelates thereof).
3. Phentermine.

(e) Other Substances. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts:

1. Dextropropoxyphene (Alpha-(plus)- 4-dimethyiamino-1, 2-diphenyl-3-methyl-2-propionoxybutane).

(f) Narcotic Drugs. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

1. Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 8, 15; c. 1446, s. 5; 1975, cc. 401, 819; 1977, c. 667, s. 3; c. 891, s. 3; 1979, c. 434, ss. 4-6.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, inserted item 11 in subdivision (a), renumbered former items 11 through 19 of subdivision (a) as present items 12 through 20 of subdivision (a), added item 2 to subdivision (c), and added subdivision (f).

CASE NOTES

Applied in State v. King, 44 N.C. App. 31, 259 S.E.2d 919 (1979).

§ 90-93. Schedule V controlled substances.

(a) This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the North Carolina Drug Commission shall find: a low potential for abuse relative to the substances listed in Schedule IV of this Article; currently accepted medical use in the United States; and limited physical or psychological dependence relative to the substances listed in Schedule IV of this Article. The following controlled substances are included in this schedule:

1. Any compound, mixture or preparation containing any of the following limited quantities of narcotic drugs or salts thereof, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic alone:
   (i) Not more than 200 milligrams of codeine or any of its salts per 100 milliliters or per 100 grams.
   (ii) Not more than 100 milligrams of dihydrocodeine or any of its salts per 100 millitiers or per 100 grams.
   (iii) Not more than 100 milligrams of ethylmorphine or any of its salts per 100 milliliters or per 100 grams.
   (iv) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.
   (v) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.
   (vi) Not more than 0.5 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

2. Loperamide.

(b) A Schedule V substance may be sold at retail without a prescription only by a registered pharmacist and no other person, agent or employee may sell a Schedule V substance even if under the direct supervision of a pharmacist.

(c) Notwithstanding the provisions of G.S. 90-93(b), after the pharmacist has fulfilled the responsibilities required of him in this Article, the actual cash transaction, credit transaction, or delivery of a Schedule V substance, may be completed by a nonpharmacist. A pharmacist may refuse to sell a Schedule V substance until he is satisfied that the product is being obtained for medicinal purposes only.

(d) A Schedule V substance may be sold at retail without a prescription only to a person at least 18 years of age. The pharmacist must require every retail purchaser of a Schedule V substance to furnish suitable identification, including proof of age when appropriate, in order to purchase a Schedule V substance. The name and address obtained from such identification shall be entered in the record of disposition to consumers. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 9, 15; 1977, c. 667, s. 3; 1979, c. 434, ss. 7, 8.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, designated the former first paragraph of the section as the present first paragraph of subsection (a), designated former subdivision (a) as subdivision 1 of present subsection (a), rewrote the introductory phrase of present subdivision 1 of subsection (a), designated items 1 through 5 of former subdivision (a) as items (i) through (v) of present subdivision 1 of subsection (a), added item (vi) to subdivision 1 of subsection (a), and added subdivision 2 of subsection (a).

§ 90-94. Schedule VI controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that such substance comes within this schedule, the North Carolina Drug Commission shall find: no currently accepted medical use in the United States, or a relatively low potential for abuse in terms of risk to public health and potential to produce psychic or physiological dependence liability based upon present medical knowledge, or a need for further and continuing study to develop scientific evidence of its pharmacological effects.

The following controlled substances are included in this schedule:

1. Marijuana.
2. Tetrahydrocannabinols. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, s. 15; 1977, c. 667, s. 3.)

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

CASE NOTES

Findings Not Required as to Marijuana. — The requirement that the Drug Authority (now Drug Commission) make findings as to whether a substance comes within this section applies only to drugs the Authority (now Commission) may wish to add, delete or reschedule, and not to substances, such as marijuana, which have already been included by the General Assembly. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, it is not necessary for the State to show that the Drug Authority (now Drug Commission) has made a finding that marijuana is a controlled substance since it has been listed as such under this section. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Applied in State v. McIntyre, 13 N.C. App. 479, 186 S.E.2d 207 (1972); State v. McKinney, 288 N.C. 113, 215 S.E.2d 578 (1975).

Quoted in State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Stated in State v. Shufford, 34 N.C. App. 115, 237 S.E.2d 481 (1977).

Cited in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977); State v. McGill, 296 N.C. 564, 251 S.E.2d 616 (1979); State v. Board, 296 N.C. 652, 252 S.E.2d 803 (1979).

§ 90-95. (See Editor's note for date of expiration) Violations; penalties.

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than 10 years or fined not more than ten thousand dollars ($10,000), or both in the discretion of the court;

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court, but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(c) Any person who violates G.S. 90-95(a)(2) shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court.

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than two years or fined not more than two thousand dollars ($2,000), or both in the discretion of the court; but if the quantity of the controlled substance, or combination of the controlled substances, exceeds 100 tablets, capsules or other dosage units, or equivalent quantity, including one-half gram or more of phencyclidine or one gram or more of cocaine, the violation shall be a felony punishable by a term of imprisonment of not more than five years or a fine of not more than five thousand dollars ($5,000), or both, in the discretion of the court;

(3) A controlled substance classified in Schedule V shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars ($500.00), or both in the discretion of the court;

(4) A controlled substance classified in Schedule VI shall be guilty of a misdemeanor and shall be fined not more than one hundred dollars ($100.00); but if the quantity of the controlled substance exceeds one ounce (avoirdupois) of marijuana or one tenth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as

hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be a felony punishable by a term of imprisonment of not more than five years or a fine of not more than five thousand dollars ($5,000), or both in the discretion of the court.

(e) The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:

(1) If any person commits a felony under this Article after having been previously convicted of an offense under any law of North Carolina or any law of the United States or any other state, which offense would be punishable as a felony under this Article, he shall be sentenced to a term of imprisonment of up to twice the term otherwise prescribed or fined up to twice the fine otherwise prescribed, or both in the discretion of the court;

(2) If any person commits a felony under this Article after having been previously convicted two or more times of offenses under any law of North Carolina or any law of the United States or any other state, which offenses would be punishable as felonies under this Article, he shall be sentenced to a term of imprisonment of not less than 10 years nor more than 30 years or fined not more than thirty thousand dollars ($30,000), or both in the discretion of the court;

(3) If any person commits an offense under this Article for which the prescribed punishment includes imprisonment for not more than two years, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court;

(4) If any person commits an offense under this Article for which the prescribed punishment includes imprisonment for not more than six months, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than two years or fined not more than two thousand dollars ($2,000), or both in the discretion of the court;

(5) Any person 18 years of age or over who violates G.S. 90-95(a)(1) by delivering a controlled substance to a person under 16 years of age shall be guilty of a felony and shall be sentenced to a term of imprisonment of not less than five years nor more than 30 years;

(6) For the purpose of increasing punishment, previous convictions for offenses shall be counted by the number of separate trials at which final convictions were obtained and not by the number of charges at a single trial;

(7) If any person commits an offense under this Article for which the prescribed punishment includes only a fine, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars ($500.00), or both in the discretion of the court.

(f) Repealed by Session Laws 1975, c. 360, s. 2, effective July 1, 1975 to July 1, 1977.

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Clinical Toxicological Lab, North Carolina Baptist Hospital, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court division of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed.

(h) Notwithstanding any other provisions of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance

a. Is in excess of 50 pounds, but less than 100 pounds, such person shall, upon conviction, be punished by imprisonment for not less than two years nor more than five years in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 100 pounds or more, but less than 2,000 pounds, such person shall, upon conviction, be punished by imprisonment for not less than three years nor more than 10 years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall, upon conviction, be punished by imprisonment for not less than 16 years nor more than 40 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units or equivalent quantity, but less than 5,000 dosage units or equivalent quantity, such person shall, upon conviction, be punished by imprisonment for not less than three years nor more than 10 years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units or equivalent quantity, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall, upon conviction, be punished by imprisonment for not less than 16 years nor more than 40 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or

preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine) or any mixture containing any such substance, shall be guilty of a felony which felony shall be known as "trafficking in cocaine" and if the quantity of such substances or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall, upon conviction, be punished by imprisonment for not less than three years nor more than 10 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall, upon conviction, be punished by imprisonment for not less than 16 years nor more than 40 years in the State's prison and shall be fined not less than two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, naloxone and naltrexone, and their respective salts), including heroin, or any mixture containing any such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall, upon conviction, be punished by imprisonment for not less than six years nor more than 15 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall, upon conviction, be punished by imprisonment for not less than eight years nor more than 20 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall, upon conviction, be punished by imprisonment for not less than 20 years nor more than 50 years in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(5) Notwithstanding any other provision of law, except as provided in G.S. 90-95(h) (6), any person who has been convicted of a violation of this subsection shall serve the applicable minimum prison term provided by this subsection before either unconditional release or parole.

(6) A person sentenced under this subsection is not eligible for early release or early parole if the person is sentenced as a committed youthful offender and the sentencing judge may not suspend the sentence or place the person sentenced on probation. However, the sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(7) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any other sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section. (1971, c. 919, s. 1; 1973, c. 654, s. 1; c. 1078; c. 1358, s. 10; 1975, c. 360, s. 2; 1977, c. 862, ss. 1, 2; 1979, 2nd Sess., c. 1251, ss. 4-6.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to furnishing controlled substances to inmates of charitable, mental or penal institutions, see § 14-258.1.

Editor's Note. — Because of doubt as to the effective date of amendments to this § 90-95 in Session Laws 1979, c. 760, s. 5, and Session Laws 1979, 2nd Sess., c. 1251, s. 7, the section is set out twice in this volume. The section as set out above does not incorporate the amendments. Under Session Laws 1981, c. 63, amending Session Laws 1979, c. 760, s. 6, and Session Laws 1979, 2nd Sess., c. 1251, s. 7, the amendments will take effect April 15, 1981. It is possible, however, that the amendments will be postponed to a later date by a subsequent 1981 act not available at the time of preparation of this volume. For this section is amended by Session Laws 1979, c. 760, s. 5, and Session Laws 1979, 2nd Sess., c. 1251, s. 7, and for a detailed discussion of the amendments, see the following section, also numbered 90-95, and the note thereto.

Session Laws 1975, c. 360, s. 2, amended this section by repealing subsection (f), which read as follows:

"(f) Any person convicted of an offense or offenses under this Article who is sentenced to an active term of imprisonment that is less than the maximum active term that could have been imposed may, in addition, be sentenced to a term of special probation. Except as indicated in this subsection, the administration of special probation shall be the same as probation. The conditions of special probation shall be fixed in the same manner as probation, and the conditions may include requirements for rehabilitation treatment. Special probation shall follow the active sentence but shall not preclude parole. If parole is granted, special probation shall become effective in place of parole. No term of special probation shall exceed five years. Special probation may be revoked in the same manner as probation; upon revocation, the original term of imprisonment may be increased by no more than the difference between the active term of imprisonment actually served and the maximum active term that could have been imposed at trial for the offense or offenses for which the person was convicted, and the resulting term of imprisonment need not be diminished by the time spent on special probation. A person whose special probation term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment."

The 1975 amendatory act expired by its own terms July 1, 1977. It is questionable whether the repealed subsection was revived by the expiration of the act.

Effect of Amendments. — Session Laws 1979, 2nd Sess., c. 1251, ss. 4, 5 and 6 added "Except as provided in subsections (h) and (i) of this section," at the beginning of subsections (b) and (d) and added subsections (h) and (i).

Session Laws 1979, 2nd Sess., c. 1251, s. 8, reads as follows: "Nothing in Sections 6 or 7 hereof shall be construed to render lawful any acts committed prior to the effective dates of those sections respectively and unlawful at the time said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under Section 6 hereof and pending on the effective date of Section 7 hereof."

Session Laws 1979, 2nd Sess., c. 1251, s. 9, contains a severability clause.

Legal Periodicals. — For note on the punishment of physicians under the Controlled Substances Act, see 56 N.C.L. Rev. 154 (1978).

CASE NOTES

I. General Consideration.
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I. GENERAL CONSIDERATION.

Section Is Constitutional. — This section, relating to the possession and distribution of controlled substances, is constitutional. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973), decided under this section as it stood before the 1973 revision.

Practice of Arresting for Possession of Marijuana But Not Alcoholic Beverages. — The practice of arresting persons present at an arena who have marijuana in their possession and not arresting persons found at the arena who have alcoholic beverages in their possession is not unconstitutional and does not violate either the due process or equal protection clauses of U.S. Const., amend. 14. Wheaton v. Hagan, 435 F. Supp. 1134 (M.D.N.C. 1977).

Double Jeopardy. — Defendant was not subjected to double jeopardy when he was convicted and separately sentenced to both felonious possession and felonious transportation of the same package of heroin since the felonious transportation involves acts not necessarily a part of, nor a requisite to, felonious possession. State v. Harrington, 283 N.C. 527, 196 S.E.2d 742, cert. denied, 414 U.S. 1011, 94 S. Ct. 375, 38 L. Ed. 2d 249 (1973), decided prior to the 1973 revision of this section.

Possession with intent to sell and sale are distinct offenses, and the former is not a lesser included offense of the latter. State v. Saunders, 35 N.C. App. 359, 241 S.E.2d 351 (1978).

Neither the offense of unauthorized possession nor the offense of unauthorized sale of a controlled substance is included within the other offense and one placed in jeopardy as to the one offense is not thereby placed in jeopardy as to the other. Thus, one charged with both offenses may be convicted of both and sentenced to imprisonment for each. State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974).

Possession and sale are separate and distinct offenses. State v. Joyner, 37 N.C. App. 216, 245 S.E.2d 592 (1978).

Possession of heroin and distribution of heroin are separate and distinct crimes, and each may be punished as provided by law. State v. Thornton, 283 N.C. 513, 196 S.E.2d 701 (1973), decided under this section as it stood prior to the 1973 revision.

Defendant was not subjected to double jeopardy when he was placed on trial for the two offenses of possession of heroin and distribution of heroin and consecutive sentences were imposed for two convictions. State v. Thornton, 283 N.C. 513, 196 S.E.2d 701 (1973), decided prior to the 1973 revision of this section.

Possession of a controlled substance and distribution of the same controlled substance are separate and distinct crimes, and each may be punished as provided by law, even where the possession and distribution in point of time were the same. Unlawful possession cannot be considered a lesser included offense of the crime of unlawful distribution. State v. Brown, 20 N.C. App. 71, 200 S.E.2d 666 (1973), cert. denied, 284 N.C. 617, 202 S.E.2d 274 (1974), decided under this section as it stood before the 1973 revision.

Possession and distribution of heroin are separate and distinct offenses, and a defendant may be prosecuted for both without violating the constitutional prohibition against double jeopardy. State v. Patterson, 21 N.C. App. 443, 204 S.E.2d 709 (1974), decided under this section as it stood before the 1973 revision.

Where a licensed physician merely writes a prescription for a controlled substance listed in Schedules II, III, IV or V, and nothing more, such act is not a violation of subsection (a)(1). State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

However, if that prescription is written outside the normal course of professional practice in North Carolina and not for a legitimate medical purpose, the physician violates § 90-108. State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

Drug Referred to in Indictment by Trade Name. — Desoxyn is a trade name for methamphetamine hydrochloride. Thus there was no variance between the charge in the bill of indictment that defendant possessed Desoxyn and the evidence which tended to prove defendant possessed methamphetamine. State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974), decided under this section as it stood before the 1973 revision.

It was proper for the trial judge to take judicial notice and to instruct the jury that Desoxyn and methamphetamine are the same thing. State v. Newton, 21 N.C. App. 384, 204 S.E.2d 724 (1974), decided under this section as it stood before the 1973 revision.

Establishing Identity of Substance. — Testimony by a special agent that, "Two of the three substances that I purchased were MDA" did not constitute substantial evidence that the drug possessed and sold by defendant was in fact 3, 4-methylenedioxyamphetamine as charged in the bills of indictment. State v. Board, 296 N.C. 652, 252 S.E.2d 803 (1979).

Qualified chemist's identification of green vegetable material as marijuana constituted sufficient showing by the State that it was Cannabis sativa L., a controlled substance under this section. State v. Bell, 24 N.C. App. 430, 210 S.E.2d 905 (1975).

Subsection (g) was not intended to apply to proceedings which result in adjudications of delinquency in the district court. In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977).

Application of Interested Witness Rule. — The trial court did not err in a prosecution for possession with intent to sell and deliver, and delivery, of marijuana in failing to find that the undercover officer was an interested witness per se, and the jury was properly instructed that the interested witness rule would apply if the jury determined that he was an interested witness. State v. Richardson, 36 N.C. App. 373, 243 S.E.2d 918 (1978).

Evidence of Other Drug Violations. — In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found. State v. Richardson, 36 N.C. App. 373, 243 S.E.2d 918 (1978).

Sufficiency of Evidence to Withstand Motion for Nonsuit. — Evidence that (1) officers heard running through the house immediately after announcing the presence of the police and requesting entry; (2) defendants were found in the downstairs bedroom with the packaged marijuana next to the kitchen where the manufacturing paraphernalia was assembled; and (3) two blenders were in operation and manufacturing appeared to be in progress, was sufficient to withstand a motion for nonsuit on charges of manufacture and possession of marijuana. State v. Shufford, 34 N.C. App. 115, 237 S.E.2d 481, petition for review denied, 293 N.C. 592, 239 S.E.2d 265 (1977).

As to "close juxtaposition" of defendants to marijuana as sufficient to withstand nonsuit on charges of manufacture and possession, see State v. Shufford, 34 N.C. App. 115, 237 S.E.2d 481, petition for review denied, 293 N.C. 592, 239 S.E.2d 265 (1977).

Verdict and Judgment. — Where there was nothing in the record to indicate that the defendants had been convicted previously of a violation of subsection (d), the recital in the judgments that the defendants were found guilty of a felony as a result of possession of phencyclidine hydrochloride was erroneous, and the judgments were modified by striking the word "felony" as it related to the conviction of the defendants for simple possession of phencyclidine hydrochloride. State v. Gagne, 22 N.C. App. 615, 207 S.E.2d 384, cert. denied, 285 N.C. 761, 209 S.E.2d 285 (1974).

Punishment. — The trial court erred in sentencing defendant to imprisonment for 10 years for felonious possession of heroin where the indictment did not charge defendant with a prior conviction of that offense and the State did not prove a prior conviction, a sentence of five years being the maximum that could be imposed in such case. State v. Moore, 27 N.C. App. 245, 218 S.E.2d 496 (1975), decided under this section as it stood before the 1979 amendment.

Applied in State v. Guy, 13 N.C. App. 637, 186 S.E.2d 663 (1972); State v. Brady, 16 N.C. App. 555, 192 S.E.2d 640 (1972); State v. Higgins, 16 N.C. App. 581, 192 S.E.2d 699 (1972); State v. McEachin, 17 N.C. App. 634, 195 S.E.2d 349 (1973); State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973); State v. Clark, 18 N.C. App. 473, 197 S.E.2d 81 (1973); State v. Hendrix, 19 N.C. App. 99, 197 S.E.2d 892 (1973); State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185 (1973); State v. Keitt, 19 N.C. App. 414, 199 S.E.2d 23 (1973); State v. Crisp, 19 N.C. App. 456, 199 S.E.2d 155 (1973); State v. Haddock, 19 N.C. App. 714, 200 S.E.2d 437 (1973); State v. McQueary, 20 N.C. App. 472, 201 S.E.2d 556 (1974); State v. Wooten, 20 N.C. App. 499, 201 S.E.2d 696 (1974); State v. Akel, 21 N.C. App. 415, 204 S.E.2d 549 (1974); State v. Blackwelder, 22 N.C. App. 18, 205 S.E.2d 609 (1974); State v. Armstrong, 22 N.C. App. 36, 205 S.E.2d 597 (1974); State v. Stalls, 22 N.C. App. 265, 206 S.E.2d 500 (1974); State v. Williams, 22 N.C. App. 502, 206 S.E.2d 783 (1974); State v. Carriker, 287 N.C. 530, 215 S.E.2d 134 (1975); State v. Battle, 26 N.C. App. 478, 216 S.E.2d 458 (1975); State v. Hardy, 31 N.C. App. 67, 228 S.E.2d 487 (1976); State v. Vinson, 31 N.C. App. 318, 229 S.E.2d 203 (1976); State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976); State v. Mendez, 42 N.C. App. 141, 256 S.E.2d 405 (1979); State v. King, 44 N.C. App. 31, 259 S.E.2d 919 (1979).

Quoted in State v. Reese, 33 N.C. App. 89, 234 S.E.2d 41 (1977).

Cited in State v. Jackson, 280 N.C. 563, 187 S.E.2d 27 (1972); State v. McIntyre, 281 N.C. 304, 188 S.E.2d 304 (1972); State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400 (1972); State v. Cobb, 21 N.C. App. 66, 202 S.E.2d 801 (1974); State v. Crews, 286 N.C. 41, 209 S.E.2d 462 (1974); State v. Chapman, 24 N.C. App. 462, 211 S.E.2d 489 (1975); State v. Beddard, 35 N.C. App. 212, 241 S.E.2d 83 (1978); Dove v. North Carolina Bd. of Alcoholic Control, 37 N.C. App. 605, 246 S.E.2d 584 (1978); State v. Bagley, 39 N.C. App. 328, 250 S.E.2d 87 (1979); State v. King, 42 N.C. App. 210, 256 S.E.2d 247 (1979); State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980); State v. Beam, 45 N.C. App. 82, 262 S.E.2d 350 (1980).

II. MANUFACTURE.

The manufacturing of marijuana is a felony, regardless of the quantity manufactured or the intent of the offender. This differs from the offense of possession of marijuana in that in specified cases simple possession constitutes a misdemeanor while possession for purpose of distribution is made a felony. State v. Elam, 19 N.C. App. 451, 199 S.E.2d 45, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973), decided under this section as it stood before the 1973 revision.

Indictment for Manufacture Need Not Allege Intent to Distribute. — The averment in the indictment "with intent to distribute" is not necessary in charging the felony of manufacturing marijuana and is treated as surplusage. State v. May, 20 N.C. App. 179, 201 S.E.2d 95 (1973), decided under this section as it stood before the 1973 revision.

When Intent to Distribute Must Be Proved. — The burden is on the State to prove from the evidence beyond a reasonable doubt that, in cases where the defendant is charged with manufacture of a controlled substance and the activity constituting manufacture is preparation or compounding, that the defendant intended to distribute the controlled substance. In proving such intent, the State would be able to rely upon ordinary circumstantial evidence (e.g., the amount of the controlled substance possessed, the nature of its packaging, labeling and storage, if any, the activities of the defendant with reference to the controlled substance) as evidence pertinent to intent. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

Evidence Insufficient to Establish Manufacture. — Where the only evidence of manufacturing was the fact that the marijuana was "packaged," and there was no showing when the marijuana was packaged, by whom, or for what purpose, and the marijuana and other items found were not established to have been defendant's, other than on the theory of constructive possession, the State failed to prove a sufficient nexus between the defendant, the marijuana, and other items to establish that (1) marijuana was being manufactured and (2) that it was being done by the defendant. State v. Baxter, 21 N.C. App. 81, 203 S.E.2d 93, rev'd on other grounds, 285 N.C. 735, 208 S.E.2d 696 (1974), decided under this section as it stood before the 1973 revision.

Evidence Sufficient to Establish Manufacture. — Evidence was sufficient to withstand a motion for judgment as of nonsuit on a charge of manufacture of marijuana where stripped stalks of marijuana were found growing behind a television antenna connected to the defendant's residence and marijuana plants were found growing in flower pots on a table in the defendant's front yard 32 feet from his residence. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

III. SALE OR DELIVERY.

"Delivery" Means "Transfer". — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, trial judge's charge to the jury placing the burden on the State to prove that defendant "transferred" the marijuana was not prejudicial error, since "delivery" means "transfer" under § 90-87. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

One may unlawfully sell a controlled substance which he lawfully possesses. State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974).

Sale Unlawful under §§ 90-71 and 90-72 Is Violation of This Section. — When a drug is sold under circumstances which render the sale unlawful under §§ 90-71 and 90-72, there is also a violation of § 90-95 if the drug involved is a controlled substance. State v. Austin, 31 N.C. App. 20, 228 S.E.2d 507 (1976).

The sale of a controlled substance is a specific act and occurs only at one specific time. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976).

The delivery of a controlled substance is a specific act and occurs only at one specific time. State v. Lewis, 32 N.C. App. 298, 231 S.E.2d 693 (1977).

Sale and Delivery Charged as Single Offense. — In a prosecution for felonious sale and delivery of marijuana, and felonious possession of marijuana with intent to sell, the fact that the State included in the same count as a single offense both sale and delivery, even though the two acts could have been charged as separate offenses, was not prejudicial to the defendant. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

Indictment Must Allege Name of Purchaser. — An indictment charging the unlawful sale of marijuana must allege the name of the purchaser or that his name is unknown. State v. Long, 14 N.C. App. 508, 188 S.E.2d 690 (1972), decided prior to the 1971 revision of this Article.

This section contains no modification of the common-law requirement that the name of the person, to whom the accused allegedly sold narcotics unlawfully, be stated in the indictment when it is known. State v. Bennett, 280 N.C. 167, 185 S.E.2d 147 (1971), decided prior to the 1971 revision of this Article.

An indictment which does not include the narcotics purchaser's name, if known, fails to state sufficient facts to sustain a conviction. The Controlled Substances Act does not expressly eliminate the requirement that the name of a known purchaser be alleged in the indictment. State v. Ingram, 20 N.C. App. 464, 201 S.E.2d 532 (1974), decided under this section as it stood before the 1973 revision.

Where the bill of indictment alleges a sale of narcotics to one person and the proof tends to show only a sale to a different person, the variance is fatal. State v. Ingram, 20 N.C. App. 464, 201 S.E.2d 532 (1974), decided under this section as it stood before the 1973 revision.

Finding of Marijuana to Be a Controlled Substance Not Required. — In a prosecution for felonious sale and delivery of marijuana and felonious possession of marijuana with intent to sell, it is not necessary for the State to show that the Drug Authority (now Commission) has made a finding that marijuana is a controlled substance since it has been listed as such under § 90-94. State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976).

IV. POSSESSION.

A. In General.

Types of Possession. — An accused's possession of narcotics may be actual or constructive. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972). See also State v. Bagnard, 24 N.C. App. 54, 210 S.E.2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Weems, 31 N.C. App. 569, 230 S.E.2d 193 (1976).

Constructive Possession Defined. — Constructive possession is that which exists without actual personal dominion over a chattel, but with an intent and capability to maintain control and dominion. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); State v. Davis, 25 N.C. App. 181, 212 S.E.2d 516 (1975); State v. Wells, 27 N.C. App. 144, 218 S.E.2d 225 (1975); State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

Where a defendant has both the power and intent while acting in combination with others to control the disposition and use of heroin, he has it in his constructive possession. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971), decided prior to the 1971 revision of this Article.

Possession Is a Continuing Offense. — The possession of a controlled substance with the intent to sell it is a continuing offense from the time it was unlawfully obtained until the time the possessor divests himself of the possession. State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976); State v. Lewis, 32 N.C. App. 298, 231 S.E.2d 693 (1977).

Included Offenses. — To prove the offense of possession of over one ounce of marijuana, the State must show possession and that the amount possessed was greater than one ounce. To prove the offense of possession with intent to sell or deliver marijuana, the State must show possession of any amount of marijuana and that the person possessing the substance intended to sell or deliver it. Thus, the two crimes each contain one element that is not necessary for proof of the other crime. One is not a lesser included offense of the other. State v. McGill, 296 N.C. 564, 251 S.E.2d 616 (1979).

To aid or abet one in the crime of possession the act or encouragement must be done knowingly with the intent to aid the possessor obtain or retain possession. State v. Keeter, 42 N.C. App. 642, 257 S.E.2d 480 (1979).

Establishing Possession. — An accused has possession of narcotics within the meaning of the law when he has both the power and intent to control their disposition or use. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Davis, 20 N.C. App. 191, 201 S.E.2d 61 (1973); State v. Bagnard, 24 N.C. App. 54, 210 S.E.2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Weems, 31 N.C. App. 569, 230 S.E.2d 193 (1976).

The requirements of power and intent necessarily imply that a defendant must be aware of the presence of an illegal drug if he is to be convicted of possessing it. State v. Davis, 20 N.C. App. 191, 201 S.E.2d 61 (1973), cert. denied, 284 N.C. 618, 202 S.E.2d 274 (1974), decided under this section as it stood before the 1973 revision.

Where narcotics are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Balsom, 17 N.C. App. 655, 195 S.E.2d 125 (1973); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977); State v. Blackburn, 34 N.C. App. 683, 239 S.E.2d 626, cert. denied, 294 N.C. 442, 241 S.E.2d 522 (1977).

Where narcotics are found on the premises under the control of the defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts which might leave in the minds of the jury a reasonable doubt as to his guilt. State v. Allen, 279 N.C. 406, 183 S.E.2d 680 (1971); State v. Wells, 27 N.C. App. 144, 218 S.E.2d 225 (1975).

The rule establishing "possession" by power and intent to control use and disposition does not compel submission of the case to the jury in every instance in which controlled substances are found on the premises of an accused. State v. Davis, 20 N.C. App. 191, 201 S.E.2d 61 (1973), cert. denied, 284 N.C. 618, 202 S.E.2d 274 (1974), decided under this section as it stood before the 1973 revision.

An accused has possession of contraband material within the meaning of the law when he has both the power and the intent to control its disposition or use. State v. Davis, 25 N.C. App. 181, 212 S.E.2d 516 (1975).

The crime of possession requires that the contraband be in the custody and control of the defendant and subject to his disposition. State v. Keeter, 42 N.C. App. 642, 257 S.E.2d 480 (1979).

The State is not required to prove exclusive possession or control of a controlled substance. State v. Barnes, 18 N.C. App. 263, 196 S.E.2d 576 (1973), decided prior to the 1973 revision of this section.

An accused has possession of marijuana within the meaning of this Article, when he has

both the power and the intent to control its disposition or use, which power may be in him alone or in combination with another. Constructive possession is sufficient. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974).

Mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession. State v. Balsom, 17 N.C. App. 655, 195 S.E.2d 125 (1973); State v. Weems, 31 N.C. App. 569, 230 S.E.2d 193 (1976).

Amount of Substance Irrelevant. — Evidence that defendant possessed at most only a tiny amount of the substance heroin is sufficient for conviction. State v. Thomas, 20 N.C. App. 255, 201 S.E.2d 201 (1973), cert. denied, 284 N.C. 622, 202 S.E.2d 277 (1974), decided under this section as it stood before the 1973 revision.

For purposes of this section, no limitation is set of the amount of the controlled substance which must be possessed in order to come within its prohibition. State v. Young, 20 N.C. App. 316, 201 S.E.2d 370 (1973), decided under this section as it stood before the 1973 revision.

This section makes it unlawful to possess any amount of heroin regardless of value. State v. Bell, 33 N.C. App. 607, 235 S.E.2d 886, appeal dismissed, 293 N.C. 254, 237 S.E.2d 536 (1977).

Possessor's Knowledge of Nature of Substance. — Possession of a bottle cap containing a residue of heroin by a person unfamiliar with the uses of heroin might well be consistent with innocent possession because of lack of knowledge by the possessor of the contraband nature of the article possessed. Possession of such an article by one sophisticated in the use of drugs is quite another matter. Evidence of the marks on defendant's arms was admissible as being relevant to show his prior knowledge. State v. Thomas, 20 N.C. App. 255, 201 S.E.2d 201 (1973), cert. denied, 284 N.C. 622, 202 S.E.2d 277 (1974), decided under this section as it stood before the 1973 revision.

Establishing Time and Place of Unlawful Possession Not Essential. — For a charge of unlawful possession of narcotics, time and place are not essential elements of the offense. State v. Bennett, 280 N.C. 167, 185 S.E.2d 147 (1971), decided prior to the 1971 revision of this Article.

Evidence Insufficient. — Where there was no evidence concerning whether the flower bed and cornfield in which marijuana was located were on defendant's property or otherwise under his control, nor any evidence linking defendant to the marijuana other than the fact that it was growing near his trailer, admission of the marijuana into evidence was error in a prosecution for manufacture and possession of marijuana with intent to sell and deliver. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

Evidence Sufficient. — Where the evidence tended to show that 10 glassine bags were wrapped together when removed from defendant, that a chemical analysis was made on only one of the bags and that bag was found to contain heroin, and that a visual examination only was made of the contents of the other bags, all the bags were competent to show what the search of defendant's premises produced and the evidence of the contents of the one tested glassine bag was sufficient for a conviction of possession of a quantity of narcotic drugs. State v. Steele, 18 N.C. App. 126, 196 S.E.2d 379 (1973), decided prior to the 1973 revision of this section.

Where there was ample evidence that each defendant had actual possession of LSD at the time they brought the bottles to a prosecution witness and delivered them to him for safekeeping, it was not necessary that the State show that defendants had possession, either actual or constructive, when they were subsequently arrested. State v. Hultman, 20 N.C. App. 201, 200 S.E.2d 841 (1973), cert. denied, 284 N.C. 619, 202 S.E.2d 275 (1974), decided under this section as it stood before the 1973 revision.

Where the State relied upon several factors to show that the defendant was in constructive possession of heroin, it was not necessary for the State to prove each separate fact beyond a reasonable doubt. It is enough, if upon the whole evidence, the jury is satisfied beyond a reasonable doubt of the defendant's guilt. State v. Davis, 25 N.C. App. 181, 212 S.E.2d 516 (1975).

Where the expert witness testified that he had examined and identified marijuana in numerous prior cases and trials, that he examined the contents of all the envelopes taken from defendant and that the contents of each appeared to be the same and that he selected five envelopes at random, all of which, after analysis of the contents, were found to contain marijuana, this evidence was sufficient to submit to the jury on the issue of whether the contents of all the envelopes were marijuana. State v. Hayes, 291 N.C. 293, 230 S.E.2d 146 (1976).

Circumstantial Evidence. — The State may overcome a motion to dismiss or motion for judgment as of nonsuit by presenting evidence which places the accused within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Bagnard, 24 N.C. App. 54, 210 S.E.2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975); State v. Finney, 290 N.C. 755, 228 S.E.2d 433 (1976); State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

The State's evidence was sufficient to support a reasonable inference that marijuana was in defendant's possession where it placed defendant within three or four feet of marijuana in defendant's home, and no one else was in the room where the marijuana was found. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972), decided prior to the 1973 revision of this section.

The State's evidence was sufficient to support a reasonable inference that defendant exercised custody, control, and dominion over marijuana found in a pig shed located approximately 20 yards directly behind defendant's residence, where it tended to show that defendant had been seen on numerous occasions in and around the outbuildings directly behind his house, and that marijuana seeds were found in defendant's bedroom. State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972), decided prior to the 1973 revision of this section.

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of feloniously growing marijuana where it tended to show that (1) marijuana seeds were found in defendant's bedroom, (2) marijuana was found in a pigpen located 20 yards directly behind defendant's residence, (3) an unintersected path began at the edge of the pigpen and extended some distance to a cornfield where marijuana was found growing, and (4) the wire fencing at the beginning of the path was lower than the remainder of the path. State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972), decided prior to the 1973 revision of this section.

When one occupies a house, either alone or together with others as a tenant and as such has control over the premises, this fact in and of itself gives rise to the inference of both knowledge and control. State v. Walsh, 19 N.C. App. 420, 199 S.E.2d 38, cert. denied, 284 N.C. 258, 200 S.E.2d 658 (1973), decided under this section as it stood before the 1973 revision.

Where marijuana was found in a bedroom of defendant's home, and correspondence addressed to defendant was in the room, it is clear that the defendant was in possession of this marijuana. It was in his custody and control and subject to his disposition. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973), decided under this section as it stood before the 1973 revision.

Evidence of constructive possession of marijuana was sufficient to show both the power and intent to control disposition or use of an apartment where: the apartment was rented to defendants; there was absolutely no evidence that they had sublet to anyone; the current telephone bill showed telephone calls to the homes of defendants; one's I.D. card was found in a bedroom; and the rental record showed the rent to have been paid by the defendants. State v. Cockman, 20 N.C. App. 409, 201 S.E.2d 740, cert. denied, 285 N.C. 87, 203 S.E.2d 61 (1974), decided under this section as it stood before the 1973 revision.

Where police found 3,214 hits of blotter acid (L.S.D. in dots on pieces of paper) in the refrigerator, and there was evidence that the defendant was the lessee of the trailer in question and had been living there for six months or more, the State's evidence of possession was ample. State v. Juan, 20 N.C. App. 208, 200 S.E.2d 824 (1973), cert. denied, 284 N.C. 620, 202 S.E.2d 276 (1974), decided under this section as it stood before the 1973 revision.

Nothing else appearing, a man residing with his wife in an apartment, no one else residing or being present therein, may be deemed in constructive possession of marijuana located therein, notwithstanding the fact that he is temporarily absent from the apartment and his wife is present therein. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974).

Where defendant had been given the keys and the custody of a vehicle by its owner, there were 443.1 grams of marijuana found in the car while defendant was the driver and one of the two bags of marijuana was located just inside the car's door on the driver's side, unobstructed by the seat, viewing the evidence in a light most favorable to the State, the jury could find that defendant had both the power and the intent to control its disposition or use so as to have it in his constructive possession. State v. Bagnard, 24 N.C. App. 54, 210 S.E.2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975).

Evidence tending to show that defendant had possession and control of and claimed ownership to the automobile in which drugs were located was sufficient to show that defendant had constructive possession of the drugs in question. State v. Leonard, 34 N.C. App. 131, 237 S.E.2d 347 (1977).

Marijuana located in flower pots 32 feet in front of defendant's trailer and beside defendant's television antenna was within such close proximity to defendant's residence as to raise the inference that defendant had at least constructive possession of it. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

Verdict and Judgment. — Where the judgment and commitment indicate that defendant was found guilty of possession of heroin with intent to distribute, but the plea was only to the charge of possession and the verdict was guilty of a charge of possession only, the record should be conformed to correct the judgment to show that defendant pleaded not guilty to possession of heroin and that he was found guilty of possession of heroin. State v. Byrum, 20 N.C. App. 265, 201 S.E.2d 193 (1973), decided under this section as it stood before the 1973 revision.

B. Possession with Intent to Sell or Deliver.

Possession is an element of possession with intent to deliver and the unauthorized possession is, of necessity, an offense included within the charge that the defendant did unlawfully possess with intent to deliver. State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Stanley, 24 N.C. App. 323, 210 S.E.2d 496 (1974), rev'd on other grounds, 288 N.C. 19, 215 S.E.2d 589 (1975); State v. Cloninger, 37 N.C. App. 22, 245 S.E.2d 192 (1978).

It is impossible to possess a controlled substance with intent to distribute without having first possessed it, either actually upon the person or constructively, with the possible exception of a conspiracy or aiding and abetting. State v. Aikens, 22 N.C. App. 310, 206 S.E.2d 348 (1974); State v. Aiken, 286 N.C. 202, 209 S.E.2d 763 (1974); State v. Stanley, 24 N.C. App. 323, 210 S.E.2d 496 (1974), rev'd on other grounds, 288 N.C. 19, 215 S.E.2d 589 (1975).

Possession and Distribution Are Separate Offenses. — The two offenses, (1) the distribution, and (2) the possession with intent to distribute, are separate offenses. State v. Rush, 19 N.C. App. 109, 197 S.E.2d 891 (1973), decided under this section as it stood before the 1973 revision.

The possession and distribution of a single quantity of marijuana taking place on one occasion constitute two crimes for each of which defendant may be convicted and punished. State v. Yelverton, 18 N.C. App. 337, 196 S.E.2d 551, cert. denied, 283 N.C. 670, 197 S.E.2d 880 (1973), decided prior to the 1973 revision of this section.

Establishing Intent to Distribute. — The jury can reasonably infer an intent to distribute from the amount of the substance found, the manner in which it was packaged, and the presence of other packaging materials. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974).

The quantity of narcotics found in defendant's possession, its packaging, its location and the paraphernalia for measuring and weighing are all circumstances from which it could properly be inferred that it was possessed for sale rather than for personal use. State v. Mitchell, 27 N.C. App. 313, 219 S.E.2d 295 (1975), cert. denied, 289 N.C. 301, 222 S.E.2d 701 (1976).

The quantity of the drug seized is a relevant factor in determining whether there was an intent to sell, and where the quantity seized is extremely small, the court should not instruct the jury on the intent to sell portion of the charge. State v. Francum, 39 N.C. App. 429, 250 S.E.2d 705 (1979).

This section clearly permits North Carolina courts and juries to examine and utilize the quantities of drugs seized as one possible indicator of intent to distribute. State v. Mitchell, 27 N.C. App. 313, 219 S.E.2d 295 (1975), cert. denied, 289 N.C. 301, 222 S.E.2d 701 (1976).

The quantity of the drug seized is an indicator of intent to sell. State v. Cloninger, 37 N.C. App. 22, 245 S.E.2d 192 (1978).

In proving intent to distribute, the State may rely upon ordinary circumstantial evidence, such as the amount of controlled substance possessed, the nature of its packaging, labeling, and storage, and the activities of defendant with reference to the controlled substance. State v. Childers, 41 N.C. App. 729, 255 S.E.2d 654, cert. denied, 298 N.C. 302, 259 S.E.2d 916 (1979).

Evidence Sufficient to Establish Intent. — Evidence of possession of 276 grams of marijuana, reinforced by other evidence showing concealment and that the marijuana was separated into smaller containers, indicating that it was being broken up for more ready distribution, would support a jury finding that the defendant actually had the intent to distribute. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973), decided under this section as it stood before the 1973 revision.

Evidence Insufficient to Establish Intent. — Possession of 215.5 grams of marijuana, without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribution, and therefore is not sufficient to withstand a motion for judgment as of nonsuit on a charge of possession with intent to sell and distribute. State v. Wiggins, 33 N.C. App. 291, 235 S.E.2d 265, cert. denied, 293 N.C. 592, 241 S.E.2d 513 (1977).

§ 90-95. (See Editor's note for effective date) Violations; penalties.

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon;

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(c) Any person who violates G.S. 90-95(a)(2) shall be punished as a Class I felon.

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be punished as a Class I felon;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than two years or fined not more than two thousand dollars ($2,000), or both in the discretion of the court; but if the quantity of the controlled substance, or combination of the controlled substances, exceeds 100 tablets, capsules or other dosage units, or equivalent quantity, including one-half gram or more of phencyclidine or one gram or more of cocaine, the violation shall be punishable as a Class I felony;

(3) A controlled substance classified in Schedule V shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars ($500.00), or both in the discretion of the court;

(4) A controlled substance classified in Schedule VI shall be guilty of a misdemeanor and shall be fined not more than one hundred dollars ($100.00); but if the quantity of the controlled substance exceeds one ounce (avoirdupois) of marijuana or one tenth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

(e) The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:

(1), (2) Repealed by Session Laws 1979, c. 760, s. 5.

(3) If any person commits an offense under this Article for which the prescribed punishment includes imprisonment for not more than two years, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon;

(4) If any person commits an offense under this Article for which the prescribed punishment includes imprisonment for not more than six months, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than two years or fined not more than two thousand dollars ($2,000), or both in the discretion of the court;

(5) Any person 18 years of age or over who violates G.S. 90-95(a)(1) by delivering a controlled substance to a person under 16 years of age shall be punished as a Class E felon;

(6) For the purpose of increasing punishment, previous convictions for offenses shall be counted by the number of separate trials at which final convictions were obtained and not by the number of charges at a single trial;

(7) If any person commits an offense under this Article for which the prescribed punishment includes only a fine, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a misdemeanor and shall be sentenced to a term of imprisonment of not more than six months or fined not more than five hundred dollars ($500.00), or both in the discretion of the court.

(f) Repealed by Session Laws 1975, c. 360, s. 2, effective July 1, 1975 to July 1, 1977.

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Clinical Toxicological Lab, North Carolina Baptist Hospital, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court division of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed.

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:

a. Is in excess of 50 pounds, but less than 100 pounds, such person shall be punished as a Class H felon and shall be sentenced to a term of at least five years in the State's prison and shall be fined not less than five thousand dollars ($5,000);

b. Is 100 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a term of

at least seven years in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of coca leaves or any salts, compound, derivative, or preparation thereof which is chemically equivalent or identical to any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a term of at least seven years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a term of at least 35 years in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, naloxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a term of at least 14 years in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a term of at least 18 years in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a term of at least 45 years in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(5) A person sentenced under this subsection is not eligible for early release or early parole if the person is sentenced as a committed youthful offender and the sentencing judge may not suspend the sentence or place the person sentenced on probation. However, the sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection,

or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section. (1971, c. 919, s. 1; 1973, c. 654, s. 1; c. 1078; c. 1358, s. 10; 1975, c. 360, s. 2; 1977, c. 862, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 4-7.)

Editor's Note. — Because of doubt as to the effective date of amendments to this § 90-95 in Session Laws 1979, c. 760, s. 5, and Session Laws 1979, 2nd Sess., c. 1251, s. 7, the section is set out twice in this volume. The section as set out above incorporates the amendments. Under Session Laws 1981, c. 63, amending Session Laws 1979, c. 760, s. 6, and Session Laws 1979, 2nd Sess., c. 1251, s. 7, the amendments will take effect April 15, 1981. It is possible, however, that the amendments will be postponed to a later date by a subsequent 1981 act not available at the time of preparation of this volume. For this section as in effect until the effective date of the amendments, see the preceding section, also numbered 90-95. For a detailed discussion of the 1979 and 1979, 2nd Sess., amendments, see below.

Effect of Amendments. — The 1979 amendment substituted "punished as a Class H felon" for "guilty of a felony and shall be sentenced to a term of imprisonment of not more than 10 years or fined not more than ten thousand dollars ($10,000), or both in the discretion of the court" in subdivision (1) of subsection (b) and substituted "punished as a Class I felon" for "guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court" in subdivision (2) of subsection (b), in subsection (c), and in subdivision (1) of subsection (d). The amendment also substituted "punishable as a Class I felony" for "a felony punishable by a term of imprisonment of not more than five years or a fine of not more than five thousand dollars ($5,000), or both, in the discretion of the court" in subdivision (2) of subsection (d) and for "a felony punishable by a term of imprisonment of not more than five years or a fine of not more than five thousand dollars ($5,000), or both in the discretion of the court" in subdivision (4) of subsection (d). In subsection (e), the amendment deleted subdivisions (1) and (2), relating to punishment for second and subsequent offenses, and substituted "punished as a Class I felon" for "guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court" in subdivision (3) and substituted "punished as a Class E felon" for "guilty of a felony and shall be sentenced to a term of imprisonment of not less than five years nor more than 30 years" in subdivision (5). The 1979 amendatory act was originally made effective July 1, 1980, but was amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47, so as to postpone the effective date to March 1, 1981, and by Session Laws 1981, c. 63, so as to postpone the effective date to April 15, 1981. See the Editor's note, above.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47 and Session Laws 1981, c. 63, provides: "This act shall become effective on April 15, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Session Laws 1979, 2nd Sess., c. 1251, ss. 4, 5 and 6, added "Except as provided in subsections (h) and (i) of this section," at the beginning of subsections (b) and (d) and added subsections (h) and (i). Session Laws 1979, 2nd Sess., c. 1251, s. 7, rewrote the penalty provisions in subsection (h) as enacted by s. 6 of the same act, substituted provisions for punishment as a specified class of felon for provisions as to maximum punishment, and increasing the minimum punishments. Section 7 of the 1979 2nd Sess. act also eliminated former subdivision (5) of subsection (h), requiring a convicted person to serve at least the minimum prison term provided for release or parole, and redesignated former subdivisions (6) and (7) as (5) and (6). Session Laws 1979, 2nd Sess., c. 1251, s. 7, was originally made effective March 1, 1981, but was amended by Session Laws 1981, c. 63, so as to postpone the effective date to April 15, 1981. See the Editor's note, above.

Session Laws 1979, 2nd Sess., c. 1251, s. 8, provides: "Nothing in Sections 6 or 7 hereof

shall be construed to render lawful any acts committed prior to the effective dates of those sections respectively and unlawful at the time said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under Section 6 hereof and pending on the effective date of Section 7 hereof."

Session Laws 1979, 2nd Sess., c. 1251, s. 9, contains a severability clause.

§ 90-95.1. (See Editor's note for date of expiration) Continuing criminal enterprise.

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than one hundred thousand dollars ($100,000), and to the forfeiture prescribed in subsection (b) of this section; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than two hundred thousand dollars ($200,000), and to the forfeiture described in subsection (b) of this section.

(b) Any person who is convicted under subsection (a) of engaging in a continuing criminal enterprise shall forfeit to the State of North Carolina:

(1) The profits obtained by him in such enterprise, and

(2) Any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(c) For purposes of this section, a person is engaged in a continuing criminal enterprise if:

(1) He violates any provision of this Article, the punishment of which is a felony; and

(2) Such violation is a part of a continuing series of violations of this Article;

a. Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management; and

b. From which such person obtains substantial income or resources.

(d) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended and probation shall not be granted. (1971, c. 919, s. 1.)

Cross references. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Editor's Note. — Because of doubt as to the effective date of the amendment to this § 90-95.1 in Session Laws 1979, c. 760, s. 5, the section is set out twice in this volume. The section as set out above does not incorporate the amendment. Under Session Laws 1981, c. 63, amending Session Laws 1979, c. 760, s. 6, the amendment will take effect April 15, 1981. It is possible, however, that the amendment will be postponed to a later date by a subsequent 1981 act not available at the time of preparation of this volume. For this section as amended by Session Laws 1979, c. 760, s. 5, and for a detailed discussion of the amendment, see the following section, also numbered 90-95.1, and the note thereto.

§ 90-95.1. (See Editor's note for effective date) Continuing criminal enterprise.

(a) Any person who engages in a continuing criminal enterprise shall be punished as a Class C felon and in addition shall be subject to the forfeiture prescribed in subsection (b) of this section.

(b) Any person who is convicted under subsection (a) of engaging in a continuing criminal enterprise shall forfeit to the State of North Carolina:

(1) The profits obtained by him in such enterprise, and

(2) Any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

(c) For purposes of this section, a person is engaged in a continuing criminal enterprise if:

(1) He violates any provision of this Article, the punishment of which is a felony; and

(2) Such violation is a part of a continuing series of violations of this Article;

a. Which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management; and

b. From which such person obtains substantial income or resources.

(d) Repealed by Session Laws 1979, c. 760, s. 5. (1971, c. 919, s. 1; 1979, c. 760, s. 5.)

Editor's Note. — Because of doubt as to the effective date of the amendment to this § 90-95.1 in Session Laws 1979, c. 760, s. 5, the section is set out twice in this volume. The section as set out above incorporates the amendment. Under Session Laws 1981, c. 63, amending Session Laws 1979, c. 760, s. 6, the amendment will take effect April 15, 1981. It is possible, however, that the amendment will be postponed to a later date by a subsequent 1981 act not available at the time of preparation of this volume. For this section as in effect until the effective date of Session Laws 1979, c. 760, s. 5, see the preceding section, also numbered 90-95.1. As to the effect of the amendment, see below.

Effect of Amendments. — The 1979 amendment, effective March 1, 1981, rewrote subsection (a) and deleted subsection (d), providing that imposition or execution of any sentence imposed under this section should not be suspended and probation should not be granted. The amendatory act was originally made effective July 1, 1980, but was amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47, so as to postpone the effective date to March 1, 1981, and by Session Laws 1981, c. 63, so as to postpone the effective date to April 15, 1981. See the Editor's note above.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47, and Session Laws 1981, c. 63, provides: "This act shall become effective on April 15, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 90-95.2. Cooperation between law-enforcement agencies.

(a) The head of any law-enforcement agency may temporarily provide assistance to another agency in enforcing the provisions of this Article if so requested in writing by the head of the other agency. The assistance may comprise allowing officers of the agency to work temporarily with officers of the other agency (including in an undercover capacity) and lending equipment and supplies. While working with another agency under the authority of this section, an officer shall have the same jurisdiction, powers, rights, privileges, and immunities as the officers of the requesting agency in addition to those he normally possesses. While on duty with the other agency, he shall be subject to the lawful operational commands of his superior officers in the other agency, but he shall for personnel and administrative purposes remain under the control of his own agency, including for purposes of pay. He shall furthermore be entitled to workmen's compensation when acting pursuant to this section to the same extent as though he were functioning within the normal scope of his duties.

(b) As used in this section:

(1) "Head" means any director or chief officer of a law-enforcement agency, including the chief of police of a local police department and

the sheriff of a county, or an officer of the agency to whom the head of the agency has delegated authority to make or grant requests under this section, but only one officer in the agency shall have this delegated authority at any time.

(2) "Law-enforcement agency" means any State or local agency, force, department, or unit responsible for enforcing criminal laws in this State, including any local police department or sheriff's department.

(c) This section in no way reduces the jurisdiction or authority of State law-enforcement officers. (1975, c. 782, s. 1.)

§ 90-95.3. Restitution to law-enforcement agencies for undercover purchases.

When any person is convicted of an offense under this Article, the court may order him to make restitution to any law-enforcement agency for reasonable expenditures made in purchasing controlled substances from him or his agent as part of an investigation leading to his conviction. (1975, c. 782, s. 2.)

CASE NOTES

Quoted in Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

§ 90-96. Conditional discharge and expunction of records for first offense.

(a) Whenever any person who has not previously been convicted of any offense under this Article, or under any statute of the United States, or any state relating to controlled substances included in any schedule of this Article pleads guilty to or is found guilty of a misdemeanor under this Article by possessing a controlled substance included within Schedules III through VI of this Article, the court may without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Discharge and dismissal under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of

guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the misdemeanor in question and has not been convicted of any felony, or misdemeanor, other than a traffic violation, under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the period of probation following the decision to defer further proceedings on the misdemeanor in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in the file shall be disclosed only to Judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted a conditional discharge.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules III through VI of this Article, upon dismissal by the State of the charges against him, upon entry of a nolle prosequi, or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, or trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred,

it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose. (1971, c. 919, s. 1; 1973, c. 654, s. 2; c. 1066; 1977, 2nd Sess., c. 1147, s. 11B; 1979, c. 431, ss. 3, 4; c. 550.)

Effect of Amendments. — The first 1979 amendment rewrote subdivision (b)(3) and added the second paragraph of subsection (b).

The second 1979 amendment, effective June 10, 1979, deleted "North Carolina Department of Human Resources, the names of all persons convicted under this Article, together with the offense or offenses of which such persons were convicted. The clerk shall also file with the" which previously followed "in his county, file with the" in the present first sentence of subsection (c), and substituted "the" for "such" following "contained in" in the present second sentence of subsection (c).

CASE NOTES

Application and Purpose of Section. — This section is applicable only to first offenders and is clearly for the purpose of permitting the trial court to grant probation under conditions favorable to defendant. State v. Cordon, 21 N.C. App. 394, 204 S.E.2d 715, cert. denied, 285 N.C. 592, 206 S.E.2d 864 (1974).

When defendant consents to the terms of the probation, he abandons his right to appeal on the issue of guilt or innocence and commits himself to abide by the stipulated conditions. State v. Cordon, 21 N.C. App. 394, 204 S.E.2d 715, cert. denied, 285 N.C. 592, 206 S.E.2d 864 (1974).

A defendant on appeal from an order revoking probation may not challenge his adjudication of guilt. State v. Cordon, 21 N.C. App. 394, 204 S.E.2d 715, cert. denied, 285 N.C. 592, 206 S.E.2d 864 (1974).

Cited in Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

OPINIONS OF ATTORNEY GENERAL

"Not over 21 years" Means "until Twenty-Second Birthday." — See opinion of Attorney General to Mr. Harvey D. Johnson, 42 N.C.A.G. 319 (1973).

§ 90-96.1. Immunity from prosecution for minors.

Whenever any person who is not more than 18 years of age, who has not previously been convicted of any offense under this Article or under any statute of the United States of any state relating to controlled substances included in any schedule of this Article, is accused with possessing or distributing a controlled substance in violation of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), the court may, upon recommendation of the district attorney, grant said person immunity from prosecution for said violation(s) if said person shall disclose the identity of the person or persons from whom he obtained the controlled substance(s) for which said person is being accused of possessing or distributing. (1973, c. 47, s. 2; c. 654, s. 3.)

Editor's Note. — Pursuant to Session Laws 1973, c. 47, s. 2, "district attorney" has been substituted for "solicitor" in this section as enacted by Session Laws 1973, c. 654, s. 3.

CASE NOTES

Quoted in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-97. Other penalties.

Any penalty imposed for violation of this Article shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law. If a violation of this Article is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this State. (1971, c. 919, s. 1.)

Legal Periodicals. — For article, "Prior Crimes as Evidence in Present Criminal Trials," see 1 Campbell L. Rev. 1 (1979).

§ 90-98. (See Editor's note for date of expiration) Attempt and conspiracy; penalties.

Any person who attempts or conspires to commit any offense defined in this Article is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (1971, c. 919, s. 1.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Editor's Note. — Because of doubt as to the effective date of the amendment to this § 90-98 in Session Laws 1979, c. 760, s. 5, the section is set out twice in this volume. The section as set out above does not incorporate the amendment. Under Session Laws 1981, c. 63, amending Session Laws 1979, c. 760, s. 6, the amendment will take effect April 15, 1981. It is possible, however, that the amendment will be postponed to a later date by a subsequent 1981 act not available at the time of preparation of this volume. For this section as amended by Session Laws 1979, c. 760, s. 5, and for a detailed discussion of the amendment, see the following section, also numbered 90-98, and the note thereto.

§ 90-98. (See Editor's note for effective date) Attempt and conspiracy; penalties.

Any person who attempts or conspires to commit any offense defined in this Article is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. If the offense the person attempts or conspires to commit is a felony, the attempt or conspiracy is punishable as a felony of the same class as that offense. (1971, c. 919, s. 1; 1979, c. 760, s. 5.)

Editor's Note. — Because of doubt as to the effective date of the amendment to this § 90-98 in Session Laws 1979, c. 760, s. 5, the section is set out twice in this volume. The section as set out above incorporates the amendment. Under Session Laws 1981, c. 63, amending Session Laws 1979, c. 760, s. 6, the amendment will take effect April 15, 1981. It is possible, however, that the amendment will be postponed to a later date by a subsequent 1981 act not available at the time of preparation of this volume. For this section as in effect until the effective date of Session Laws 1979, c. 760, s. 5, see the preceding section, also numbered 90-98. As to the effect of the amendment, see below.

Effect of Amendments. — The 1979 amendment, effective March 1, 1981, added the second sentence. The amendatory act was originally made effective July 1, 1980, but was amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47, so as to postpone the effective date to March 1, 1981, and by Session Laws 1981, c. 63, so as to

postpone the effective date to April 15, 1981. See the Editor's note above.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47, and Session Laws 1981, c. 63, provides: "This act shall become effective on April 15, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 90-99. Republishing of schedules.

The North Carolina Department of Human Resources shall update and republish the schedules established by this Article on a semiannual basis for two years from January 1, 1972, and thereafter on an annual basis. (1971, c. 919, s. 1; 1977, c. 667, s. 3.)

§ 90-100. Rules and regulations.

The North Carolina Drug Commission is authorized to promulgate rules and regulations relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances within this State. (1971, c. 919, s. 1; 1977, c. 667, s. 3.)

CASE NOTES

Stated in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-101. Annual registration to manufacture, etc., controlled substances generally; effect of registration; exceptions; waiver; inspection.

(a) Every person who manufactures, distributes, dispenses or conducts research with any controlled substance within this State or who proposes to engage in the manufacture, distribution, dispensing of, or the conduct of research with any controlled substance within this State, shall obtain annually a registration issued by the North Carolina Department of Human Resources in accordance with rules and regulations promulgated by the North Carolina Drug Commission.

(b) Persons registered by the North Carolina Department of Human Resources under this Article (including research facilities) to manufacture, distribute, dispense or conduct research with controlled substances may possess, manufacture, distribute, dispense or conduct research with those substances to the extent authorized by their registration and in conformity with the other provisions of this Article.

(c) The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this Article:

(1) An agent, or an employee thereof, of any registered manufacturer, distributor, or dispenser of any controlled substance if such agent is acting in the usual course of his business or employment;

(2) A common or contract carrier, or public warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of his business or employment;

(3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner;

(4) Repealed by Session Laws 1977, c. 891, s. 4.

(5) Any law-enforcement officer acting within the course and scope of official duties, or any person employed in an official capacity by, or

acting as an agent of, any law-enforcement agency or other agency charged with enforcing the provisions of this Article when acting within the course and scope of official duties.

(d) The North Carolina Drug Commission may, by regulation, waive the requirement for registration of certain classes of manufacturers, distributors, or dispensers if it finds it consistent with the public health and safety.

(e) A separate registration shall be required at each principal place of business, research or professional practice where the registrant manufactures, distributes, dispenses or uses controlled substances.

(f) The North Carolina Department of Human Resources is authorized to inspect the establishment of a registrant, applicant for registration, or practitioner in accordance with rules and regulations promulgated by the North Carolina Drug Commission.

(g) Practitioners licensed in North Carolina by their respective licensing boards may possess, dispense or administer controlled substances to the extent authorized by law and by their boards.

(h) A physician licensed by the Board of Medical Examiners pursuant to Article 1 of this Chapter may possess, dispense or administer tetrahydrocannabinols in duly constituted pharmaceutical form for human administration for treatment purposes pursuant to regulations adopted by the North Carolina Drug Commission. (1971, c. 919, s. 1; 1973, c. 1358, s. 12; 1977, c. 667, s. 3; c. 891, s. 4; 1979, c. 781.)

Effect of Amendments. — The 1979 amendment added subsection (h).

CASE NOTES

Applied in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

Cited in State v. Tillman, 36 N.C. App. 141, 242 S.E.2d 898 (1978).

§ 90-102. Additional provisions as to registration.

(a) The North Carolina Department of Human Resources shall register an applicant to manufacture or distribute controlled substances included in Schedules I through VI of this Article unless it determines that the issuance of such registration is inconsistent with the public interest. In determining the public interest, the following factors shall be considered:

(1) Maintenance of effective controls against diversion of any controlled substances and any substance compounded therefrom into other than legitimate medical, scientific, or industrial channels;

(2) Compliance with applicable federal, State and local law;

(3) Prior conviction record of applicant, its agents or employees under federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) Past experience in the manufacture of controlled substances, and the existence in the establishment or facility of effective controls against diversion; and

(5) Any factor relating to revocation, suspension, or denial of past registrations, licenses, or applications under this or any other State or federal law;

(6) Such other factors as may be relevant to and consistent with the public health and safety.

(b) Registration granted under subsection (a) of this section shall not entitle a registrant to manufacture and distribute controlled substances included in Schedule I or II other than those specified in the registration.

(c) Individual practitioners licensed to dispense and authorized to conduct research under federal law with Schedules II through V substances must be registered with the North Carolina Department of Human Resources to conduct such research. The North Carolina Department of Human Resources need not require separate registration under this Article for practitioners engaging in research with nonnarcotic controlled substances in Schedules II through V where the registrant is already registered under this Article in another capacity. Practitioners registered under federal law to conduct research with the substances of Schedules I and VI of this Article may conduct research with Schedules I and VI substances within this State by registering with the North Carolina Department of Human Resources upon furnishing evidence of said federal registration.

(d) Manufacturers, distributors and research facilities registered or licensed under federal law to manufacture, distribute or do research on controlled substances included in Schedules I through VI of this Article shall be entitled to registration under this Article, but such registration is expressly made subject to the provisions of G.S. 90-103. Research facilities registered under federal law to conduct research with Schedules I and VI controlled substances may conduct research with Schedules I and VI controlled substances within this State upon furnishing the North Carolina Department of Human Resources evidence of that federal registration.

(e) The North Carolina Department of Human Resources shall initially permit persons to register who own or operate any establishment engaged in the manufacture, distribution, or dispensing of any substances prior to January 1, 1972, and who are registered or licensed by the State. (1971, c. 919, s. 1; 1973, c. 1358, s. 14; 1977, c. 667, s. 3.)

CASE NOTES

Cited in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-103. Revocation or suspension of registration.

(a) A registration under G.S. 90-102 to manufacture, distribute, or dispense a controlled substance, may be suspended or revoked by the North Carolina Drug Commission upon a finding that the registrant:

(1) Has furnished false or fraudulent material information in any application filed under this Article;

(2) Has been convicted of a felony under any State or federal law relating to any controlled substance; or

(3) Has had his federal registration suspended or revoked to manufacture, distribute, or dispense controlled substances.

(b) The North Carolina Drug Commission may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

(c) Before denying, suspending, or revoking a registration or refusing a renewal of registration, the North Carolina Drug Commission shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked, or suspended, or why the renewal should not be refused. The order to show cause shall contain a statement of the basis therefor and shall call upon the applicant or registrant to appear before the North Carolina Drug Commission at a time and place not less than 30 days after the date of service of the order, but in the case of a denial or renewal of registration, the show cause order shall be served not later than 30 days before the expiration

of the registration. These proceedings shall be conducted in accordance with rules and regulations of the North Carolina Drug Commission required by Chapter 150A of the General Statutes, and subject to judicial review as provided in Chapter 150A of the General Statutes. Such proceedings shall be independent of, and not in lieu of, criminal prosecutions or other proceedings under this Article or any law of the State.

(d) The North Carolina Drug Commission may suspend, without an order to show cause, any registration simultaneously with the institutions of proceedings under this section, or where renewal of registration is refused if it finds that there is an imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review thereof, unless sooner withdrawn by the North Carolina Drug Commission, or dissolved by a court of competent jurisdiction.

(e) In the event the North Carolina Drug Commission suspends or revokes a registration granted under G.S. 90-102, all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may in the discretion of the North Carolina Drug Commission be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances may be ordered forfeited to the State.

(f) The Bureau shall promptly be notified of all orders suspending or revoking registration. (1971, c. 919, s. 1; 1973, c. 1331, s. 3; 1977, c. 667, s. 3.)

§ 90-104. Records of registrants or practitioners.

Each registrant or practitioner manufacturing, distributing, or dispensing controlled substances under this Article shall keep records and maintain inventories in conformance with the record-keeping and the inventory requirements of the federal law and shall conform to such rules and regulations as may be promulgated by the North Carolina Drug Commission. (1971, c. 919, s. 1; 1977, c. 667, s. 3.)

CASE NOTES

Quoted in White v. North Carolina Bd. of Pharmacy, 35 N.C. App. 554, 241 S.E.2d 730 (1978).

§ 90-105. Order forms.

Controlled substances included in Schedules I and II of this Article shall be distributed only by a registrant or practitioner, pursuant to an order form. Compliance with the provisions of the Federal Controlled Substances Act or its successor respecting order forms shall be deemed compliance with this section. (1971, c. 919, s. 1.)

CASE NOTES

Quoted in State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-106. Prescriptions and labeling.

(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance included in Schedule II of this Article may be dispensed without the written prescription of a practitioner.

(b) In emergency situations, as defined by rule of the North Carolina Drug Commission, Schedule II drugs may be dispensed upon oral prescription of a practitioner, reduced promptly to writing and filed by the dispensing agent. Prescriptions shall be retained in conformity with the requirements of G.S. 90-104. No prescription for a Schedule II substance may be refilled.

(c) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance included in Schedules III or IV, except paregoric, U.S.P., as provided in G.S. 90-91(e)1, may be dispensed without a prescription, and oral prescriptions shall be promptly reduced to writing and filed with the dispensing agent. Such prescription may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription.

(d) No controlled substance included in Schedule V of this Article or paregoric, U.S.P., may be distributed or dispensed other than for a medical purpose.

(e) No controlled substance included in Schedule VI of this Article may be distributed or dispensed other than for scientific or research purposes by persons registered under, or permitted by, this Article to engage in scientific or research projects.

(f) No controlled substance shall be dispensed or distributed in this State unless such substance shall be in a container clearly labeled in accord with regulations lawfully adopted and published by the federal government or the North Carolina Drug Commission.

(g) When a copy of a prescription for a controlled substance under this Article is given as required by G.S. 90-70, such copy shall be plainly marked: "Copy — for information only." Copies of prescriptions for controlled substances shall not be filled or refilled.

(h) A pharmacist dispensing a controlled substance under this Article shall enter the date of dispensing and shall write his own signature on the face of the prescription pursuant to which such controlled substance was dispensed.

(i) A manufacturer's sales representative may distribute a controlled substance as a complimentary sample only upon the written request of a practitioner. Such request must be made on each distribution and must contain the names and addresses of the supplier and the requester and the name and quantity of the specific controlled substance requested. The manufacturer shall maintain a record of each such request for a period of two years. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, s. 15; 1975, c. 572; 1977, c. 667, s. 3.)

CASE NOTES

Under subsection (a) a physician may lawfully prescribe drugs only through a written prescription. State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

Where a physician prescribes Schedule II controlled drugs, not in the normal course of professional practice in this State, he is acting unlawfully and in violation of subsection (a). State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

Legitimate Medical Purpose Standard Incorporated Into Prescription Requirements of Subsections (a) and (c). — It is inconceivable that the legislature would have imposed tighter strictures on the dispensing of the less dangerous Schedule V drugs than it imposed on the dispensing of the drugs listed in Schedules II, III and IV. It is reasonable to assume that the legislature intended all controlled substances to be dispensed only for legitimate medical purposes and it felt no need specifically to enunciate such a standard for Schedules II, III and IV drugs as it had already incorporated the legitimate medical purpose standard into the prescription requirement of subsections (a) and (c). State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

§ 90-107. Prescriptions, stocks, etc., open to inspection by officials.

Prescriptions, order forms and records, required by this Article, and stocks of controlled substances included in Schedules I through VI of this Article shall be open for inspection only to federal and State officers, whose duty it is to enforce the laws of this State or of the United States relating to controlled substances included in Schedules I through VI of this Article, and to authorized employees of the North Carolina Department of Human Resources. No officer having knowledge by virtue of his office of any such prescription, order, or record shall divulge such knowledge other than to other law-enforcement officials or agencies, except in connection with a prosecution or proceeding in court or before a licensing board or officer to which prosecution or proceeding the person to whom such prescriptions, orders, or records relate is a party. (1971, c. 919, s. 1; 1973, c. 1358, s. 13; 1977, c. 667, s. 3.)

§ 90-108. (See Editor's note for date of expiration) Prohibited acts; penalties.

(a) It shall be unlawful for any person:

(1) Other than practitioners licensed under Articles 1, 2, 4, 6, 11, 12 of this Chapter to represent to any registrant or practitioner who manufactures, distributes, or dispenses a controlled substance under the provision of this Article that he is a licensed practitioner in order to secure or attempt to secure any controlled substance as defined in this Article or to in any way impersonate a practitioner for the purpose of securing or attempting to secure any drug requiring a prescription from a practitioner as listed above and who is licensed by this State;

(2) Who is subject to the requirements of G.S. 90-101 or a practitioner to distribute or dispense a controlled substance in violation of G.S. 90-105 or 90-106;

(3) Who is a registrant to manufacture, distribute, or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;

(4) To omit, remove, alter, or obliterate a symbol required by the Federal Controlled Substances Act or its successor;

(5) To refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice or information required under this Article;

(6) To refuse any entry into any premises or inspection authorized by this Article;

(7) To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article;

(8) Who is a registrant or a practitioner to distribute a controlled substance included in Schedule I or II of this Article in the course of his legitimate business, except pursuant to an order form as required by G.S. 90-105;

(9) To use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(10) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(11) To furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed under this Article, or any record required to be kept by this Article;

(12) To make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit controlled substance.

(b) Any person who violates this section shall be guilty of a misdemeanor. Provided, that if the violation is prosecuted by an information, indictment, or warrant which alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally, such violations shall be a felony punishable by imprisonment for not less than one year nor more than five years and a fine of not more than five thousand dollars ($5,000). (1971, c. 919, s. 1; 1973, c. 1358, s. 11.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Editor's Note. — Because of doubt as to the effective date of the amendment to this § 90-108 in Session Laws 1979, c. 760, s. 5, the section is set out twice in this volume. The section as set out above does not incorporate the amendment. Under Session Laws 1981, c. 63, amending Session Laws 1979, c. 760, s. 6, the amendment will take effect April 15, 1981. It is possible, however, that the amendment will be postponed to a later date by a subsequent 1981 act not available at the time of preparation of this volume. For this section as amended by Session Laws 1979, c. 760, s. 5, and for a detailed discussion of the amendment, see the following section, also numbered 90-108, and the note thereto.

Legal Periodicals. — For note on the punishment of physicians under the Controlled Substances Act, see 56 N.C.L. Rev. 154 (1978).

CASE NOTES

When Writing of Prescription by Physician Violates Section. — Where a licensed physician writes a prescription for a controlled substance listed in Schedules II, III, IV or V, and that prescription is written outside of the normal course of professional practice in North Carolina and not for a legitimate medical purpose, the physician violates this section. State v. Best, 292 N.C. 294, 233 S.E.2d 544 (1977).

Applied in State v. Booze, 29 N.C. App. 397, 224 S.E.2d 298 (1976); State v. Austin, 31 N.C. App. 20, 228 S.E.2d 507 (1976).

§ 90-108. (See Editor's note for effective date) Prohibited acts; penalties.

(a) It shall be unlawful for any person:

(1) Other than practitioners licensed under Articles 1, 2, 4, 6, 11, 12 of this Chapter to represent to any registrant or practitioner who manufactures, distributes, or dispenses a controlled substance under the provision of this Article that he is a licensed practitioner in order to secure or attempt to secure any controlled substance as defined in this Article

or to in any way impersonate a practitioner for the purpose of securing or attempting to secure any drug requiring a prescription from a practitioner as listed above and who is licensed by this State;

(2) Who is subject to the requirements of G.S. 90-101 or a practitioner to distribute or dispense a controlled substance in violation of G.S. 90-105 or 90-106;

(3) Who is a registrant to manufacture, distribute, or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;

(4) To omit, remove, alter, or obliterate a symbol required by the Federal Controlled Substances Act or its successor;

(5) To refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice or information required under this Article;

(6) To refuse any entry into any premises or inspection authorized by this Article;

(7) To knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article;

(8) Who is a registrant or a practitioner to distribute a controlled substance included in Schedule I or II of this Article in the course of his legitimate business, except pursuant to an order form as required by G.S. 90-105;

(9) To use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(10) To acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(11) To furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed under this Article, or any record required to be kept by this Article;

(12) To make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit controlled substance.

(b) Any person who violates this section shall be guilty of a misdemeanor. Provided, that if the violation is prosecuted by an information, indictment, or warrant which alleges that the violation was committed intentionally, and upon trial it is specifically found that the violation was committed intentionally, such violations shall be a Class I felony. (1971, c. 919, s. 1; 1973, c. 1358, s. 11; 1979; c. 760, s. 5.)

Editor's Note. — Because of doubt as to the effective date of the amendment to this § 90-108 in Session Laws 1979, c. 760, s. 5, the section is set out twice in this volume. The section as set out above incorporates the amendment. Under Session Laws 1981, c. 63, amending Session Laws 1979, c. 760, s. 6, the amendment will take effect April 15, 1981. It is possible, however, that the amendment will be postponed to a later date by a subsequent 1981 act not available at the time of preparation of this volume. For this section as in effect until the effective date of Session Laws 1979, c. 760, s. 5, see the preceding section, also numbered 90-108. As to the effect of the amendment, see below.

Article 12 of this Chapter, referred to in subsection (a)(1), has been recodified as Article 12A.

Effect of Amendments. — The 1979 amendment, effective March 1, 1981, substituted "Class I felony" for "felony punishable by

imprisonment for not less than one year nor more than five years and a fine of not more than five thousand dollars ($5,000)" at the end of subsection (b). The amendatory act was originally made effective July 1, 1980, but was amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47, so as to postpone the effective date to March 1, 1981, and by Session Laws 1981, c. 63, so as to postpone the effective date to April 15, 1981. See the Editor's note above.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47, and Session Laws 1981, c. 63, provides: "This act shall become effective on April 15, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 90-109. Nonprofessional treatment.

(a) Any person other than a practitioner, who holds himself out to the public, or any part of it, as being a drug treatment facility, or being able or available to treat, give shelter or comfort to, including telephone crisis services (hotlines), or who proposes to do any of the foregoing to or for any person using, under the influence of, or experiencing the effects of a controlled substance, included in Schedules I through VI of this Article shall first be licensed by the North Carolina Department of Human Resources as a drug treatment facility in accordance with rules and regulations adopted by the North Carolina Drug Commission.

(b) A license required by this section shall be obtained from the North Carolina Department of Human Resources and may be in the form of a letter from the North Carolina Department of Human Resources, signed by the Secretary of the North Carolina Department of Human Resources to the person applying for the license. A license as required by this section shall not be transferable, shall be prominently displayed at the place where treatment, shelter or comfort are afforded, and shall bear such reasonable restrictions, including duration, as the North Carolina Department of Human Resources may impose on it. A license application as required by this section need not be in any special form, but must disclose the essential plan of operation of the proposed drug treatment facility, the names and qualifications of all persons agreeing to provide professional medical services, paramedical or associated services, and the identity and qualifications of the supervisory and adult persons who will be available at the place of the proposed drug treatment facility.

(c) The North Carolina Department of Human Resources shall not issue a drug treatment facility license to an applicant until it shall satisfy itself that professional and competent medical services are at all times available to the applicant at the drug treatment facility, that a responsible adult will be present or immediately available to the applicant at all times at the drug treatment facility, and that the applicant will make a positive contribution toward controlling drug dependence and assisting drug dependent persons. The North Carolina Department of Human Resources may deny license applications of proposed or existing drug treatment facilities if it finds there are reasonable grounds for belief that issuance of the license would be inconsistent with the safety of the public or with the application of law. A decision of the North Carolina Department of Human Resources to deny or revoke a drug treatment facility license may be appealed to the North Carolina Drug Commission in accordance with rules and regulations adopted by the Commission.

(d) A license granted under this section shall not in any way alter or reduce the liability of the licensee, its agents or employees, voluntary or compensated, with respect to any phase of its operations.

(e) Violation of this section shall be a misdemeanor. (1971, c. 919, s. 1; 1973, c. 1361; 1977, c. 667, s. 3.)

§ 90-109.1. Treatment.

(a) A person may request treatment and rehabilitation for drug dependence from a practitioner, and such practitioner or employees thereof shall not disclose the name of such person to any law-enforcement officer or agency; nor shall such information be admissible as evidence in any court, grand jury, or administrative proceeding unless authorized by the person seeking treatment. A practitioner may undertake the treatment and rehabilitation of such person or refer such person to another practitioner for such purpose and under the same requirement of confidentiality.

(b) A person seeking treatment or rehabilitation for drug dependence shall first be examined and evaluated by a practitioner. Such practitioner shall prescribe a proper course of treatment and medication, if needed. The treating practitioner may further prescribe a course of treatment or rehabilitation and authorize another practitioner to provide the prescribed treatment or rehabilitation services.

(c) Every practitioner that provides treatment or rehabilitation services to a person dependent upon drugs shall periodically as required by the Secretary of the North Carolina Department of Human Resources commencing January 1, 1972, make a statistical report to the Secretary of the North Carolina Department of Human Resources in such form and manner as the Secretary shall prescribe for each such person treated or to whom rehabilitation services were provided. The form of the report prescribed shall be furnished by the Secretary of the North Carolina Department of Human Resources. Such report shall include the number of persons treated or to whom rehabilitation services were provided; the county of such person's legal residence; the age of such person; the number of such persons treated as inpatients and the number treated as outpatients; the number treated who had received previous treatment or rehabilitation services; and any other data required by the Secretary. If treatment or rehabilitation services are provided to a person by a hospital, public agency, or drug treatment facility, such hospital, public agency, or drug treatment facility shall coordinate with the treating medical practitioner so that statistical reports required in this section shall not duplicate one another. The Secretary shall cause all such reports to be compiled into periodical reports which shall be a public record. (1971, c. 919, s. 1; 1977, c. 667, s. 3.)

§ 90-110. Injunctions.

(a) The superior court of North Carolina shall have jurisdiction in proceedings in accordance with the rules of those courts to enjoin violations of this Article.

(b) In case of an alleged violation of an injunction or restraining order issued under this section, trial shall, upon demand of the accused, be by a jury in accordance with the rules of the superior courts of North Carolina. (1971, c. 919, s. 1.)

§ 90-111. Cooperative arrangements.

The North Carolina Department of Human Resources and the Attorney General of North Carolina shall cooperate with federal and other State agencies in discharging their responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end, they are authorized to:

(1) Arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances;

(2) Coordinate and cooperate in training programs on controlled substances for law enforcement at the local and State levels;

(3) Cooperate with the Bureau by establishing a centralized unit which will accept, catalogue, file, and collect statistics, including records of drug-dependent persons and other controlled substance law offenders within the State, and make such information available for federal, State, and local law-enforcement purposes. Provided that neither the Attorney General of North Carolina, the North Carolina Department of Human Resources nor any other State officer or agency shall be authorized to accept or file, or give out the names or other form of personal identification of drug-dependent persons who voluntarily seek treatment or assistance related to their drug dependency. (1971, c. 919, s. 1; 1977, c. 667, s. 3.)

§ 90-112. Forfeitures.

(a) The following shall be subject to forfeiture:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of the provisions of this Article;

(2) All raw material, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of the provisions of this Article;

(3) All property which is used, or intended for use, as a container for property described in subdivisions (1) and (2);

(4) All conveyances, including vehicles, vessels, or aircraft, which are used or intended for use to unlawfully conceal, convey, or transport, or in any manner to facilitate the unlawful concealment, conveyance, or transportation of property described in (1) or (2), except that

a. No conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this Article unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this Article;

b. No conveyance shall be forfeited under the provisions of this section by reason of any act or omission, committed or omitted while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any state;

c. No conveyance shall be forfeited unless the violation involved is a felony under this Article;

d. A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who had no knowledge of or consented to the act or omission.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this Article.

(b) Any property subject to forfeiture under this Article may be seized by any law-enforcement officer upon process issued by any district or superior court having jurisdiction over the property except that seizure without such process may be made when:

(1) The seizure is incident to an arrest or a search under a search warrant;

(2) The property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under this Article.

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in custody of the law-enforcement agency seizing it, which may:

(1) Place the property under seal; or,
(2) Remove the property to a place designated by it; or,
(3) Request that the North Carolina Department of Justice take custody of the property and remove it to an appropriate location for disposition in accordance with law.

(d) Whenever property is forfeited under this Article, the law-enforcement agency having custody of it may:

(1) Retain the property for official use; or
(2) Sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public, provided that the proceeds be disposed of for payment of all proper expenses of the proceedings for forfeiture and sale including expense of seizure, maintenance of custody, advertising, and court costs; or
(3) Transfer any conveyance including vehicles, vessels, or aircraft which are forfeited under the provisions of this Article to the North Carolina Department of Justice when, in the discretion of the presiding judge and upon application of the North Carolina Department of Justice, said conveyance may be of official use to the North Carolina Department of Justice;
(4) Upon determination by the director of any law-enforcement agency that a vehicle, vessel or aircraft transferred pursuant to the provisions of this Article is of no further use to said agency for use in official investigations, such vehicle, vessel or aircraft may be sold as surplus property in the same manner as other vehicles owned by the law-enforcement agency and the proceeds from such sale after deducting the cost of sale shall be paid to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of the county in the county in which said vehicle, vessel or aircraft was seized; provided, that any vehicle transferred to any law-enforcement agency under the provisions of this Article which has been modified to increase speed shall be used in the performance of official duties only and not for resale, transfer or disposition other than as junk.

(e) All substances included in Schedules I through VI that are possessed, transferred, sold, or offered for sale in violation of the provisions of this Article shall be deemed contraband and seized and summarily forfeited to the State. All substances included in Schedules I through VI of this Article which are seized or come into the possession of the State, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the State according to rules and regulations of the North Carolina Department of Justice.

All species of plants from which controlled substances included in Schedules I, II and VI of this Article may be derived, which have been planted or cultivated in violation of this Article, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the State.

The failure, upon demand by the Attorney General of North Carolina, or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(f) All conveyances subject to forfeiture under the provisions of this Article shall be forfeited as in the case of conveyances used to conceal, convey, or transport intoxicating beverages. (1971, c. 919, s. 1; 1973, cc. 447, 542; c. 1446, s. 6.)

CASE NOTES

Currency was not subject to forfeiture under this section solely by virtue of being found in "close proximity" to the controlled substance which the defendant was convicted of possessing. State v. McKinney, 36 N.C. App. 614, 244 S.E.2d 455 (1978).

Cited in State v. Rogers, 28 N.C. App. 110, 220 S.E.2d 398 (1975).

OPINIONS OF ATTORNEY GENERAL

Standing of Property Owner to Contest Seizure. — Owner of a motor vehicle seized under the provisions of this section from a legal possessor of such motor vehicle does not have standing to intervene and petition for return of his vehicle as he does under the provisions of G.S. 18A-21. Opinion of Attorney General to Honorable Robert Rouse, 44 N.C.A.G. 262 (1975).

§ 90-112.1. Remission or mitigation of forfeitures; possession pending trial.

(a) Whenever, in any proceeding in court for a forfeiture, under G.S. 90-112 of any conveyance seized for a violation of this Article the court shall have exclusive jurisdiction to continue, remit or mitigate the forfeiture.

(b) In any such proceeding the court shall not allow the claim of any claimant for remission or mitigation unless and until he proves (i) that he has an interest in such conveyance, as owner or otherwise, which he acquired in good faith; (ii) that he had no knowledge, or reason to believe, that it was being or would be used in the violation of laws of this State relating to controlled substances; (iii) that his interest is in an amount in excess or equal to the fair market value of such conveyance.

(c) If the court, in its discretion, allows the remission or mitigation the conveyance shall be returned to the claimant; and should there be joint request of any two or more claimants, whose claims are allowed, the court shall order the return of the conveyance to such of the joint requesting claimants as have the prior claim on lien. Such return shall be made only upon payment of all expenses incident to the seizure and forfeiture incurred by the State. In all other cases the court shall order disposition of such conveyance as provided in G.S. 90-112, and after satisfaction of the expenses of the sale, and such claims as may be approved by the court, the funds shall be paid to the treasurer or proper officer authorized to receive fines and forfeitures to be used for the school fund of the county in which said vehicle was seized.

(d) If the court should determine that the conveyance should be held for purposes of evidence, then it may order the vehicle to be held until the case is heard. (1975, c. 601.)

§ 90-113: Repealed by Session Laws 1973, c. 540, s. 7.

§ 90-113.1. Burden of proof; liabilities.

(a) It shall not be necessary for the State to negate any exemption or exception set forth in this Article in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this Article, and the burden of proof of any such exemption or exception shall be upon the person claiming its benefit.

(b) In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this Article, he shall be presumed not to be the holder of such registration or form, and the burden of proof shall be upon him to rebut such presumption.

(c) No liability shall be imposed by virtue of this Article upon any duly authorized officer, engaged in the lawful enforcement of this Article. (1971, c. 919, s. 1.)

CASE NOTES

Prosecution of Officer's Agent. — It would violate every precept of fair play and fundamental justice to allow a law-enforcement officer to benefit from this section's protection and at the same time prosecute his youthful agent, who at his insistence violated the provisions of the act. State v. Stanley, 288 N.C. 19, 215 S.E.2d 589 (1975).

§ 90-113.2. Judicial review.

All final determinations, findings, and conclusions of the North Carolina Drug Commission under this Article shall be final and conclusive decisions of the matters involved, except that any person aggrieved by such decision may obtain review of the decision as provided in Chapter 150A of the General Statutes. Findings of fact by the North Carolina Drug Commission, if supported by substantial evidence, shall be conclusive. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1331, s. 3; 1977, c. 667, s. 3; c. 891, s. 5.)

§ 90-113.3. Education and research.

(a) The North Carolina Department of Public Instruction and the Board of Governors of the University of North Carolina are authorized and directed to carry out educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with such programs, they are authorized to:

(1) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups and organizations;

(2) Assist the regulated industry and interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances; and

(3) Disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them.

(b) The North Carolina Department of Public Instruction and the Board of Governors of the University of North Carolina or either of them may enter into contracts for educational activities related to controlled substances.

(c) The North Carolina Department of Human Resources is authorized and directed to encourage research on misuse and abuse of controlled substances. In connection with such research and in furtherance of the enforcement of this Article, it is authorized to:

(1) Establish methods to assess accurately the effects of controlled substances and to identify and characterize controlled substances with potential for abuse;

(2) Make studies and undertake programs of research to:

a. Develop new or improved approaches, techniques, systems, equipment, and devices to strengthen the enforcement of this Article;

b. Determine patterns of misuse and abuse of controlled substances and the social effect thereof; and

c. Improve methods for preventing, predicting, understanding, and dealing with the misuse and abuse of controlled substances.

(3) Enter into contracts with other public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.

(d) The North Carolina Department of Human Resources may enter into contracts for research activities related to controlled substances, and the North Carolina Department of Public Instruction and the Board of Governors of the University of North Carolina or either of them may enter into contracts for educational activities related to controlled substances, without performance bonds.

(e) The North Carolina Department of Human Resources may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of persons who are the subjects of such research. Persons who obtain this authorization may not be compelled in any State civil, criminal, administrative, legislative, or other proceeding to identify the subjects of research for which such authorization was obtained.

(f) The North Carolina Department of Human Resources may authorize persons engaged in research to possess and distribute controlled substances in accordance with such restrictions as the authorization may impose. Persons who obtain this authorization shall be exempt from State prosecution for possession and distribution of controlled substances to the extent authorized by the North Carolina Department of Human Resources. (1971, c. 919, s. 1; c. 1244, s. 14; 1973, c. 476, s. 128; 1977, c. 667, s. 3.)

§ 90-113.4. Possession of hypodermic syringes and needles regulated.

(a) No person except a manufacturer or a wholesaler or agents or employees of such manufacturers or wholesalers or a retail dealer in surgical instruments, practitioner, or registered research facility, shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of administering controlled substances injections and which is possessed for the purpose of administering controlled substances, unless such possession be authorized by the certificate of a physician issued within the period of one year prior thereto; provided, however, a nurse who is licensed by the North Carolina Board of Nursing and who is specifically authorized by a physician or dentist to give subcutaneous injections under the supervision or direction of such physician or dentist may possess hypodermic syringes or needles for the purpose of giving such injections.

(b) Violation of this section shall be a misdemeanor. (1971, c. 919, s. 1.)

CASE NOTES

Applied in State v. Kelly, 13 N.C. App. 588, 186 S.E.2d 631 (1972); State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973); State v. Edmonds, 19 N.C. App. 105, 198 S.E.2d 27 (1973); State v. Hart, 33 N.C. App. 235, 234 S.E.2d 430 (1977).

Quoted in State v. Kelly, 281 N.C. 618, 189 S.E.2d 163 (1972).

§ 90-113.4A. Destroying hypodermic syringes and needles before discarding.

(a) It shall be unlawful for any firm, organization, corporation, hospital, medical clinic, their agents or employees to discard a hypodermic syringe or needle unless such instrument is first rendered inoperable for future use; provided that this section shall not apply to the discarding of such instruments after personal use by individuals who are under the care of a physician, and further provided that this section shall not apply to the discarding of such instruments after use for the treatment of livestock.

(b) Violation of this section shall be a misdemeanor. (1977, c. 907, s. 1.)

§ 90-113.5. State Board of Pharmacy, North Carolina Department of Justice and peace officers to enforce Article.

It is hereby made the duty of the State Board of Pharmacy, its officers, agents, inspectors, and representatives, and all peace officers within the State, including agents of the North Carolina Department of Justice, and all State's attorneys, to enforce all provisions of this Article, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this State, and of all other states, relating to controlled substances. The North Carolina Department of Justice is hereby authorized to make initial investigation of all violations of this Article, and is given original but not exclusive jurisdiction in respect thereto with all other law-enforcement officers of the State. (1971, c. 919, s. 1.)

§ 90-113.6. Payments and advances.

(a) The Attorney General is authorized to pay any person, from funds appropriated for the North Carolina Department of Justice, for information concerning a violation of this Article, such sum or sums of money as he may find appropriate, without reference to any rewards to which such persons may otherwise be entitled by law.

(b) Moneys expended from appropriations of the North Carolina Department of Justice for the purchase of controlled substances or other substances proscribed by this Article which is subsequently recovered shall be reimbursed to the current appropriation for the Department.

(c) The Attorney General is authorized to direct the advance of funds by the State Treasurer in connection with the enforcement of this Article. (1971, c. 919, s. 1.)

§ 90-113.7. Pending proceedings.

(a) Prosecutions for any violation of law occurring prior to January 1, 1972, shall not be affected by these repealers, or amendments, or abated by reason, thereof.

(b) Civil seizures or forfeitures and injunctive proceedings commenced prior to January 1, 1972, shall not be affected by these repealers, or amendments, or abated by reason, thereof.

(c) All administrative proceedings pending on January 1, 1972, shall be continued and brought to final determination in accord with laws and regulations in effect prior to January 1, 1972. Such drugs placed under control prior to January 1, 1972, which are not included within Schedules I through VI of this Article shall automatically be controlled and listed in the appropriate schedule.

(d) The provisions of this Article shall be applicable to violations of law, seizures and forfeiture, injunctive proceedings, administrative proceedings, and investigations which occur following January 1, 1972. (1971, c. 919, s. 1.)

CASE NOTES

Legislative Intent for Prospective Application of Act. — The expressed intent of the General Assembly that the provisions of the Controlled Substances Act be prospective relates to the entire act. State v. Kelly, 281 N.C. 618, 189 S.E.2d 163 (1972).

The General Assembly intended that the provisions of the Controlled Substances Act be prospective and effective as of Jan. 1, 1972. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Effect of the Savings Clause. — The savings provision of this section leaves the Narcotic Drug Act, former §§ 90-86 to 90-113 of this Chapter, continued in full force and effect for any offense committed prior to Jan. 1, 1972. State v. McIntyre, 281 N.C. 304, 188 S.E.2d 304 (1972).

Where the repealing statute contains a savings clause as to crimes committed prior to the repeal, or as to pending prosecutions, the offender may be tried and punished under the old law. In such case, the crime is punishable under the old statute although no prosecution is pending at the time the new statute goes into effect. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

Prior Law Controls as to Prosecution and Punishment for Offenses Committed prior to Jan. 1, 1972. — The law as to prosecution and punishment as set forth in former Articles 5 and 5A of this Chapter as written prior to Jan. 1, 1972, remains in full force and effect as to offenses committed prior to Jan. 1, 1972. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400, cert. denied, 281 N.C. 155, 188 S.E.2d 366 (1972); State v. Williams, 14 N.C. App. 431, 188 S.E.2d 717, cert. denied, 281 N.C. 627, 190 S.E.2d 473 (1972); State v. Lindquist, 14 N.C. App. 361, 188 S.E.2d 686 (1972).

For earlier cases indicating that reduction in grade of offenses committed prior to Jan. 1, 1972, inures to the benefit of the defendant, see State v. Smith, 13 N.C. App. 583, 186 S.E.2d 600, cert. denied, 281 N.C. 157, 187 S.E.2d 586 (1972); State v. Guy, 13 N.C. App. 637, 186 S.E.2d 663 (1972).

Prosecution Defined. — A prosecution consists of the series of proceedings had in the bringing of an accused person to justice, from the time when the formal accusation is made, by the filing of an affidavit or a bill of indictment or information in the criminal court, until the proceedings are terminated. This is a correct definition of the word "prosecution" and is consistent with the legislative intent expressed in this section. State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972).

"Prosecution" as the word is used in this section includes every step in a criminal action, from its commencement to its final determination by appellate review or until defendant begins to serve his sentence without pursuing an appeal or until the action is dismissed. State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400, cert. denied, 281 N.C. 155, 188 S.E.2d 366 (1972).

§ 90-113.8. Continuation of regulations.

Any orders, rules, and regulations which have been promulgated under any law affected by this act [c. 919 of the 1971 Session Laws] and which are in effect on the day preceding January 1, 1972, shall continue in effect until modified, superseded, or repealed by proper authority. (1971, c. 919, s. 2.)

ARTICLE 5A.

North Carolina Toxic Vapors Act.

§ 90-113.8A. Title.

This Article shall be known and may be cited as the "North Carolina Toxic Vapors Act." (1971, c. 1208, s. 1.)

CASE NOTES

Constitutionality. — It is clear to men of ordinary intelligence that they are forbidden from smelling with the intention of getting drunk or high, any vapors with the quality of causing the proscribed conditions. This is all the definition necessary to comply with the Constitution. State v. Futrell, 39 N.C. App. 674, 251 S.E.2d 715 (1979), decided prior to 1979 amendments to Article.

This Article does not create a class so broad that the inhaling of steam in sufficient quantity, the smoking of tobacco, or the smelling of perfume could be covered by the statute. State v. Futrell, 39 N.C. App. 674, 251 S.E.2d 715 (1979), decided prior to 1979 amendments to Article.

§ 90-113.9. Definitions.

For purposes of this Article, unless the context requires otherwise,

(1) "Intoxication" means drunkenness, stupefaction, depression, giddiness, paralysis, irrational behavior, or other change, distortion, or disturbance of the auditory, visual, or mental processes. (1971, c. 1208, s. 1; 1979, c. 671, s. 1.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote this section, which formerly read: "No person shall, for the purpose of causing a condition of intoxication, inebriation, excitement, stupefaction, or the dulling of his brain, or nervous system, intentionally smell or inhale the fumes from any substance having the property of releasing toxic vapors or fumes; provided, that nothing in this section shall be interpreted as applying to the inhalation of any anesthesia for medical or dental purposes."

§ 90-113.10. Inhaling fumes for purpose of causing intoxication.

It is unlawful for any person to knowingly breathe or inhale any compound, liquid, or chemical containing toluol, hexane, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other substance for the purpose of inducing a condition of intoxication. This section does not apply to any person using as an inhalant any chemical substance pursuant to the direction of a physician or dentist. (1971, c. 1208, s. 1; 1979, c. 671, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote this section, which formerly read: "No person shall, for the purpose of violating G.S. 90-113.9, use or possess for the purpose of so using any substance having the property of releasing toxic vapors or fumes."

§ 90-113.11. Possession of substances.

It is unlawful for any person to possess any compound, liquid, or chemical containing toluol, hexane, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other substance which will induce a condition of intoxication through inhalation for the purpose of violating G.S. 90-113.10. (1971, c. 1208, s. 1; 1979, c. 671, s. 3.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote this section, which formerly read: "No person shall sell, or offer to sell, to any other person any substances having the property of releasing toxic vapors or fumes, if he has reasonable cause to suspect that the product sold, or offered for sale, will be used for the purpose set forth in G.S. 90-113.9."

§ 90-113.12. Sale of substance.

It is unlawful for any person to sell, offer to sell, deliver, give, or possess with the intent to sell, deliver, or give any other person any compound, liquid, or chemical containing toluol, hexane, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other substance which will induce a condition of intoxication through inhalation if he has reasonable cause to suspect that the product sold, offered for sale, given, delivered, or possessed with the intent to sell, give, or deliver, will be used for the purpose of violating G.S. 90-113.10. (1971, c. 1208, s. 1; 1979, c. 671, s. 4.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote this section, which formerly read: "Violation of this Article shall be a misdemeanor."

§ 90-113.13. Violation a misdemeanor.

Violation of this Article is a misdemeanor. (1979, c. 671, s. 5.)

Editor's Note. — Session Laws 1979, c. 671, s. 6, makes this section effective July 1, 1979.

§ 90-113.14. Conditional discharge and expunction of records for first offenses.

(a) Whenever any person who has not previously been convicted of any offense under Article 5 or 5A of Chapter 90, or under any statute of the United States, or any state relating to those substances included in Article 5 or 5A of Chapter 90 pleads guilty to or is found guilty of violating Article 5 or 5A by possessing cannabis as prohibited thereunder, the court may without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of such Articles. Discharge and dismissal under this section may occur only once with respect to any person.

(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the misdemeanor in question and has not been convicted of any felony, or misdemeanor, other than a traffic violation, under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character

and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the period of probation following the decision to defer further proceedings on the misdemeanor in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the North Carolina Drug Authority, the names of all persons convicted under such Articles, together with the offense or offenses of which such persons were convicted. The clerk shall also file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under Article 5 or 5A has been previously granted a conditional discharge. (1971, c. 1078; 1975, s. 650, ss. 3, 4; 1977, c. 642, s. 3; 1979, c. 431, ss. 3, 4.)

Effect of Amendments. — The 1979 amendment rewrote subdivision (b)(3) and added the second paragraph of subsection (b).

CASE NOTES

Destruction of Police Investigative Files. — Except for the possible application of this section, there is no statutory authority in North Carolina for the destruction of police investigative files containing fingerprints and photographs of an accused. State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

Should it be conceded that in extraordinary circumstances a remedy is available to have police investigative files destroyed or

expunged, it would require notice, an opportunity to be heard, and findings of fact supporting the action taken. State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

OPINIONS OF ATTORNEY GENERAL

"Not over 21 Years" Means "until Twenty-Second Birthday". — See opinion of Attorney General to Mr. Harvey D. Johnson, 42 N.C.A.G. 319 (1973).

ARTICLE 6.

Optometry.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-114. Optometry defined.

Any one or any combination of the following practices shall constitute the practice of optometry:

(1) The examination of the human eye by any method, other than surgery, to diagnose, to treat, or to refer for consultation or treatment any abnormal condition of the human eye and its adnexa; or

(2) The employment of instruments, devices, pharmaceutical agents and procedures, other than surgery, intended for the purposes of investigating, examining, treating, diagnosing or correcting visual defects or abnormal conditions of the human eye or its adnexa; or

(3) The prescribing and application of lenses, devices containing lenses, prisms, contact lenses, orthoptics, vision training, pharmaceutical agents, and prosthetic devices to correct, relieve, or treat defects or abnormal conditions of the human eye or its adnexa.

Provided, however, in using or prescribing pharmaceutical agents, other than topical pharmaceutical agents within the definition hereinabove set out which are used for the purpose of examining the eye, the optometrist so using or prescribing shall communicate and collaborate with a physician duly licensed to practice medicine in North Carolina designated or agreed to by the patient. (1909, c. 444, s. 1; C. S., s. 6687; 1923, c. 42, s. 1; 1977, c. 482, s. 1.)

Legal Periodicals. — For comment on Article, see 1 N.C.L. Rev. 300.

CASE NOTES

Editor's Note. — The following cases were decided under this section as it stood prior to the 1977 amendment.

This Article was intended to regulate the practice of optometry, and not the optical trade. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948).

This section is in substantial accord with the definitions given in other jurisdictions. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948).

The duplication of an ophthalmic lens, or the duplication or replacement of a frame or mounting for such lenses, does not constitute the practice of optometry as defined in this section. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948). See note to § 90-115.

Neither an optician nor an optometrist is permitted to use any medicine to treat the eye in order to relieve irritation or for any other trouble which requires the use of drugs. High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

§ 90-115. Practice without registration unlawful.

After the passage of this Article it shall be unlawful for any person to practice optometry in the State unless he has first obtained a certificate of registration as hereinafter provided. Within the meaning of this Article, a person shall be deemed as practicing optometry who does, or attempts to, sell, furnish, replace, or duplicate, a lens, frame, or mounting, or furnishes any kind of material or apparatus for ophthalmic use, without a written prescription from a person authorized under the laws of the State of North Carolina to practice optometry, or from a person authorized under the laws of North Carolina to practice medicine: Provided, however, that the provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles, without advice or aid as to the selection thereof, as merchandise from permanently located or established places of business, nor shall it prohibit persons or corporations from making mechanical repairs to frames for spectacles; nor shall it prohibit any person, firm, or corporation engaged in grinding lenses and filling prescriptions from replacing or duplicating lenses on original prescriptions issued by a duly licensed optometrist, and oculist. (1909, c. 444, s. 2; C. S., s. 6688; 1935, c. 63; 1967, c. 691, s. 43.)

CASE NOTES

Section Is Invalid in Part. — This section is invalid insofar as it declares that a person is practicing optometry when he replaces or duplicates an ophthalmic lens, or replaces or duplicates the frame or mounting for such lens, for these acts do not constitute the practice of optometry as defined by § 90-114, and the prescription has no reasonable relation to the public health, safety or welfare. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948). See Const., Art. I, §§ 1, 19, and 34.

Effect of Definition in § 90-114. — The mere fact that this section provides that a person shall be deemed to be practicing optometry if he duplicates a lens or replaces or duplicates a frame or mounting, without a prescription, does not make it so, unless such duplication or replacement constitutes the practice of optometry within the definition thereof in § 90-114. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948), decided prior to 1977 amendment of § 90-114.

What Optician May Do. — So long as an optician confines his work to the mere mechanical process of duplicating lenses, replacing or duplicating frames and mountings, "making mechanical repairs to frames for spectacles," and filling prescriptions issued by a duly licensed optometrist or oculist, and does not in any manner undertake "the measurement of the powers of vision and the adaptation of lenses for the aid thereof," he is not practicing optometry. Palmer v. Smith, 229 N.C. 612, 51 S.E.2d 8 (1948), decided prior to 1977 amendment of § 90-114.

Cited in High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

§ 90-115.1. Acts not constituting the unlawful practice of optometry.

In addition to the exemptions from this Article otherwise existing the following acts or practices shall not constitute the unlawful practice of optometry:

(1) The practice of optometry, in the discharge of their official duties, by optometrists in any branch of the military service of the United States or in the full employ of any agency of the United States.

(2) The teaching of optometry, in optometry schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Examiners in Optometry, by any person or persons licensed to practice optometry anywhere in the United States or in any country, territory or other recognized jurisdiction; provided, however, that such teaching of optometry by any person or persons licensed in any jurisdiction other than a place in the United States must first be approved by the North Carolina State Board of Examiners in Optometry.

(3) The practice of optometry in optometry schools or colleges in this State approved by the North Carolina State Board of Examiners in Optometry by students enrolled in such schools or colleges when such practice is performed as a part of their course of instruction and is under the supervision of an optometrist who is either duly licensed in North Carolina or qualified under subdivision (2) above as a teacher. Additionally, the practice of optometry by such students at any location upon patients or inmates of institutions wholly owned or operated by the State of North Carolina or any political subdivision or subdivisions thereof when, in the opinion of the dean of such optometry school or college or his designee, the student's optometric education and experience is adequate therefor, subject to review and approval by the said Board of Examiners in Optometry, and such practice is a part of the course of instruction of such students, is performed under the supervision of a duly licensed optometrist acting as a teacher or instructor and is without remuneration except for expenses and subsistence as defined and permitted by the rules and regulations of said Board of Examiners in Optometry.

(4) The temporary practice of optometry by licensed optometrists of another state or of any territory or country when the same is performed, as clinicians, at meetings or organized optometric societies, associations, colleges or similar optometric organizations, or when such optometrists appear in emergency cases upon the specific call of and in consultation with an optometrist duly licensed to practice in this State.

(5) The practice of optometry by a person who is a graduate of an optometric school or college approved by the North Carolina State Board of Examiners in Optometry and who is not licensed to practice optometry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Examiners in Optometry pursuant to the terms and provisions of this Article, and when such practice of optometry complies with the conditions of said intern permit, or provisional license.

(6) Any act or acts performed by an optometric assistant or technician to an optometrist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board.

(7) Optometric assisting and related functions as a part of their instructions by optometric assistant students enrolled in a course conducted in this State and approved by the Board, when such functions are performed under the supervision of an optometrist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of optometry pursuant to the provisions of subdivision (2) above. (1975, c. 733.)

§ 90-116. Board of Examiners in Optometry.

There is hereby created a board, whose duty it shall be to carry out the purposes and enforce the provisions of this Article, and which shall be styled the "North Carolina State Board of Examiners in Optometry." This Board shall be elected by the North Carolina State Optometric Society and commissioned by the Governor and shall consist of five regular optometrists who are members of the North Carolina State Optometric Society and who have been engaged in the practice of optometry in the State for five years. The terms of the members shall be as follows: one for one year, one for two years, one for three years, one for four years, one for five years. The terms of members thereafter appointed shall be for five years. The members of the Board, before entering upon their duties, shall respectively take all oaths taken and prescribed for other State officers, in the manner provided by law, which shall be filed in the office of the Secretary of State, and the Board shall have a common seal. The North Carolina State Optometric Society shall have the power to fill all vacancies on said Board for unexpired terms, and members so elected shall be commissioned by the Governor. (1909, c. 444, s. 3; 1915, c. 21, s. 1; C. S., s. 6689; 1935, c. 63.)

§ 90-117. Officers; common seal.

The North Carolina State Board of Examiners in Optometry shall, at each annual meeting thereof, elect one of its members president and one secretary-treasurer. The common seal which has already been adopted by said Board, pursuant to law, shall be continued as the seal of said Board. (1909, c. 444, s. 4; C. S., s. 6690; 1935, c. 63; 1953, c. 1041, s. 11; 1973, c. 800, s. 1.)

§ 90-117.1. Quorum; adjourned meetings.

Three members of said Board shall constitute a quorum for the transaction of business and at any meeting of the Board; if three members are not present at the time and the place appointed for the meeting, those members of the Board present may adjourn from day to day until a quorum is present, and the action of the Board taken at any adjourned meeting thus had shall have the same force and effect as if had upon the day and at the hour of the meeting called and adjourned from day to day. (1973, c. 800, s. 2.)

§ 90-117.2. Records and transcripts.

The said Board shall keep a record of its transactions at all annual or special meetings and shall provide a record book in which shall be entered the names and proficiency of all persons to whom licenses may be granted under the provisions of law. The said book shall show, also, the license number and the date upon which such license was issued and shall show such other matters as in the opinion of the Board may be necessary or proper. Said book shall be deemed a book of record of said Board and a transcript of any entry therein or a certification that there is not entered therein the name, proficiency and license number or date of granting such license, certified under the hand of the secretary-treasurer, attested by the seal of the North Carolina State Board of

Examiners in Optometry, shall be admitted as evidence in any court of this State when the same shall otherwise be competent. (1973, c. 800, s. 3.)

§ 90-117.3. Annual and special meetings.

The North Carolina State Board of Examiners in Optometry shall meet annually in June of each year at such place as may be determined by the Board, and at such other times and places as may be determined by action of the Board or by any three members thereof. Notice of the place of the annual meeting and of the time and place of any special or called meeting shall be given in writing, by registered or certified mail or personally, to each member of the Board at least 10 days prior to said meeting; provided the requirements of notice may be waived by any member of the Board. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1973, c. 800, s. 4.)

§ 90-117.4. Judicial powers; additional data for records.

The president of the North Carolina State Board of Examiners in Optometry, and/or the secretary-treasurer of said Board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said Board pursuant to its requirements and in the same manner as process issued by any court of record. The said Board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said Board or to produce books, records or documents shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisoned in the discretion of the court.

The Board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence. (1973, c. 800, s. 5.)

§ 90-117.5. Bylaws and regulations.

The North Carolina State Board of Examiners in Optometry shall have the power to make necessary bylaws and regulations, not inconsistent with the provisions of this Article, regarding any matter referred to in this Article and for the purpose of facilitating the transaction of business by the said Board. (1973, c. 800, s. 6.)

§ 90-118. Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses; educational requirements for prescription and use of pharmaceutical agents.

(a) The North Carolina State Board of Examiners in Optometry shall grant licenses to practice optometry to such applicants who are graduates of an

accredited optometric institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of optometry, subject, however, to the further provisions of this section and to the provisions of this Article.

(b) The applicant shall be of good moral character, at least 21 years of age at the time the application for examination is filed. The application shall be made to the said Board in writing and shall be accompanied by evidence satisfactory to said Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the said Board; that he is a graduate of and has a diploma from an accredited optometric college or the optometric department of an accredited university or college recognized and approved as such by the said Board.

(c) The North Carolina State Board of Examiners in Optometry is authorized to conduct both written or oral and clinical examinations of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant a license to any person who, in its discretion, is found deficient in said examination, or to any person guilty of cheating, deception, or fraud during such examination, or whose examination discloses, to the satisfaction of the Board, a deficiency in academic education. The Board may employ such optometrists found qualified therefor by the Board in examining applicants for licenses as it deems appropriate.

(d) Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

(e) The Board shall not license any person to practice optometry in the State of North Carolina beyond the scope of the person's educational training as determined by the Board. No optometrist presently licensed in this State shall prescribe and use pharmaceutical agents in the practice of optometry unless and until he (i) has submitted to the Board evidence of satisfactory completion of all educational requirements established by the Board to prescribe and use pharmaceutical agents in the practice of optometry and (ii) has been certified by the Board as educationally qualified to prescribe and use pharmaceutical agents.

Provided, however, that no course or courses in pharmacology shall be approved by the Board unless (i) taught by an institution having facilities for both the didactic and clinical instruction in pharmacology and which is accredited by a regional or professional accrediting organization that is recognized and approved by the Council on Postsecondary Accreditation or the United States Office of Education and (ii) transcript credit for the course or courses is certified to the Board by the institution as being equivalent in both hours and content to those courses in pharmacology required by the other licensing boards in this Chapter whose licensees or registrants are permitted the use of pharmaceutical agents in the course of their professional practice. (1909, c. 444, s. 5; 1915, c. 21, ss. 2, 3, 4; C. S., s. 6691; 1923, c. 42, ss. 2, 3; 1935, c. 63; 1949, c. 357; 1959, c. 464; 1973, c. 800, s. 7; 1975, c. 19, s. 23; 1977, c. 482, s. 2.)

CASE NOTES

Discontinuing Practice of Optometry for 18 Years Will Not Constitute Abandonment of License. — See Mann v. North Carolina State Bd. of Exmrs., 206 N.C. 853, 175 S.E. 281 (1934), decided prior to the 1973 amendment of this section.

§ 90-118.1. Contents of original license.

The original license granted by the North Carolina State Board of Examiners in Optometry shall bear a serial number, the full name of the applicant, the date of issuance and shall be signed by the president and a majority of the members of the said Board and attested by the seal of said Board and the secretary thereof. The certificate of renewal of license shall bear a serial number which need not be the serial number of the original license issued, the full name of the applicant and the date of issuance. (1973, c. 800, s. 8.)

§ 90-118.2. Displaying license and current certificate of renewal.

The license and the current certificate of renewal of license to practice optometry issued, as herein provided, shall at all times be displayed in a conspicuous place in the office of the holder thereof and whenever requested the license and the current certificate of renewal shall be exhibited to or produced before the North Carolina State Board of Examiners in Optometry or to its authorized agents. (1973, c. 800, s. 9.)

§ 90-118.3. Refusal to grant renewal of license.

For nonpayment of fee or fees required by this Article, or for violation of any of the terms or provisions of G.S. 90-121.2, the North Carolina State Board of Examiners in Optometry may refuse to issue a certificate of renewal of license. As used herein the term "license" shall include license, provisional license or intern permit. (1973, c. 800, s. 10.)

§ 90-118.4. Duplicate licenses.

When a person is a holder of a license to practice optometry in North Carolina or the holder of a certificate of renewal of license, he may make application to the North Carolina State Board of Examiners in Optometry for the issuance of a copy or a duplicate thereof accompanied by a reasonable fee set by the Board. Upon the filing of the application and the payment of the fee, the said Board shall issue a copy or duplicate. (1973, c. 800, s. 11.)

§ 90-118.5. Licensing practitioners of other states.

(a) The North Carolina State Board of Examiners in Optometry may, in its discretion, issue a license to practice optometry in this State without an examination other than clinical to a legal and ethical practitioner of optometry who moves into North Carolina from another state or territory of the United States, whose standard of requirements is equal to that of the State of North Carolina and in which such applicant has conducted a legal and ethical practice of optometry for at least five years next preceding his or her removal and who has not, during his period of practice, been found guilty by the state regulatory agency charged with the responsibility therefor of the violation of the ethics of his profession, nor found guilty by a court of competent jurisdiction of the violation of the criminal laws of the state which issued a license to him, or of the criminal laws of the United States, or whose license to practice optometry has not been revoked or suspended by a duly constituted authority.

(b) Application for license to be issued under the provisions of this section shall be accompanied by a certificate from the optometry board or like board of the state from which said applicant removed, certifying that the applicant is the legal holder of a license to practice optometry in that state, and for a

period of five years immediately preceding the application has engaged in the practice of optometry; is of good moral character and that during the period of his practice no charges have been filed with said board against the applicant for the violation of the criminal laws of the state or the United States, or for the violation of the ethics of the profession of optometry.

(c) Application for a license under this section shall be made to the North Carolina State Board of Examiners in Optometry within six months of the date of the issuance of the certificate hereinbefore required, and said certificate shall be accompanied by the diploma or other evidence of the graduation from an accredited, recognized and approved optometry college, school or optometry department of a college or university.

(d) Any license issued upon the application of any optometrist from any other state or territory shall be subject to all of the provisions of this Article with reference to the license issued by the North Carolina State Board of Examiners in Optometry upon examination of applicants and the rights and privileges to practice the profession of optometry under any license so issued shall be subject to the same duties, obligations, restrictions and the conditions as imposed by this Article on optometrists originally examined by the North Carolina State Board of Examiners in Optometry. (1973, c. 800, s. 12.)

§ 90-118.6. Certificate issued to optometrist moving out of State.

Any optometrist duly licensed by the North Carolina State Board of Examiners in Optometry, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said Board, upon application to said Board and the payment to it of the fee in this Article provided, shall be issued a certificate showing his full name and address, the date of license originally issued to him, the date and number of his renewal of license, and whether any charges have been filed with the Board against him. The Board may provide forms for such certificate, requiring such additional information as it may determine proper. (1973, c. 800, s. 13.)

§ 90-118.7. Licensing former optometrists who have moved back into State or resumed practice.

Any person who shall have been licensed by the North Carolina State Board of Examiners in Optometry to practice optometry in this State who shall have retired from practice or who shall have moved from the State and shall have returned to the State, may, upon a satisfactory showing to said Board of his proficiency in the profession of optometry and his good moral character during the period of his retirement, or absence from the State, be granted by said Board a license to resume the practice of optometry upon making application to the said Board in such form as it may require. The license to resume practice, after issuance thereof, shall be subject to all the provisions of this Article. (1973, c. 800, s. 14.)

§ 90-118.8. Provisional license.

(a) The North Carolina State Board of Examiners in Optometry may, subject to its rules and regulations, issue a provisional license to practice optometry to any person who is licensed to practice optometry anywhere in the United States or in any country, territory or other recognized jurisdiction, if the Board shall determine that said licensing jurisdiction imposed upon said person requirements for licensure no less exacting than those imposed by this State. A provisional licensee may engage in the practice of optometry only in strict

accordance with the terms, conditions and limitations of his license and with the rules and regulations of the Board pertaining to provisional license.

(b) A provisional license shall be valid until the date of the announcement of the results of the next succeeding Board examination of candidates for licensure to practice optometry in this State, unless the same shall be earlier revoked or suspended by the Board.

(c) No person who has failed an examination conducted by the North Carolina State Board of Examiners in Optometry shall be eligible to receive a provisional license.

(d) Any person desiring to secure a provisional license shall make application therefor in the manner and form prescribed by the rules and regulations of the Board and shall pay the fee prescribed in G.S. 90-123.

(e) A provisional licensee shall be subject to those various disciplinary measures and penalties set forth in G.S. 90-121.1 upon a determination of the Board that said provisional licensee has violated any of the terms or provisions of this Article. (1973, c. 800, s. 15.)

§ 90-118.9. Intern permit.

The North Carolina State Board of Examiners in Optometry may, in the exercise of the discretion of said Board, issue to a person who is not licensed to practice optometry in this State and who is a graduate of an optometry school, college, or institution approved by said Board, an intern permit authorizing such person to practice optometry under the supervision or direction of an optometrist duly licensed to practice in this State, subject to the following particular conditions:

(1) An intern permit shall be valid for no more than one year from the date of issue thereof; provided, however, that the Board may, in its discretion, renew such permit for not more than three additional one-year periods; and provided, further, that no person shall be granted an intern permit or intern permits embracing or covering an aggregate time span of more than 48 calendar months;

(2) The holder of a valid intern permit may practice optometry only under the supervision or direction of one or more optometrists duly licensed to practice in this State;

(3) The holder of a valid intern permit may practice optometry only (i) as an employee in a hospital, sanatorium, or a like institution which is licensed or approved by the State of North Carolina and approved by the North Carolina State Board of Examiners in Optometry; or (ii) as an employee of the State of North Carolina or an agency or political subdivision thereof, or any other governmental entity within the State of North Carolina, when said employment is approved by the North Carolina State Board of Examiners in Optometry;

(4) The holder of a valid intern permit shall receive no fee or fees or compensation of any kinds or nature for optometric services rendered by him other than such salary or compensation as might be paid to him by the entity specified in subdivision (3) above wherein or for which said services are rendered;

(5) The holder of a valid intern permit shall not, during the term of said permit or any renewal thereof, change the place of his internship without first securing the written approval of the North Carolina State Board of Examiners in Optometry;

(6) The practice of optometry by the holder of a valid intern permit shall be strictly limited to the confines of and to the registered patients of the hospital, sanatorium or institution to which he is attached or to the persons officially served by the governmental entity by whom he is employed;

(7) Any person seeking an intern permit shall first file with the North Carolina State Board of Examiners in Optometry such papers and documents as are required by said Board, together with the application fee authorized by G.S. 90-123. A fee authorized by G.S. 90-123 shall be paid for any renewal of said intern permit;

Such person shall further supply to the Board such other documents, materials, or information as the Board may request;

(8) Any person seeking an intern permit or who is the holder of a valid intern permit shall comply with such limitations as the North Carolina State Board of Examiners in Optometry may place or cause to be placed, in writing, upon such permit, and shall comply with such rules and regulations as the Board might promulgate relative to the issuance and maintenance of said permit in the practice of optometry relative to the same;

(9) The holder of an intern permit shall be subject to the provisions of G.S. 90-121. (1973, c. 800, s. 16.)

Editor's Note. — Section 90-121, referred to in subdivision (9) of this section, was repealed by Session Laws 1973, c. 800, s. 20. For present section covering the same subject matter, see § 90-118.2.

§ 90-118.10. Annual renewal of licenses.

Since the laws of North Carolina now in force provided for the annual renewal of any license issued by the North Carolina State Board of Examiners in Optometry, it is hereby declared to be the policy of this State that all licenses heretofore issued by the North Carolina State Board of Examiners in Optometry, or hereafter issued by said Board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina State Board of Examiners in Optometry is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each optometrist engaged in the practice of optometry in North Carolina shall make application to the North Carolina State Board of Examiners in Optometry and receive from said Board, subject to the further provisions of this section and of this Article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said Board from time to time may prescribe by regulation.

If the application for such renewal certificate, accompanied by the fee required by this Article, is not received by the Board before January 31 of each year, an additional fee of ten dollars ($10.00) shall be charged for renewal certificate. If such application accompanied by the renewal fee is not received by the Board before March 31 of each year, every person thereafter continuing to practice optometry without having applied for a certificate of renewal shall be guilty of the unauthorized practice of optometry and shall be subject to the penalties prescribed by G.S. 90-118.11.

In issuing a certificate of renewal, the Board shall expressly state whether such person, otherwise licensed in the practice of optometry, has been certified to prescribe and use pharmaceutical agents. (1973, c. 800, s. 17; c. 1092, s. 1; 1977, c. 482, s. 3.)

§ 90-118.11. Unauthorized practice; penalty.

If any person shall practice or attempt to practice optometry in this State without first having passed the examination and obtained a license from the North Carolina State Board of Examiners in Optometry; or without having obtained a provisional license from said Board; or if he shall practice optometry after March 31 of each year without applying for a certificate of renewal of license, as provided in G.S. 90-118.10; or shall practice or attempt to practice optometry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall practice or attempt to practice optometry by means or methods that the Board has determined is beyond the scope of the person's educational training; or shall violate any of the provisions of this Article for which no specific penalty has been provided; or shall practice, or attempt to practice, optometry in violation of the provisions of this Article; or shall practice optometry under any name other than his own name, said person shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or imprisonment, or both, in the discretion of the court. Each day's violation of this Article shall constitute a separate offense. (1973, c. 800, s. 18; 1977, c. 482, s. 4.)

§ 90-119. Persons in practice before passage of statute.

Every person who had been engaged in the practice of optometry in the State for two years prior to the date of the passage of this Article shall hereafter file an affidavit as proof thereof with the Board. The secretary shall keep a record of such persons who shall be exempt from the provisions of the preceding section [G.S. 90-118]. Upon payment of three dollars ($3.00) he shall issue to each of them certificates of registration without the necessity of an examination. Failure on the part of a person so entitled within six months of the enactment of this Article to make written application to the Board for the certificate of registration accompanied by a written statement, signed by him and duly verified before an officer authorized to administer oaths within this State, fully setting forth the grounds upon which he claims such certificate, shall be deemed a waiver of his right to a certificate under the provisions of this section. A person who has thus waived his right may obtain a certificate thereafter by successfully passing examination and paying a fee as provided herein. (1909, c. 444, ss. 6, 7, 9; C. S., s. 6692.)

§§ 90-120, 90-121: Repealed by Session Laws 1973, c. 800, ss. 19, 20.

§ 90-121.1. Board may enjoin illegal practices.

In view of the fact that the illegal practice of optometry imminently endangers the public health and welfare, and is a public nuisance, the North Carolina State Board of Examiners in Optometry may, if it shall find that any person is violating any of the provisions of this Article, apply to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. If upon such application, it shall appear to the court that such person has violated, or is violating, the provisions of this Article, the court shall issue an order restraining any further violating thereof. All such actions by the Board for injunctive relief shall be governed by the provisions of Article 37 of the Chapter on "Civil Procedure" [Chapter 1]: Provided, such injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of G.S. 90-124. (1973, c. 800, s. 19.)

§ 90-121.2. Rules and regulations; discipline, suspension, revocation and regrant of certificate.

(a) The Board shall have the power to make, adopt, and promulgate such rules and regulations, including rules of ethics, as may be necessary and proper for the regulation of the practice of the profession of optometry and for the performance of its duties. The Board shall have jurisdiction and power to hear and determine all complaints, allegations, charges of malpractice, corrupt or unprofessional conduct, and of the violation of the rules and regulations, including rules of ethics, made against any optometrist licensed to practice in North Carolina. The Board shall also have the power and authority to: (i) refuse to issue a license to practice optometry; (ii) refuse to issue a certificate of renewal of a license to practice optometry; (iii) revoke or suspend a license to practice optometry; and (iv) invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper; in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;

(2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice optometry;

(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;

(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;

(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any State or federal narcotic or barbiturate law;

(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Is mentally, emotionally, or physically unfit to practice optometry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice optometry unless or until such person shall have been subsequently lawfully declared to be mentally competent;

(8) Has employed or procured any person to obtain or solicit professional patronage or has personally solicited professional patronage;

(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of optometry or in attempting to fraudulently obtain a license to practice optometry;

(10) Has engaged in such immoral conduct as to discredit the optometry profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of optometry;

(13) Has employed a person not licensed in this State to do or perform any act of service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article can lawfully be done or performed only by an optometrist licensed in this State;

(14) Is incompetent in the practice of optometry;
(15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;
(16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;
(17) Has committed any fraudulent or misleading acts in the practice of optometry;
(18) Has, directly or indirectly, advertised in any manner for professional patronage or business; provided, however, that it shall not be considered advertising for an optometrist, duly licensed to practice in this State, to place his name, office address, telephone number, and office hours in an approved register or other publication, or to place his name, followed by the word, "Optometrist," on the door or window of his office, or to place his name before the public in any other manner expressly approved by the Board;
(19) Has, in the practice of optometry, committed an act or acts constituting malpractice;
(20) Has used or permitted another to use his name, as an optometrist, in promoting the sale or advertisement of any product or services;
(21) Has permitted an optometric assistant in his employ or under his supervision to do or perform any act or acts violative to this Article or of the rules and regulations promulgated by the Board;
(22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of optometry;
(23) Has persistently maintained, in the practice of optometry, unsanitary offices, practices, or techniques;
(24) Is a menace to the public health by reason of having a serious communicable disease;
(25) Has engaged in any unprofessional conduct as the same may be from time to time defined by the rules and regulations of the Board.

(b) If any person engages in or attempts to engage in the practice of optometry while his license is suspended, his license to practice optometry in the State of North Carolina may be permanently revoked.

(c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article.

(d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or any of the rules and regulations promulgated by the Board.

(e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.

(f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license and intern permit. (1973, c. 800, s. 20.)

§ 90-121.3. Hearings.

(a) The Board shall grant any person whose license is affected the right to be heard before the Board, before any of the following action is finally taken, the effect of which would be:

(1) To deny permission to take an examination for licensing for which application has been duly made; or

(2) To deny a license after examination for any cause other than failure to pass an examination; or
(3) To withhold the renewal of a license for any cause other than failure to pay a statutory renewal fee; or
(4) To suspend a license; or
(5) To revoke a license; or
(6) To revoke or suspend a provisional license or an intern permit; or
(7) To invoke any other disciplinary measures, censure, or probative terms against a licensee, a provisional licensee, or an intern.

(b) Proceedings under this section shall be conducted in accordance with the provisions of Chapter 150A of the General Statutes of North Carolina.

(c) In lieu of or as a part of such hearings and subsequent proceedings the Board is authorized and empowered to enter any consent order relative to the discipline, censure, or probation of a licensee, an intern, or an applicant for a license, or relative to the revocation or suspension of a license, provisional license, or intern permit.

(d) Following the service of the notice of hearing as required by Chapter 150A of the General Statutes, the Board and the person upon whom such notice is served shall have the right to conduct adverse examinations, take depositions, and engage in such further discovery proceedings as are permitted by the laws of this State in civil matters. The Board is hereby authorized and empowered to issue such orders, commissions, notices, subpoenas, or other process as might be necessary or proper to effect the purposes of this subsection; provided, however, that no member of the Board shall be subject to examination hereunder. (1973, c. 800, s. 21; c. 1331, s. 3.)

§ 90-121.4. Restoration of revoked license.

Whenever any optometrist has been deprived of his license, the North Carolina State Board of Examiners in Optometry in its discretion may restore said license upon due notice being given and hearing had, and satisfactory evidence produced or proper reformation of the licentiate, before restoration. (1973, c. 800, s. 22.)

§ 90-122. Compensation and expenses of Board.

Each member of the North Carolina State Board of Examiners in Optometry shall receive as compensation for his services in the performance of his duties under this Article a sum not exceeding thirty-five dollars ($35.00) for each day actually engaged in the performance of the duties of his office, said per diem to be fixed by said Board, and all legitimate and necessary expenses incurred in attending meetings of the said Board.

The secretary-treasurer shall, as compensation for his services, both as secretary-treasurer of the Board and a member thereof, be allowed a reasonable annual salary to be fixed by the Board and shall, in addition thereto, receive all legitimate and necessary expenses incurred by him in attending meetings of the Board and in the discharge of the duties of his office.

All per diem allowances and all expenses paid as herein provided shall be paid upon voucher drawn by the secretary-treasurer of the Board who shall likewise draw voucher payable to himself for the salary fixed for him by the Board.

The Board is authorized and empowered to expend from funds collected hereunder such additional sum or sums as it may determine necessary in the administration and enforcement of this Article, and employ such personnel as it may deem requisite to assist in carrying out the administrative functions required by this Article and by the Board. (1909, c. 444, s. 11; C. S., s. 6695; 1923, c. 42, s. 4; 1935, c. 63; 1959, c. 574; 1973, c. 800, s. 23; 1979, c. 771, s. 3.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "thirty-five dollars ($35.00)" for "twenty dollars ($20.00)" in the first paragraph.

§ 90-123. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Examiners in Optometry, said Board is hereby authorized to charge and collect fees established by its rules and regulations not exceeding the following:

(1) Each application for general optometry examination $200.00
(2) Each general optometry license renewal, which fee shall be annually fixed by the Board and not later than December 15 of each year it shall give written notice of the amount of the renewal fee to each optometrist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such optometrist 125.00
(3) Each provisional license 125.00
(4) Each intern permit or renewal thereof 125.00
(5) Each certificate of license to a resident optometrist desiring to change to another state or territory 100.00
(6) Each license issued to a practitioner of another state or territory to practice in this State 125.00
(7) Each license to resume the practice issued to an optometrist who has retired from the practice of optometry or who has removed from and returned to this State 125.00
(8) Each application for registration as an optometric assistant or renewal thereof 25.00
(9) Each application for registration as an optometric technician or renewal thereof 25.00

(1909, c. 444, s. 12; C. S., s. 6696; 1923, c. 42, s. 5; 1933, c. 492; 1937, c. 362, s. 1; 1959, c. 477; 1969, c. 624; 1973, c. 1092, s. 2; 1979, c. 771, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "$200.00" for "$75.00" in subdivision (1), "$125.00" for "$75.00" in subdivision (2), "$125.00" for "$50.00" in subdivision (3), "$125.00" for "$50.00" in subdivision (4), "$100.00" for "$15.00" in subdivision (5), "$125.00" for "$75.00" in subdivision (6), and "$125.00" for "$75.00" in subdivision (7) and added subdivisions (8) and (9).

§ 90-123.1. Continuing education courses required.

All registered optometrists now or hereafter licensed in the State of North Carolina are and shall be required to take annual courses of study in subjects relating to the practice of the profession of optometry to the end that the utilization and application of new techniques, scientific and clinical advances, and the achievements of research will assure expansive and comprehensive care to the public. The length of study shall be prescribed by the Board but shall not exceed 25 hours in any calendar year. Attendance must be at a course or courses approved by the Board. Attendance at any course or courses of study are to be certified to the Board upon a form provided by the Board and shall be submitted by each registered optometrist at the time he makes application to the Board for the renewal of his license and payment of his renewal fee. The Board is authorized to use up to one half of its annual renewal fees for the purposes of contracting with institutions of higher learning, professional organizations, or qualified individuals for the providing of educational programs that meet this requirement. The Board is further authorized to treat funds set aside for the purpose of continuing education as State funds for the purpose of

accepting any funds made available under federal law on a matching basis for the promulgation and maintenance of programs of continuing education. In no instance may the Board require a greater number of hours of study than are available at approved courses held within the State, and shall be allowed to waive this requirement in cases of certified illness or undue hardship. (1969, c. 354.)

§ 90-124. Rules and regulations of Board; violation a misdemeanor.

Rules and regulations adopted by the Board shall become effective 30 days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the Board, and/or by certified copy under the hand and seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule or regulation shall be guilty of a misdemeanor, subject to a fine of not more than two hundred dollars ($200.00) or imprisonment for not more than 90 days for each offense, and each day that this section is violated shall be considered a separate offense.

The Board shall issue every two years to each licensed optometrist a compilation or supplement of the Optometric Practice Act and the Board Rules and Regulations, and upon written request by such licensed optometrist, a directory of optometrists. (1909, c. 444, s. 13; C. S., s. 6697; 1935, c. 63; 1953, c. 189; c. 1041, s. 12; 1955, c. 996; 1973, c. 800, s. 24.)

Legal Periodicals. — For comment on the 1955 amendment, see 33 N.C.L. Rev. 519 (1955).

CASE NOTES

Cited in Head v. New Mexico Bd. of Exmrs. in Optometry, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963).

§ 90-125. Practicing under other than own name or as a salaried or commissioned employee.

Except as provided for in Chapter 55B of the General Statutes of North Carolina, it shall be unlawful for any person licensed to practice optometry under the provisions of this Article to advertise, practice, or attempt to practice under a name other than his own, except as an associate of or assistant to an optometrist licensed under the laws of the State of North Carolina; and it shall be likewise unlawful for any corporation, lay body, organization, group, or lay individuals to engage, or undertake to engage, in the practice of optometry through means of engaging the services, upon a salary or commission basis, of one licensed to practice optometry or medicine in any of its branches in this State. Likewise, it shall be unlawful for any optometrist licensed under the provisions of this Article to undertake to engage in the practice of optometry as a salaried or commissioned employee of any corporation, lay body, organization, group, or lay individual. (1935, c. 63; 1937, c. 362, s. 2; 1969, c. 718, s. 16.)

CASE NOTES

Cited in High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E. 301 (1963).

§§ 90-126, 90-126.1: Repealed by Session Laws 1973, c. 800, s. 26.

§ 90-127. Application of Article.

Nothing in this Article shall be construed to apply to physicians and surgeons authorized to practice under the laws of North Carolina, except the provisions contained in G.S. 90-125, or prohibit persons to sell spectacles, eyeglasses, or lenses as merchandise from permanently located and established places of business. (1909, c. 444, s. 15; C. S., s. 6699; 1937, c. 362, s. 3.)

§ 90-127.1. Free choice by patient guaranteed.

No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed optometrist or duly licensed physician as the provider of care or services which are within the scope of practice of the profession of optometry as defined in this Chapter. (1965, c. 396, s. 3; 1973, c. 800, s. 25.)

§ 90-127.2. Filling prescriptions.

Legally licensed druggists of this State may fill prescriptions of optometrists duly licensed by the North Carolina State Board of Examiners in Optometry to prescribe, apply or use pharmaceutical agents. (1977, c. 482, s. 5.)

§ 90-128: Repealed by Session Laws 1973, c. 800, s. 26.

ARTICLE 7.

Osteopathy.

Repeal of Article. — This Article is repealed, effective July 1, 1983, by Session Laws 1977, c. 712, s. 3, as amended by Session Laws 1979, 2nd Sess., c. 1173, § 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 90-129. Osteopathy defined.

For the purpose of this Article osteopathy is defined to be the science of healing without the use of drugs, as taught by the various colleges of osteopathy recognized by the North Carolina Osteopathic Society, Incorporated. (1907, c. 764, s. 8; 1913, c. 92, s. 3; C. S., s. 6700.)

Cross References. — As to what constitutes illegal practice of medicine by licensed osteopath, see § 90-18 and note.

CASE NOTES

Purpose of Article. — In all probability, the General Assembly enacted the statutes relating to the practice of osteopathy now embodied in this Article because of the decision in State v. McKnight, 131 N.C. 717, 42 S.E. 580, 59 L.R.A. 187 (1902), which recognized that osteopathy is a "mode of treatment which absolutely excludes medicines and surgery from its pathology" and held that for this reason the statutes requiring examination and license "before beginning the practice of medicine or surgery" did not apply to osteopaths. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

The distinction between the practice of osteopathy and the practice of medicine and surgery is recognized by Articles 1 and 7 of this Chapter. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

"Osteopathy" Does Not Involve Use of Drugs. — "Osteopathy" is the very antithesis of any science of medicine involving the use of drugs. It is a system of treating diseases of the human body without drugs or surgery. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

The words "as taught by the various colleges of osteopathy" do not set at large the signification of "osteopathy," permitting the colleges to give it any meaning they choose. The legislature merely authorizes the colleges to determine, select, and teach the most desirable methods of doing what is comprehended within the term "osteopathy." The colleges cannot widen the scope of the osteopath's certificate so as to permit him to practice other systems of healing by the simple expedient of varying their curricula. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

In a prosecution of an osteopath for practicing medicine without a license, the State does not have the burden of showing that the administration or prescription of medicines with which defendant is charged was not taught in the recognized colleges of osteopathy. State v. Baker, 229 N.C. 73, 48 S.E.2d 61 (1948).

§ 90-130. Board of Examiners; membership; officers; meetings.

There shall be a State Board of Osteopathic Examination and Registration, consisting of five members appointed by the Governor, in the following manner, to wit: Within 30 days after this Article goes into effect the Governor shall appoint five persons who are reputable practitioners of osteopathy, selected from a number of not less than 10 who are recommended by the North Carolina Osteopathic Society, and this number may be increased to 15, upon the request of the Governor; the recommendation of the president and secretary being sufficient proof of the appointees' standing in the profession; and said appointees shall constitute the first Board of Osteopathic Examination and Registration. Their term of office shall be so designated by the Governor that the term of one member shall expire each year. Thereafter in each year the Governor shall in like manner appoint one person to fill the vacancy in the Board thus created, from a number of not less than five, who are recommended by the State Osteopathic Society; the term of said appointee to be for five years. A vacancy occurring from any other cause shall be filled by the Governor for the unexpired term in the same manner as above stated. The Board shall,

within 30 days after its appointment, meet in the City of Raleigh, and organize by electing a president, secretary and treasurer, each to serve for one year. Thereafter the election of said officers shall occur annually. The treasurer and secretary shall each give bond, approved by the Board, for the faithful performance of their respective duties, in such sum as the Board may from time to time determine. The Board shall have a common seal, and shall formulate rules to govern its actions; and the president and secretary shall be empowered to administer oaths. The Board shall meet in the City of Raleigh at the call of the president, in the month following the election of its officers, and in July of each succeeding year, and at such other times and places as a majority of the Board may designate. Three members of the Board shall constitute a quorum, but no certificate to practice osteopathy shall be granted on an affirmative vote of less than three. The Board shall keep a record of its proceedings, and a register of all applicants for certificates, giving the name and location of the institution granting the applicant the degree of doctor of or diploma in osteopathy, the date of his or her diploma, and also whether the applicant was rejected or a certificate granted. The record and registers shall be prima facie evidence of all matters recorded therein. (1907, c. 764, s. 1; 1913, c. 92, s. 1; C. S., s. 6701; 1937, c. 301, s. 1.)

§ 90-131. Educational requirements, examination and certification of applicants.

Any person, before engaging in the practice of osteopathy in this State, after June 3, 1959, shall, upon the payment of a fee of twenty-five dollars ($25.00), make application for a certificate to practice osteopathy to the Board of Osteopathic Examination and Registration on a form prescribed by the Board, giving, first, his name, age (which shall not be less than 21 years), and residence; second, evidence that such applicant is of good character and shall have, previous to the beginning of his course in osteopathy, obtained a diploma from a high school, or academy, or its equivalent, and evidence of having completed not less than two years if he matriculated in an osteopathic college before October 1, 1952, and if thereafter three years preosteopathic education in an accredited college or university approved by the Board; third, the date of his diploma, and evidence that such diploma was granted on personal attendance and completion of a course of not less than four academic years conforming to the minimum standards for osteopathic colleges established by the American Osteopathic Association. The Board may require the applicant to file an affidavit as to any facts pertaining to his application for a license to practice osteopathy and shall, except as otherwise provided, give to applicants a written examination in the subjects of anatomy, physiology, biochemistry, toxicology, chemistry, osteopathic pathology, bacteriology, histology, diagnosis, hygiene, osteopathic obstetrics and gynecology, minor surgery, principles and practice of osteopathy, and such other like subjects as the Board may require. An applicant passing said examination with a minimum grade in each subject of seventy percent (70%) and a minimum general average of seventy-five percent (75%) in all subjects and who otherwise meets the requirements of this Article shall be licensed to practice osteopathy as defined in G.S. 90-129. The Board is authorized to promulgate rules and regulations to carry out the provisions of this Article; and to employ qualified personnel including persons or organizations specially qualified in preparing, giving and grading examinations to assist or advise the Board. The Board may refuse to grant a certificate to any person convicted of a felony, or a crime involving moral turpitude or who engages in gross unprofessional or immoral conduct, or who is addicted to any vice to such a degree as to render him unfit to practice osteopathy, and may, after due notice and hearing, revoke such certificate for like cause. (1907, c. 764, s. 2; 1913, c. 92, s. 1; C. S., s. 6702; 1959, c. 705, s. 1.)

CASE NOTES

Necessity for Examination. — Those who practice and receive pay for the treatment of human diseases without the use of drugs, and who are not licensed osteopaths, are required to take the examination and receive the license provided for by statute. State v. Siler, 169 N.C. 314, 84 S.E. 1015 (1915).

§ 90-132. When examination dispensed with; temporary permit; annual registration.

The Board may, in its discretion, dispense with an examination in the case of an osteopathic physician duly authorized to practice osteopathy in any other state or territory, or the District of Columbia, who presents a certificate of license issued after an examination by the legally constituted board of such state, territory, or District of Columbia, accorded only to applicants of equal grade with those required in this State or who presents a certificate issued by the National Board of Examiners for Osteopathic Physicians and Surgeons, and who makes application on a form to be prescribed by the Board, accompanied by a fee of seventy-five dollars ($75.00).

The secretary of the Board may grant a temporary permit until a regular meeting of the Board, or to such time as the Board can conveniently meet, to one whom he considers eligible to practice in the State, and who may desire to commence the practice immediately. Such permit shall only be valid until legal action of the Board can be taken. In all the above cases the fee shall be the same as charged to applicants for examination.

Every person heretofore or hereafter licensed to practice osteopathy by said Board of Osteopathic Examination and Registration shall, during the month of January of each year, register with the secretary of said Board his name and office and residence address and such other information as the Board may deem necessary and shall pay a registration fee fixed by the Board not in excess of five dollars ($5.00). An annual registration receipt shall be issued and mailed to each license holder, upon payment of the registration fee, which shall be placed in a conspicuous position in the licensee's office, if he practices in this State. In the event an osteopath fails to register as herein provided he shall pay an additional amount of ten dollars ($10.00) to the Board. Should an osteopath fail to register and pay the fees imposed, and should such failure continue for a period of 30 days, the license of such osteopath may be suspended by the Board, after notice and hearing at the next regular meeting of the Board. Upon payment of all fees and penalties which may be due, the license of such osteopath shall be reinstated. (1907, c. 764, s. 2; C. S., s. 6703; 1959, c. 705, s. 2.)

§ 90-133. Fees held by Board; salaries; payment of expenses.

All fees shall be paid in advance to the treasurer of the Board, to be by him held as a fund for the use of the State Board of Osteopathic Examination and Registration. The compensation and expenses of the members and officers of said Board, and all expenses proper and necessary, in the opinion of said Board, to discharge its duties under and to enforce the law, shall be paid out of such fund, upon the warrant of the president and secretary of said Board, and no expense shall be created to exceed the income of fees or fines as herein provided. The salaries shall be fixed by the Board, but shall not exceed ten dollars ($10.00) per day per member, and railroad and hotel expenses. (1907, c. 764, s. 3; C. S., s. 6705.)

§ 90-134. Subject to State and municipal regulations.

Osteopathic physicians shall observe and be subject to all State and municipal regulations relating to the control of contagious diseases, the reporting and certifying of births and deaths, and all matters pertaining to public health, the same as physicians of other schools of medicine, and such reports shall be accepted by the officers or department to whom the same are made. (1907, c. 764, s. 4; C. S., s. 6706.)

§ 90-135: Repealed by Session Laws 1967, c. 691, s. 59.

§ 90-136. Refusal, revocation or suspension of license; misdemeanors.

The North Carolina State Board of Osteopathic Examination and Registration may refuse to issue a license to anyone otherwise qualified, and may suspend or revoke any license issued by it to any osteopathic physician, who is not of good moral character, and/or for any one or any combination of the following causes:

(1) Conviction of a felony, as shown by a certified copy of the record of the court of conviction;
(2) The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value, by fraudulent misrepresentations;
(3) Gross malpractice;
(4) Advertising by means of knowingly false or deceptive statements;
(5) Advertising, practicing, or attempting to practice under a name other than one's own;
(6) Habitual drunkenness or habitual addiction to the use of morphine, cocaine, or other habit-forming drugs.

Each of the following acts constitutes a misdemeanor, punishable upon conviction by a fine of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00); or imprisonment for not less than 30 days nor more than one year, or both in the discretion of the court:

(1) The practice of osteopathy or an attempt to practice osteopathy, or professing to do so without a license;
(2) The obtaining of or an attempt to obtain a license, or practice in the profession, or money, or any other thing of value by fraudulent misrepresentation;
(3) The making of any willfully false oath or affirmation whenever an oath or affirmation is required by this Article;
(4) Advertising, practicing or attempting to practice osteopathy under a name other than one's own.

The Board may neither suspend nor revoke any license, however, for any of the causes hereinabove set forth except in accordance with the provisions of Chapter 150A of the General Statutes. (1937, c. 301, s. 3; 1953, c. 1041, s. 13; 1973, c. 1331, s. 3.)

§ 90-137. Restoration of revoked license.

Whenever any osteopath has been deprived of his license, the North Carolina State Board of Osteopathic Examination and Registration, in its discretion, may restore said license upon due notice being given and hearing had, and satisfactory evidence produced of proper reformation of the licentiate before restoration. (1937, c. 301, s. 3.)

§ 90-138. Objects of North Carolina Osteopathic Society.

The objects of the North Carolina Osteopathic Society shall be to unite the osteopaths of this State for mutual aid, encouragement, and improvements; to encourage scientific research in the laws of health and treatment of diseases of the human family; to elevate the standard of professional thought and conduct in the practice of osteopathy and to restrict the practice of osteopathy to persons educated and trained in the science and possessing a diploma from a reputable college of osteopathy. (1907, c. 764, s. 7; C. S., s. 6709.)

Article 8.

Chiropractic.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-139. Creation and membership of Board of Examiners.

The State Board of Chiropractic Examiners is created, to consist of six practicing doctors of chiropractic of integrity and ability, who are residents of this State and who have actively practiced chiropractic in the State for at least the ten consecutive years immediately preceding their appointments. No more than three members of the Board may be graduates of the same college or school of chiropractic. In addition, the Governor shall appoint a seventh member who is not a licensed chiropractor. (1917, c. 73, s. 1; C. S., s. 6710; 1979, c. 108, s. 1.)

Effect of Amendments. — The 1979 amendment rewrote this section, which formerly read: "There is hereby created and established a board to be known by the name and style of the State Board of Chiropractic Examiners. The Board shall be composed of three practicing chiropractors of integrity and ability, who shall be residents of the State, and no more than two members of said Board shall be graduates from the same school or college of chiropractic."

Legal Periodicals. — For brief comment on the 1949 amendments to this Article, see 27 N.C.L. Rev. 406.

§ 90-140. Appointment; term; nomination.

Each year at the time of the regular annual meeting of the licentiates of the State Board of Chiropractic Examiners, or as soon thereafter as practicable, the Governor shall appoint two members of the Board for terms of three years from a list of not less than five qualified nominees recommended by the licentiates. The Board shall serve as the elections committee of the licentiates in making the nominations. Members of the Board shall serve until their successors have been appointed and qualified. (1917, c. 73, s. 2; C. S., s. 6711; 1933, c. 442, s. 1; 1963, c. 646, s. 1; 1979, c. 108, s. 2.)

Editor's Note. — Session Laws 1979, c. 108, s. 3 provides: "Schedule. — As soon as practicable after the ratification of this act, the Governor shall appoint two members to the State Board of Chiropractic Examiners for terms of one year, two members for terms of two years, and two members for terms of three years, and one non-health-related member for a term of four years, all terms to begin at the close of the next regular annual meeting of the licentiates of the Board held after ratification of this act. The terms of Board members serving at the time of ratification of this act shall terminate when the Governor makes the appointments authorized in this section. As the terms of the seven members appointed pursuant to this section expire, successors shall be appointed as provided in section 2 of this act."

Effect of Amendments. — The 1979 amendment rewrote this section.

§ 90-141. Organization and vacancies.

The Board of Chiropractic Examiners shall elect such officers as they may deem necessary, and in case of a vacancy, caused by death or in any other manner, a majority of the Board shall have the right to fill the vacancy by the election of some other member of the North Carolina Chiropractic Association. (1917, c. 73, s. 4; C. S., s. 6713; 1933, c. 442, s. 1.)

§ 90-142. Rules and regulations.

The State Board of Chiropractic Examiners may adopt suitable rules and regulations for the performance of their duties and the enforcement of the provisions of this Article. (1919, c. 148, s. 4; C. S., s. 6714; 1967, c. 263, s. 2.)

§ 90-143. Definitions of chiropractic; examinations; educational requirements.

Chiropractic is herein defined to be the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body. It shall be the duty of the North Carolina State Board of Chiropractic Examiners (hereinafter referred to as "Board") to examine for license to practice chiropractic every applicant who complies with the following provisions: He shall, before he is admitted to examination, furnish proof of good moral character and satisfy the Board that he has completed two years of prechiropractic college education and received credits for a minimum of 60 semester hours. He shall exhibit a diploma or furnish proof of graduation from a chiropractic college accredited by the Council on Chiropractic Education or holding recognized candidate for accreditation status with the Council on Chiropractic Education or a college teaching chiropractic that, in the Board's opinion, meets the equivalent standards established by the Council on Chiropractic Education, requiring an attendance of not less than four academic years, and supplying such facilities for clinical and scientific instruction, as shall meet the approval of the Board. The examination shall include but not be limited to the following studies: neurology, chemistry, pathology, anatomy, histology, physiology, embryology, dermatology, diagnosis, microscopy, gynecology, hygiene, eye, ear, nose and throat, orthopody, diagnostic radiology, jurisprudence, palpatation, nerve tracing, chiropractic philosophy, theory, teaching and practice of chiropractic.

Provided further, that the said Board may license by reciprocity, upon application, any chiropractor holding a license issued to him by a regular board of chiropractic examiners in another state when said Board is satisfied that such applicant has educational qualifications equal to those prescribed by said Board for admission to practice chiropractic in this State, and upon proof of

good and moral character and that he has practiced chiropractic under such license for at least one year. (1917, c. 73, s. 5; 1919, c. 148, ss. 1, 2, 5; C. S., s. 6715; 1933, c. 442, s. 1; 1937, c. 293, s. 1; 1963, c. 646, s. 2; 1967, c. 263, s. 3; 1977, c. 1109, s. 1.)

CASE NOTES

Discretionary Power of Board. — This section did not dispense with the discretionary power of the Board to pass upon the requisites of good character, or the fact as to whether the applicants thereunder had been bona fide practitioners for the requisite time. It was held that the courts would not inquire into such matters and that a mandamus would not lie to compel the Board to issue a license under this section. Hamlin v. Carlson, 178 N.C. 431, 101 S.E. 22 (1919).

Competency to Give Expert Testimony. — Doctors with unlimited licenses are competent to give expert testimony in the entire medical field. Chiropractors, on the other hand, are limited in their testimony to their special field as defined and limited by this section. Allen v. Hinson, 12 N.C. App. 515, 183 S.E.2d 852, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971), decided prior to enactment of § 90-157.2.

§ 90-144. Meetings of Association and Board of Examiners.

The North Carolina Chiropractic Association shall meet at least once a year at such time and place as said Association shall determine. The North Carolina Board of Chiropractic Examiners shall meet at least once a year at such time and place as said Board shall determine at which meetings applicants for license shall be examined. (1917, c. 73, s. 6; C. S., s. 6716; 1933, c. 442, s. 1; 1949, c. 785, s. 1.)

§ 90-145. Grant of license; temporary license.

The Board of Chiropractic Examiners shall grant to each applicant who is found to be competent, upon examination, a license authorizing him or her to practice chiropractic in North Carolina. Said Board may grant a temporary license to any applicant who shall comply with the requirements of this Article as to proof of good character and of graduation from a chiropractic school or college as prescribed in this Article; but such temporary license shall not continue in force longer than until the next meeting of said Board, and in no case shall a temporary license be granted to an applicant who has already been refused a license by said Board. (1917, c. 73, s. 7; C. S., s. 6717; 1949, c. 785, s. 2.)

§ 90-146. Graduates from other states.

A graduate of a regular chiropractic school who comes into this State from another state may be granted a license by the Board of Examiners as required in this Article. (1917, c. 73, s. 8; C. S., s. 6718.)

§ 90-147. Practice without license a misdemeanor.

Any person practicing chiropractic in this State without having first obtained a license as provided in this Article shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1917, c. 73, s. 9; C. S., s. 6719.)

§ 90-148. Records of Board.

The secretary of the Board of Chiropractic Examiners shall keep a record of the proceedings of the Board, giving the name of each applicant for license, and the name of each applicant licensed and the date of such license. (1917, c. 73, s. 10; C. S., s. 6720.)

§ 90-149. Application fee.

Each applicant shall pay the secretary of said Board a fee as prescribed and set by the Board which fee shall not be more than one hundred dollars ($100.00). (1917, c. 73, s. 11; C. S., s. 6721; 1977, c. 922, s. 1.)

§ 90-150: Repealed by Session Laws 1967, c. 218, s. 4.

§ 90-151. Extent and limitation of license.

Any person obtaining a license from the Board of Chiropractic Examiners shall have the right to practice the science known as chiropractic, in accordance with the method, thought, and practice of chiropractors, as taught in recognized chiropractic schools and colleges, but shall not prescribe for or administer to any person any medicine or drugs, nor practice osteopathy or surgery. (1917, c. 73, s. 12; C. S., s. 6722; 1933, c. 442, s. 3.)

§ 90-152: Repealed by Session Laws 1967, c. 691, s. 59.

§ 90-153. Licensed chiropractors may practice in public hospitals.

A licensed chiropractor in this State may have access to and practice chiropractic in any hospital or sanitarium in this State that receives aid or support from the public, and shall have access to diagnostic X-ray records and laboratory records relating to the chiropractor's patient. (1919, c. 148, s. 3; C. S., s. 6724; 1977, c. 1109, s. 2.)

OPINIONS OF ATTORNEY GENERAL

Chiropractor May Review Diagnostic X-Ray Records of His Patient When Such Records Are in Possession of Hospital Receiving Public Aid or Support. — See opinion of Attorney General to The Honorable Ramey F. Kemp, Member of The House of Representatives, N.C. General Assembly, 48 N.C.A.G. 1 (1978).

§ 90-154. Grounds for refusal, suspension or revocation of license.

The Board of Chiropractic Examiners may suspend or refuse to grant or may revoke a license to practice chiropractic in this State, upon the following grounds: immoral conduct, bad character, the conviction of a crime involving moral turpitude, habitual intemperance in the use of ardent spirits, narcotics, or stimulants to such an extent as to incapacitate him or her for the performance of such professional duties, unethical advertising, unprofessional or dishonorable conduct unworthy of and affecting the practice of his profession. (1917, c. 73, s. 14; C. S., s. 6725; 1949, c. 785, s. 3; 1963, c. 646, s. 3.)

§ 90-155. Annual fee for renewal of license.

Any person practicing chiropractic in this State, in order to renew his license, shall, on or before the first Tuesday after the first Monday in January in each year after a license is issued to him as herein provided, pay to the secretary of the Board of Chiropractic Examiners a renewal license fee as prescribed and set by the said Board which fee shall not be more than one hundred dollars ($100.00), and shall furnish the Board evidence that he has attended two days of educational sessions or programs approved by the Board during the preceding 12 months, provided the Board may waive this educational requirement due to sickness or other hardship of applicant.

Any license or certificate granted by the Board under this Article shall automatically be canceled if the holder thereof fails to secure a renewal within 30 days from the time herein provided; but any license thus canceled may, upon evidence of good moral character and proper proficiency, be restored upon the payment of the renewal fee and an additional twenty-five dollars ($25.00) reinstatement fee. (1917, c. 73, s. 15; C. S., s. 6726; 1933, c. 442, s. 4; 1937, c. 293, s. 2; 1963, c. 646, s. 4; 1971, c. 715; 1977, c. 922, ss. 2, 3.)

§ 90-156. Pay of Board and authorized expenditures.

The members of the Board of Chiropractic Examiners shall receive their actual expenses, including railroad fare and hotel bills, when meeting for the purpose of holding examinations, and performing any other duties placed upon them by this Article, such expenses to be paid by the treasurer of the Board out of the moneys received by him as license fees, or from renewal fees. The Board shall also expend out of such fund so much as may be necessary for preparing licenses, securing seal, providing for programs for licensed doctors of chiropractic in North Carolina, and all other necessary expenses in connection with the duties of the Board. (1917, c. 73, s. 16; C. S., s. 6727; 1949, c. 785, s. 4.)

§ 90-157. Chiropractors subject to State and municipal regulations.

Chiropractors shall observe and be subject to all State and municipal regulations relating to the control of contagious and infectious diseases. (1917, c. 73, s. 17; C. S., s. 6728.)

§ 90-157.1. Free choice by patient guaranteed.

No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose a duly licensed chiropractor as the provider of care or services which are within the scope of practice of the profession of chiropractic as defined in this Chapter. (1977, c. 1109, s. 3.)

§ 90-157.2. Chiropractor as expert witness.

A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological, and pathological considerations within the scope of chiropractic. (1977, c. 1109, s. 3.)

Legal Periodicals. — For note discussing the ambit of this section in allowing chiropractors to testify as experts, see 9 N.C. Cent. L.J. 103 (1977).

CASE NOTES

Cited in Currence v. Hardin, 296 N.C. 95, 249 S.E.2d 387 (1978); Currence v. Hardin, 36 N.C. App. 130, 243 S.E.2d 172 (1978).

ARTICLE 9.

Nurse Practice Act.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 90-158. Definitions.

As used in this Article:

(1) "Registered nurse" means a person to whom the Board has issued a certificate as "registered nurse."

(2) "Licensed practical nurse" means a person to whom the Board has issued a certificate as "licensed practical nurse."

(3) "Nursing" is a unique service provided for persons who are ill, injured, or experiencing alterations in normal health processes; it is the ministering to, the assisting of, and the sustained, vigilant, and continuous care of those acutely or chronically ill; the supervision of patients during convalescence, restoration, and rehabilitation; and the promotion of health maintenance.

a. Nursing by Registered Nurse. — The practice of nursing by registered nurse means the performance for compensation of any act in the observation, care, and counsel of persons who are ill, injured, or experiencing alterations in normal health processes, and/or in the supervision and teaching of others who are or will be involved in nursing care; and/or the administration of medications and treatment as prescribed by a licensed physician or dentist. Nursing by registered nurse requires specialized knowledge, judgment, and skill, but does not require nor permit except under supervision of a physician licensed to practice medicine in North Carolina medical diagnosis or medical prescription of therapeutic or corrective measures. The use of skill and judgment is based upon an understanding of principles from the biological, social, and physical sciences. Nursing by registered nurse requires use of skills in modifying methods of nursing care and supervision as the patient's needs change.

b. Nursing by Licensed Practical Nurse. — The practice of practical nursing means the performance for compensation of selected acts in the care of persons who are ill, injured, or experiencing alterations in normal health processes. Such performance requires a knowledge of and skill in simple nursing procedures, gained through prescribed preparation, but does not require the specialized knowledge, judgment, and skill essential for nursing by registered nurse. Practical nursing is performed under orders of a licensed physician or a licensed dentist, and/or under directions issued by a registered nurse.

(4) "Board" means the North Carolina Board of Nursing.

(5) "Certificate as registered nurse" means the initial certificate issued by the Board following proof of qualifications.

(6) "Certificate as licensed practical nurse" means the initial certificate issued by the Board following proof of qualifications.

(7) "License" means a license to practice nursing as a registered nurse or to practice practical nursing as a licensed practical nurse, including a renewal thereof.

(8) "Licensee" means a holder of a current license to practice as a registered nurse or as a licensed practical nurse.

(9) "Educational unit in nursing" or "unit" means a program, department or school of nursing or a program of practical nurse education, any one or all of these. (1965, c. 578, s. 1; 1973, c. 93, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Administration of Additional Doses of Caudal Analgesia. — Following the setting in place of the needle for the injection of caudal analgesia and the administration of such analgesia to the patient, it is permissible for a registered nurse to administer additional dosage of the same medication pursuant to direct orders from the attending physician. Opinion of the Attorney General to Mr. Bryant D. Paris, Jr., Executive Secretary, North Carolina Board of Medical Examiners, Dec. 17, 1979.

§ 90-159. Board of Nursing established; composition; officers; employees.

(a) North Carolina Board of Nursing. — There is hereby established the North Carolina Board of Nursing (hereinafter referred to as "the Board"), which shall consist of 12 members to be chosen as hereinafter provided.

Five members of the Board shall be registered nurses who are licensed to practice in North Carolina, all five of whom shall be appointed by the Governor.

Two members of the Board shall be physicians, both of whom shall be appointed by the Governor.

Two members of the Board shall be administrators of hospitals operating, or associated with, educational units in nursing, and both of whom shall be appointed by the Governor.

Three members of the Board shall be licensed practical nurses who are licensed to practice in North Carolina, all three of whom shall be appointed by the Governor.

The licensed practical nurse members of the Board shall participate only in such actions and functions of the Board as shall affect the education, examination, licensure, and the practice of practical nurses.

The present members of the Board shall continue in office until the expiration of their terms; and, thereafter, all regular appointments shall be for a term of four years.

An interim vacancy on the Board shall be filled for the remainder of the unexpired term by appointment of the Governor.

The term of office of each member of the Board shall continue until his or her successor is appointed and qualified.

(b) Officers. — The officers of the Board shall be a chairman, a vice-chairman, and such other officers as the Board may deem necessary. All officers shall be elected annually by the Board for terms of one year each and until their successors shall have been elected and qualified.

(c) Executive Director. — The Board shall employ an executive director, who shall not be a member of the Board, but who shall be a registered nurse, duly registered in North Carolina. The executive director shall perform such duties and functions as may be prescribed by the Board and shall be responsible to the Board for the performance of those duties and functions. The Board shall fix the compensation of the executive director. The executive director shall serve as treasurer of the Board and shall furnish surety bond approved by the Board in such sum as it may prescribe, conditioned upon the true and faithful accounting for all funds of the Board which may come into the hands, custody, or control of the executive director, which bond shall be made payable to the Board. Such bond shall be made as part of the blanket bond of State officers and employees provided for in G.S. 128-8. The Board shall require a surety bond to be furnished by the executive director for each year of employment. The premium on said bond shall be regarded as a proper and necessary expense of the Board. The surety bond executed and furnished for the faithful accounting of the executive director if continued or renewed from year to year by endorsement or otherwise, shall be deemed to be a bond covering the faithful accounting of the executive director to the extent of the principal amount of the bond for each and every year during which the bond shall be renewed or continued in force, and the provisions of this subsection shall be a part of the contract, terms, and conditions of any such bond.

The Board may employ legal counsel, accountants, and such employees, assistants, and agents as may be necessary in the opinion of the Board to carry into effect this Article and may fix the compensation of such persons employed, and may incur other necessary expenses to effectuate this Article. (1947, c. 1091, s. 1; 1953, c. 1199, ss. 1-3; 1955, c. 1266, s. 1; 1965, c. 578, s. 1; 1969, c. 844, s. 3.)

§ 90-160. Compensation of members of Board.

The members of the Board shall receive such per diem compensation and reimbursement for actual traveling and subsistence expenses as shall be fixed by the Board. (1953, c. 1199, s. 1; 1965, c. 578, s. 1.)

§ 90-161. Expenses payable from fees collected by Board; schedule of fees.

(a) All salaries, compensation, and expenses incurred or allowed for the purposes of carrying out this Article shall be paid by the Board exclusively out of the fees received by the Board as authorized by this Article, or funds received from other sources. In no case shall any salary, expense, or other obligation of the Board be charged against the treasury of the State of North Carolina. All moneys and receipts shall be kept in a special fund by and for the use of the Board for the exclusive purpose of carrying out the provisions of this Article.

(b) The schedule of fees shall not exceed the following rates:

Application for examination leading to certificate and license as registered nurse $30.00

Application for certificate and license as registered nurse by endorsement	$30.00
Application for each reexamination leading to certificate and license as registered nurse	30.00
Renewal of license to practice as registered nurse (two-year period	15.00
Reinstatement of lapsed license to practice as a registered nurse and renewal fee	30.00
Application for examination leading to certificate and license as licensed practical nurse by examination	30.00
Application for certificate and license as licensed practical nurse by endorsement	30.00
Application for each reexamination leading to certificate and license as licensed practical nurse	30.00
Renewal of license to practice as a licensed practical nurse (two-year period)	15.00
Reinstatement of lapsed license to practice as a licensed practical nurse and renewal fee	30.00
Reasonable charge for duplication services and materials.	

(c) No refund of fees will be made. (1947, c. 1091, s. 1; 1953, c. 750; c. 1199, ss. 1, 4; 1955, c. 1266, ss. 2, 3; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1971, c. 534.)

§ 90-162. Official seal of Board; rules and regulations; appointment of subcommittee.

The Board shall adopt an official seal, which shall be affixed to all certificates and licenses issued by it. The Board shall make such rules and regulations not inconsistent with law, as may be necessary to regulate its proceedings and otherwise to carry out the purposes of and enforce this Article.

The Board of Nursing shall appoint and maintain a subcommittee of the Board to work jointly with a subcommittee of the Board of Medical Examiners to develop rules and regulations to govern the performance of medical acts by registered nurses. Rules and regulations developed by this subcommittee from time to time shall govern the performance of medical acts by registered nurses and shall become effective when they have been adopted by both the Board of Nursing and the Board of Medical Examiners. The Board of Medical Examiners shall have responsibility for securing compliance with these regulations. (1953, c. 1199, s. 1; 1965, c. 578, s. 1; 1973, c. 93, s. 2.)

§ 90-163. Meetings; quorum; power to compel attendance of witnesses and to take testimony.

The Board shall hold at least one meeting each year for the purpose of considering and acting upon the accreditation of educational units in nursing, and for the transaction of its other business and affairs. The Board shall adopt rules with respect to calling, holding, and conducting regular and special meetings. A majority of the members of the Board shall constitute a quorum. The Board may compel the attendance of witnesses and production of documents, and take testimony and proof concerning any matter within its jurisdiction and for such purposes each member of the Board may administer oaths according to law. Subpoenas shall be issued by the executive director and directed to any sheriff, constable or other officer authorized to serve process, who shall execute the same and make due return to the Board. (1953, c. 1199, s. 1; 1965, c. 578, s. 1.)

§ 90-164. Custody and use of funds.

All fees payable to the Board shall be deposited by the executive director of the Board in financial institutions designated by the Board as official depositories for funds of the Board, which funds shall be deposited in the name of the Board and shall be used for the payment of all expenses of the Board in carrying out this Article and for promoting and extending nursing education in North Carolina, pursuant to Board authorization. An annual audit of the accounts of the Board shall be made by the State Auditor. (1953, c. 1199, s. 1; 1965, c. 578, s. 1.)

§ 90-165. Board may accept contributions, etc.

The Board may accept grants, contributions, devises, bequests, and gifts which shall be kept in a separate fund and shall be used by it in promoting and encouraging nurse recruitment and nurse education in this State, including the making of loans or gifts for the education of worthy student nurses. (1953, c. 1199, s. 1; 1965, c. 578, s. 1.)

§ 90-166. Nurses registered under previous law.

Every person who on June 30, 1965, holds a certificate or license to practice nursing as a registered nurse or licensed practical nurse, issued by competent authority pursuant to the provisions of any statute heretofore providing for the certification and licensing of nurses in North Carolina, shall be deemed to be licensed as a registered nurse or licensed practical nurse under the provisions of this Article, but such person previously licensed shall comply with this Article with respect to the renewal of licenses. (1953, c. 1199, s. 1; 1965, c. 578, s. 1.)

§ 90-167. Practice as registered nurse and licensed practical nurse regulated.

In order to safeguard life and health, any person practicing or offering to practice nursing as defined herein shall be required to submit evidence that he or she is qualified so to practice by virtue of a license with current renewal, issued by the North Carolina Board of Nursing. After December 31, 1965, any person not licensed under this Article who

(1) Practices or offers to practice nursing; or

(2) Uses any card, title, or abbreviation to indicate that such person is a registered nurse or licensed practical nurse,

shall be guilty of a misdemeanor.

Nothing in this Article shall be construed in any way to prohibit or limit the performance by any person of such duties as specified mechanical acts in the physical care of a patient when such care and activities do not require the knowledge and skill required of a registered nurse or licensed practical nurse, or when such care and activities are performed under orders or directions of a licensed physician, licensed dentist or registered nurse. (1953, c. 1199, s. 1; 1965, c. 578, s. 1.)

§ 90-167.1. Education credits for practical nurse candidates.

Upon application by a licensed practical nurse for admission to a diploma school of nursing in this State, or upon application to a diploma school in this State by a graduate of a military school comparable to those accredited under

this Article the education, training and experience of such nurse shall be evaluated by the school for the purposes of determining what credits should be accorded with respect thereto in the diploma school, and reasonable credit shall be accorded therefor. Such evaluation may include proficiency examinations in various areas of knowledge and experience. The credit accorded pursuant to this section shall not exceed a total of nine months. (1969, c. 518; 1973, c. 93, s. 3.)

§ 90-168. Licensure by examination.

At least once each year and at such other times as the Board may determine, the Board shall cause an examination to be given, at such time and place as may be fixed by the Board, to applicants for a certificate and license to practice as a registered nurse or licensed practical nurse. The Board shall give due publicity in advance as to each examination, including notice to all accredited educational units in nursing in the State, in order that qualified persons may become applicants. The Board shall also notify each applicant of the time and place of each examination. The Board may adopt regulations, not inconsistent with this Article, governing the furnishing of proof of qualifications of applicants, the conduct of applicants during the examination, and the conduct of the examination.

The applicant shall be required to pass a written examination approved and given by the Board. When an applicant shall have passed such examination, as determined by the Board, whose decision shall be final, the Board shall issue to the applicant a certificate and a license to practice nursing as a registered nurse or licensed practical nurse. The form of the certificate shall be determined by the Board. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1965, c. 578, s. 1.)

§ 90-169. Scope of examination.

An applicant, qualified and admitted to the licensing examination, shall be examined on such knowledge of nursing and related material basic to nursing as the Board may determine. In preparing and giving examinations, the Board may use its own method of examination or a centralized examination service. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1965, c. 578, s. 1.)

§ 90-170. Qualifications of applicant for examination.

In order to be eligible for the examination, the applicant shall make written application to the Board on forms furnished by the Board and shall submit to the Board an application fee and written evidence, verified by oath, sufficient to satisfy the Board that the applicant meets the following qualifications and conditions:

(1) For examination leading to certificate and license as registered nurse the applicant shall:
   a. Be of good moral character;
   b. Be a graduate of a high school accredited by the State agency charged by law with accrediting high schools, or shall have a high school education equivalent thereto as determined by the Board;
   c. Have completed the course of study and shall have graduated from an educational unit in nursing accredited by the Board in accordance with this Article, or one accredited by the legal accrediting agency of another state or territory, the District of Columbia, or a foreign country, and satisfactory to the Board.

(2) For examination leading to certificate and license as licensed practical nurse, the applicant shall:

a. Be of good moral character;
b. Have completed at least the ninth grade of high school or the equivalent as determined by the Board; and
c. Have completed the course of study and graduated from a program of practical nurse education accredited by the Board in accordance with this Article, or a comparable military school or one accredited by the legal accrediting agency of another state or territory, the District of Columbia, or a foreign country, and satisfactory to the Board. (1947, c. 1091, s. 1; 1953, c. 750; c. 1199, ss. 1, 4; 1955, c. 1266, s. 2; 1961, c. 431, s. 2; 1965, c. 578, s. 1; 1973, c. 93, s. 4.)

§ 90-171. Qualifications for certificate and license without examination.

The Board may, without examination, issue a certificate and a license to practice as a registered nurse or licensed practical nurse to an applicant who has been duly licensed as a registered nurse or licensed practical nurse under the laws of another state, territory, District of Columbia or foreign country, if in the opinion of the Board the applicant is competent to practice as a registered nurse or licensed practical nurse in this State. The Board may require such applicant to prove her competency and qualifications to practice as a registered nurse or licensed practical nurse in North Carolina. The decision of the Board thereon shall be final. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1961, c. 431, s. 2; 1965, c. 578, s. 1.)

§ 90-171.1. Reexamination.

Any applicant who fails to pass the first licensure examination may take subsequent examinations. Before admission to such subsequent examination, the Board may require the applicant to complete additional courses of study designated by the Board. (1965, c. 578, s. 1.)

§ 90-171.2. Renewal of license.

The license of every person licensed under this Article shall [be] biennially renewed, except as hereinafter provided. On or before the December 31 expiration date of the current license, every registered nurse or licensed practical nurse who desires to continue the practice of nursing shall file application for renewal of license on forms furnished by the Board and shall file the required fee with completed application. At least 60 days prior to the December 31 expiration date, the Board shall cause to be mailed an application for renewal of license for the biennium to every person who has received from the Board a license to practice nursing as a registered nurse or a licensed practical nurse and who has a right to renewal of license under this Article. The application form for renewal of license shall be mailed to the last known address of such registered nurse or licensed practical nurse as it appears on the records of the Board. It shall be the duty of every registered nurse and licensed practical nurse in North Carolina to keep the Board informed of the current mailing address of such nurse, and the failure of the Board to send or the failure of any nurse to receive an application form for renewal of license shall not excuse said nurse from the requirements for renewal of license herein contained. Upon return of application form and fee and verification of the accuracy thereof, the Board shall issue to each entitled applicant a renewal of license to practice nursing for the period beginning January 1 and ending December 31 two years later. Such license shall render the holder thereof a legal practitioner for the

period stated. Failure to renew the license as required by this section shall result in the automatic forfeiture of the right to practice nursing in North Carolina.

Newly registered nurses and licensed practical nurses shall be issued a license without additional fee for the remainder of the calendar year of issuance of the original certificate.

For the biennium, 1966-1968, the Board may issue up to one half of the applicants, selected in the discretion of the Board, a renewal of license to practice nursing for the period beginning January 1, 1966, and ending December 31, 1966, for a fee of two dollars and fifty cents ($2.50). (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1955, c. 1266, s. 3; 1965, c. 578, s. 1.)

§ 90-171.3. Reinstatement of lapsed license.

A licensee who has allowed license to lapse by failure to renew as herein provided may apply for reinstatement on a form provided by the Board. The Board shall require the applicant to return the completed application with the required fee and to furnish a statement of the reason for failure to apply for renewal prior to the deadline. If the license has lapsed for at least five years, the Board may require the applicant to submit proof of competence to practice nursing. The Board may require any applicant for reinstatement to satisfy the Board that the license should be reinstated. If, in the opinion of the Board, the applicant has so satisfied the Board, it shall issue a renewal of license to practice nursing, or it shall issue a license to practice nursing for a limited time. (1947, c. 1091, s. 1; 1953, c. 1199, s. 1; 1955, c. 1266, s. 3; 1965, c. 578, s. 1.)

§ 90-171.4. Inactive list.

(a) A licensee who desires to retire temporarily from the practice of nursing in North Carolina shall request inactive status on a form provided by the Board. Upon receipt of the application, the Board shall issue to the licensee a statement of inactive status, and shall place the name of the licensee on the inactive list. While remaining on the inactive list, the individual shall not be subject to renewal fees and shall not practice nursing in North Carolina.

(b) If and when such person desires to be removed from the inactive list and returned to active status, an application shall be submitted on a form provided by the Board, and the fee shall be paid for renewal of license. The Board may require proof of competence to resume the practice of nursing, and if such proof is satisfactory to the Board, the Board shall return the applicant to active status and issue a license, or issue a license for a limited period. (1953, c. 1199, s. 1; 1965, c. 578, s. 1.)

§ 90-171.5. Revocation, suspension, or denial of license.

The Board may, after notice and hearing in accordance with the provisions of Chapter 150A of the General Statutes, revoke or suspend any license to practice nursing which has been issued by the Board or any predecessor board, or deny any license which has been applied for in accordance with this Article, if the Board shall determine upon findings of facts supported by competent evidence adduced at such hearing that such person:

(1) Has practiced fraud or deceit in procuring or attempting to procure a license to practice nursing;

(2) Has been convicted of a felony or any other crime involving moral turpitude;

(3) Is guilty of gross immorality or dishonesty;

(4) Is addicted to alcoholic or other drug habits to such a degree as to render him or her unfit or unworthy to practice nursing;
(5) Is guilty of any unprofessional or dishonorable conduct unworthy of, and affecting, the practice of his or her profession;
(6) Is unfit or incompetent to practice nursing by reason of negligence or habits;
(7) Is mentally or physically incompetent to practice nursing. (1947, c. 1091, s. 1; 1953, c. 1041, s. 15; c. 1199, ss. 1, 5; 1965, c. 578, s. 1; 1973, c. 1331, s. 3.)

§ 90-171.6. Standards for educational units in nursing.

The Board shall:
(1) Register as accredited such educational units in nursing as shall meet the requirements of this Article and of the Board with respect to curricula and standards;
(2) Prescribe standards for educational units in nursing which prepare persons for nursing and for the examination leading to certification as registered nurses or licensed practical nurses; the standards approved by the North Carolina Board of Nurse Registration and Nursing Education and North Carolina Board of Nurse Registration and Nursing Education Enlarged on May 30, 1963, shall be the prescribed standards; before making any substantive change in the standards, the Board shall hold a hearing to consider any such change; and the Board shall give all educational units in nursing at least 30 days' notice of the date and place of the hearing and of the proposed change;
(3) Provide for surveys of such units for purposes of evaluation and consultation at such times as it may deem necessary;
(4) Evaluate and approve courses for affiliation; and
(5) At intervals prepare and make a list, for public distribution, of educational units in nursing in this State approved by the Board as meeting the requirements of this Article and of the Board. (1947, c. 1091, s. 1; 1953, c. 1199, ss. 1, 6; 1965, c. 578, s. 1.)

§ 90-171.6A. Baccalaureate in nursing candidate credits.

Every graduate of a diploma school of nursing in this State who has passed the registered nurse examination shall, upon admission to any state-supported institution of higher learning offering baccalaureate education in nursing, be granted credit for previous experience in the diploma school of nursing on an individual basis by the utilization of the most effective method of evaluation to the end that the applicant shall receive optimum credit and that upon graduation the applicant will have earned the baccalaureate degree in nursing. (1969, c. 547, s. 1.)

§ 90-171.7. Basic requirements for accreditation of an educational unit in nursing.

An educational unit in nursing in order to be accredited by the Board shall meet the following standards and requirements:
(1) An educational unit in nursing leading to licensure may be operated under the authority of a general hospital, an educational institution or agency, or any other authority satisfactory to and approved by the Board. The general hospital shall not be required to have any specific number of beds for patients.

(2) The educational unit shall be conducted in connection with or by using resources of one or more general hospitals. Special hospitals and other resources may be used in addition to a general hospital.

(3) The educational unit shall give instruction in the biological, social and physical sciences, and in nursing care of mothers and newborn infants, children, mentally ill patients, and those with common medical and surgical conditions. Educational units for practical nursing shall not be required to include instruction in the care of mentally ill patients.

(4) The hospital or hospitals and/or other agencies with which the educational unit is affiliated shall provide clinical facilities so that each student may obtain the appropriate instruction and experience in nursing care of patients.

(5) The educational unit shall provide minimum instructional facilities as follows:

a. It shall have a library consisting of references sufficient in number, diversified and in late editions so as to be suitable for reference and study in connection with the basic curriculum required for an educational unit in nursing, which library shall be physically located so as to be easily accessible to the students.

b. It shall have adequate classrooms, laboratory facilities, and other suitable instructional facilities sufficient to accommodate the student body and to instruct the students.

c. The members of the faculty of the educational unit in nursing shall have general academic and professional qualifications as determined by the Board and shall be sufficient in number to effectively administer, teach, and supervise the students at the educational unit. In evaluating the members of the faculty as to qualifications and number, the Board shall recognize and take into consideration the limited availability and supply of nurses prepared for teaching positions.

(6) The educational unit in nursing shall keep and maintain an accurate system of records containing up-to-date and complete information regarding the hours spent by each student in instruction and experience, and the progress of each student graded under a suitable system. The form, content and other requirements with respect to records shall be subject to the approval of the Board. The records shall be readily accessible and shall be subject to inspection by the Board or its authorized representatives. Any person who shall intentionally falsify any record required to be kept and maintained by this Article and regulations of the Board made pursuant to this Article shall be guilty of a misdemeanor and punishable as such.

(7) An educational unit in nursing shall, from time to time and in accordance with regulations adopted by the Board, file with the Board such records, data, and reports as may be prescribed furnishing information concerning the conduct of the unit and concerning any student or graduate of the unit, as required by the Board.

(8) Any educational unit in nursing or practical nursing which receives State appropriations for the purpose of "advanced placement programs" shall develop and implement a procedure for advanced placement of any persons potentially qualified by prior training or experience into programs leading to graduation in nursing or practical nursing. This procedure shall be designed to encourage and allow credit for any person who has attained special capabilities in nursing or practical nursing through military service, on-the-job training or working experience, or other means not otherwise qualifying a person to be eligible immediately for the licensing examination provided for in G.S. 90-170. The procedure shall include these elements: public

announcement of the procedure, a convenient method for persons who have special capabilities through training or experience to make application to the educational unit for advance placement, personal counseling on obtaining advanced placement, administration of specially prepared written and clinical examinations for all parts of the curriculum otherwise required for graduation, exemption from course requirements when results of the examinations so indicate, and appropriate modification of curriculum requirements, when necessary, to facilitate individual advancement in education programs. The procedure for advanced placement shall not be approved by the Board unless it is fairly designed to facilitate the substitution of military or civilian training and experience for regular curricula, taking into account that the special nature of military and certain civilian training and experience may be equivalent without necessarily being identical to the courses of the educational unit. (1947, c. 1091, s. 1; 1953, c. 1199, ss. 1, 6; 1965, c. 578, s. 1; 1969, c. 1079; 1973, c. 871, s. 1.)

§ 90-171.8. Periodic surveys of accredited educational units.

(a) A survey of each accredited educational unit in nursing and of the institution or institutions with which the unit is associated shall be made by the executive director or other representative of the Board at such times as may be determined by the Board.

(b) A written report of the survey of an educational unit in nursing shall be submitted to the Board at a regular or special meeting and a copy of the report shall be sent to the educational unit in nursing.

(c) If the Board determines, from the report of the survey and other evidence that the unit is meeting requirements and standards prescribed by this Article and the Board for the conduct of an educational unit in nursing, the Board shall approve the unit as accredited and shall order the name of the educational unit in nursing to be continued on the accredited list.

(d) If the Board determines from the report of the survey and other evidence that the unit is not meeting requirements and standards prescribed by this Article and the Board, the Board shall take action as specified in G.S. 90-171.11. (1953, c. 1199, ss. 1, 7; 1965, c. 578, s. 1.)

§ 90-171.9. Procedure for accreditation of new educational unit; provisional accreditation.

(a) An institution wishing to establish a unit shall first apply for permission from the Board to establish such a unit.

The institution applying shall submit to the Board a written plan of organization containing a statement of:

(1) The purposes and aims of the institution in establishing the unit;
(2) The composition, powers, duties, and responsibilities of the governing body of the unit;
(3) The financial plan for operating the unit;
(4) The titles and duties of the members of the faculty and the qualifications required of each;
(5) The proposed curriculum and the plan for its administration;
(6) The clinical resources available, such as hospitals and other agencies, affiliated with or in connection with which the unit will be conducted;
(7) The standards to be met by the students;

(8) Such other written evidence as shall be necessary to satisfy the Board that the unit is able and willing to provide instruction and experience in accordance with the requirements for accreditation as prescribed by the Board; and

(9) Written evidence sufficient to satisfy the Board that the unit can and will comply with the minimum standards and requirements for accreditation upon the enrollment of students and the commencement of the operation of the unit.

(b) The executive director or other representative of the Board shall conduct a general survey of the proposed educational program and facilities and shall submit a written report of the survey to the Board with respect to the proposed unit and the institution which has applied for permission to establish it.

(c) The Board, at a meeting at which representatives of the petitioning institution may appear after reasonable written notice, shall consider the plan of organization, the report of survey, and such other evidence as may be presented, and shall act upon the application at the same or at a subsequent meeting.

(d) If the application to establish an educational unit in nursing is approved and the unit enrolls its first class of students within one year after approval, the unit shall be provisionally accredited for a period of one year beginning with the date of the enrollment of the first class of students, and the name of the unit shall be placed on the provisionally accredited list. (1947, c. 1091, s. 1; 1953, c. 1199, ss. 1, 6; 1965, c. 578, s. 1.)

§ 90-171.10. Procedure for removal from provisionally accredited list.

(a) Within the first year of operation by the unit under provisional accreditation, the Board shall make a survey of the unit. If the unit is meeting requirements and standards prescribed by this Article and by the Board, it shall be placed on the accredited list.

(b) If the unit is not meeting the standards and requirements as prescribed by this Article and the Board, the Board shall cause a notice to be served upon the unit and a hearing scheduled as specified in G.S. 90-171.13.

(c) If the Board shall determine from evidence presented at the hearing that the unit is complying with requirements and standards for the conduct of an educational unit in nursing as prescribed by this Article and the Board, the Board shall place the name of the unit on the accredited list.

(d) If the Board shall determine from evidence presented at the hearing that the unit is not complying with the requirements and standards for the conduct of an educational unit in nursing prescribed by this Article and the Board, the Board may enter an order either continuing the name of the unit on the provisionally accredited list for not more than one additional year, and the unit shall be so notified; or removing the name of the unit from the provisionally accredited list which action constitutes discontinuance of operation of the educational unit in nursing. Notification to the unit of this action shall be in accordance with the procedure specified in G.S. 90-171.13.

(e) If an educational unit in nursing has been provisionally accredited for two consecutive years and the Board determines, from survey and other evidence, that the unit has not met the requirements and standards of this Article and the Board prescribed for the conduct of an educational unit in nursing, the Board shall hold a hearing in accordance with procedure specified in G.S. 90-171.13. Following the hearing and consideration of all evidence presented, the Board shall place the unit on the accredited list or enter an order removing the name of the unit from the provisionally accredited list which shall constitute discontinuance of operation of the educational unit in nursing. The action

of the Board shall be in accordance with the procedure specified in G.S. 90-171.13. (1947, c. 1091, s. 1; 1953, c. 1199, ss. 1, 6; 1965, c. 578, s. 1.)

§ 90-171.11. Procedure for placing unit on conditional accreditation.

(a) If the Board, at a regular or special meeting, determines from survey of an educational unit in nursing and other evidence available that a unit on the accredited list appears not to be complying with the requirements and standards prescribed by this Article and the Board, the Board shall order the executive director to give written notice to the unit, specifying the particulars of apparent noncompliance with the requirements and standards.

(b) The notice shall be sent to the unit by registered mail and shall state that if the unit fails to correct the conditions and the deficiencies so as to comply fully with the requirements and standards for the conduct of units within a period of one year following the date upon which the written notice was placed in the United States mails, the unit will be removed from the fully accredited list and placed upon the list of conditionally accredited educational units in nursing (hereinafter referred to as the "conditionally accredited list"), pending a formal hearing before the Board to determine whether the unit is complying with the requirements and standards. At the end of the year referred to in the notice of apparent noncompliance given to the unit, a committee of at least three members of the Board designated by the Board shall visit and survey the unit as a basis for making a preliminary determination as to whether the unit has corrected the deficiencies specified in the notice; and if the committee shall determine that the unit has not corrected all of those deficiencies specified and is not complying with the requirements and standards for the conduct of educational units in nursing as required by this Article and the Board, the committee shall direct the executive director to remove the unit from the fully accredited list and place the unit on the conditionally accredited list until further action by the Board. The unit shall be so notified in writing. (1965, c. 578, s. 1.)

§ 90-171.12. Procedure for removing unit from conditionally accredited list.

(a) At a regular or special meeting, if the Board determines from survey of a unit on conditional accreditation and other evidence presented that the unit is meeting the requirements and standards prescribed by this Article and the Board, it shall place the educational unit in nursing on the accredited list and notify the unit in writing of the Board's action.

(b) If the Board determines from all evidence presented that the unit operating under conditional accreditation is not complying with the requirements and standards as prescribed by this Article and the Board, a hearing shall be held in accordance with procedure specified in G.S. 90-171.13.

(c) If the Board shall determine from evidence presented at the hearing that the unit is complying with requirements and standards for the conduct of an educational unit in nursing as prescribed by this Article and the Board, the Board shall place the name of the unit on the accredited list.

(d) If the Board shall determine from evidence presented at the hearing that the unit is not complying with the requirements and standards for the conduct of an educational unit in nursing prescribed by this Article and the Board, the Board shall enter an order removing the name of the unit from the conditionally accredited list which action constitutes discontinuance of operation of the educational unit in nursing. Notification to the unit of this action shall be in accordance with the procedure specified in G.S. 90-171.13. (1965, c. 578, s. 1.)

§ 90-171.13. Notice and hearing on educational unit.

(a) The Board shall cause a notice to be served on any unit operating under provisional accreditation or conditional accreditation if such unit is not complying with the requirements and standards for the conduct of an educational unit in nursing prescribed by this Article and the Board, by:

(1) Notifying the unit in writing that the survey and other evidence indicates that the unit is not complying with the standards and requirements for accreditation as prescribed;

(2) Setting forth the respects in which the unit is not complying; and

(3) Notifying the unit that a hearing will be held before the Board on a specified date not less than 20 days from the date on which the notice was given, and setting forth the time and place of such hearing.

(b) The educational unit shall have the right and opportunity to present witnesses and other evidence on the question of its compliance with the standards and requirements for accreditation, to cross-examine other witnesses, and to be fully represented at the hearing by legal counsel.

(c) A transcript of the proceedings of the hearing shall be made. Any party to the proceedings shall be entitled to a copy of the record upon payment of the cost thereof as determined by the Board.

(d) After hearing the witnesses and receiving other evidence presented at the hearing, the Board shall give consideration to all of the evidence, and upon such evidence shall make findings of fact and conclusions.

(e) If the Board shall determine from findings of fact and conclusions based upon evidence received at such hearing that the unit is complying with the standards and requirements for accreditation, the Board shall place the name of the unit on the accredited list.

(f) If the Board shall determine from findings of fact and conclusions based upon evidence received at such hearing that the unit is not complying with the standards and requirements for accreditation, it shall take the appropriate action as is specified in G.S. 90-171.10 or 90-171.12, whichever is applicable.

(g) In the event the Board enters an order directing removal of the name of the unit from the provisionally or conditionally accredited list and discontinuance of operation of the educational unit, the written order to the educational unit shall specify that the order is to become effective 20 days after the date of mailing of the order. A copy of the findings and conclusions and orders of the Board, certified by the executive director, shall be mailed to the unit together with an order to discontinue operation of the educational unit and to admit no further students. (1953, c. 1199, ss. 1, 8; 1965, c. 578, s. 1.)

§ 90-171.14. Effect of provisionally and conditionally accredited status.

When an educational unit in nursing shall have been placed upon the provisionally or conditionally accredited list in accordance with the procedure herein prescribed, the effect of such action shall be so to list the educational unit for the information of students and prospective students and other persons, institutions, and organizations interested in education for nursing in North Carolina. Insofar as applicants for examination for licensure as nurses in North Carolina are concerned, the appearance of the name of an educational unit on the provisionally or conditionally accredited list shall have the same effect as if said educational unit had continued on the fully accredited list. (1953, c. 1199, ss. 1, 8; 1965, c. 578, s. 1.)

§ 90-171.15. Appeals.

Appeals from determinations of the Board with respect to the accreditation of education units in nursing shall be taken in accordance with Chapter 150A of the General Statutes. (1953, c. 1199, ss. 1, 9; 1965, c. 578, s. 1; 1973, c. 1331, s. 3.)

§ 90-171.16. Educational units in nursing to be encouraged.

The Board shall encourage the continued operation of all present educational units in nursing and promote the establishment of additional units. (1965, c. 578, s. 1.)

§ 90-171.17. Eligibility to instruct registered nurse candidates.

Notwithstanding any other provision of law or any rule or regulation of the North Carolina Board of Nursing, where an instructor is otherwise unavailable, any registered nurse who is a graduate of a diploma school of nursing and who has been teaching nurses for five years or more and who is otherwise qualified shall be entitled to be an instructor on the floors of an educational unit in nursing and shall also be entitled to be an assistant instructor in the classrooms of an educational unit in nursing; provided that the North Carolina Board of Nursing may require such instructors to attend annual nursing workshops. On occasions when sickness or leave of absence of a B.S. degree nurse makes it impossible for her to teach, the R.N. nurse can act as classroom instructor. For the purposes of this section, "unavailable" shall mean that an educational unit in nursing has been unable, after a bona fide continuing effort, to employ sufficient registered nurses with B.S. or M.S. degrees to act as instructors on all floors and in all classrooms of the unit at all times when persons are studying nursing and taking training to be registered nurses. (1969, c. 524.)

§ 90-171.18. Course credits certified to another state.

Upon the written request of a graduate of a diploma school of nursing in this State or a person who has received a baccalaureate degree in nursing from some institution in this State, the North Carolina Board of Nursing shall certify such person's credits with respect to the study of nursing to the appropriate board of any other state of the United States which licenses nurses. (1969, c. 942.)

ARTICLE 10.

Midwives.

Repeal of Article. — This Article is repealed, effective July 1, 1983, by Session Laws 1977, c. 712, s. 3, as amended by Session Laws 1979, 2nd Sess., c. 1173, s. 2. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 90-172. Midwives to register.

All persons, other than regularly registered physicians, desiring to practice midwifery in this State, must first secure a permit from the Department of Human Resources or a local department of health in accordance with the provisions of Article 18 of Chapter 130 of the General Statutes of North Carolina. (1917, c. 257, ss. 8, 9; C. S., s. 6750; 1957, c. 1357, s. 6; 1973, c. 476, s. 128.)

§§ 90-173 to 90-178: Repealed by Session Laws 1957, c. 1357, s. 7.

Article 11.

Veterinarians.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-179. Purpose of Article.

In order to promote the public health, safety, and welfare by safeguarding the people of this State against unqualified or incompetent practitioners of veterinary medicine, it is hereby declared that the right to practice veterinary medicine is a privilege conferred by legislative grant to persons possessed of the personal and professional qualifications specified in this Article. (1973, c. 1106, s. 1.)

Editor's Note. — Session Laws 1973, c. 1106, s. 2, contains a severability clause.

§ 90-180. Title.

This Article shall be known as the North Carolina Veterinary Practice Act. (1973, c. 1106, s. 1.)

§ 90-181. Definitions.

When used in this Article these words and phrases shall be defined as follows:

(1) "Accredited school of veterinary medicine" means any veterinary college or division of a university or college that offers the degree of doctor of veterinary medicine or its equivalent and that conforms to the standards required for accreditation by the American Veterinary Medical Association.

(2) "Animal" means any animal, mammal other than man and includes birds, fish, and reptiles, wild or domestic, living or dead.
(3) "Board" means the North Carolina Veterinary Medical Board.
(4) "Licensed veterinarian" means a person who is validly and currently licensed to practice veterinary medicine in this State.
(5) "Person" means any individual, firm, partnership, association, joint venture, cooperative or corporation, or any other group or combination acting in concert; and whether or not acting as a principal, trustee, fiduciary, receiver, or as any kind of legal or personal representative, or as the successor in interest, assignee, agent, factor, servant, employee, director, officer, or any other representative of such person.
(6) "Practice of veterinary medicine" means:
a. To diagnose, treat, correct, change, relieve, or prevent animal disease, deformity, defect, injury, or other physical or mental conditions; including the prescription or administration of any drug, medicine, biologic, apparatus, application, anesthetic, or other therapeutic or diagnostic substance or technique on any animal.
b. To represent, directly or indirectly, publicly or privately, an ability and willingness to do any act described in paragraph a.
c. To use any title, words, abbreviation, or letters in a manner or under circumstances which induce the belief that the person using them is qualified to do any act described in paragraph a.
(7) "Veterinarian," "doctor of veterinary medicine," "D.V.M." or equivalent title shall mean a person who has received a doctor's degree in veterinary medicine from an accredited school of veterinary medicine or who now has a valid North Carolina license to practice veterinary medicine.
(8) "Veterinary medicine" includes veterinary surgery, obstetrics, dentistry, and all other branches or specialties of veterinary medicine.
(9) "Veterinary student intern" means a person who is enrolled in an accredited veterinary college and who has satisfactorily completed his third year of veterinary college education.
(10) "Veterinary student preceptee" means a person who is pursuing a doctorate degree in an accredited school of veterinary medicine which has a preceptor or extern program and who has completed the academic requirements of such program.
(11) "Veterinary technician" or "animal technician" shall mean a person who has successfully completed a post-high school course in the care and treatment of animals which conforms to the standards required for accreditation by the American Veterinary Medical Association. (1961, c. 353, s. 2; 1973, c. 1106, s. 1.)

§ 90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.

In order to properly regulate the practice of veterinary medicine and surgery, there shall be a board to be known as the North Carolina Veterinary Medical Board which shall consist of five members appointed by the Governor. When and as the terms of the present members expire, the Governor shall annually appoint one member of such Board, who shall hold his office for five years, and until his successor is appointed and qualified. In addition to the five members appointed by the Governor, the Commissioner of Agriculture shall biennially appoint as an additional Board member, the State Veterinarian or a North Carolina licensed veterinarian from the staff of a North Carolina department or institution, who shall hold his office for two years, and until his successor is appointed and qualified. Every person so appointed shall, within 30 days

after notice of appointment appear before the clerk of the superior court of the county in which he resides and take oath to faithfully discharge the duties of his office.

Each member shall have been a legal resident of this State and licensed to practice veterinary medicine in this State for not less than five years prior to his appointment.

No person who has been appointed a member of the Board shall continue on said Board if during the term of his appointment he shall:

(1) Transfer his legal residence to another state; or

(2) Be or become the owner of or be employed by any wholesale or jobbing house dealing in supplies, equipment, or instruments used or useful in the practice of veterinary medicine; or

(3) Have his license to practice veterinary medicine rescinded for cause in accordance with the provisions of Chapter 150A of the General Statutes. (1903, c. 503, s. 2; Rev., s. 5432; C. S., s. 6755; 1961, c. 353, s. 3; 1973, c. 1106, s. 1; c. 1331, s. 3.)

§ 90-183. Meeting of Board.

The Board shall meet at least once each year at the time and place fixed by the Board. Other meetings may be called by the president of the Board by giving notice as may be required by rule. A majority of the Board shall constitute a quorum. Meetings shall be open and public except that the Board may meet in closed session to prepare, approve, administer, or grade examinations, or to deliberate the qualification of an applicant for license or the disposition of a proceeding to discipline a licensed veterinarian.

At its annual meeting the Board shall organize by electing a president, a secretary-treasurer, and such other officers as may be prescribed by rule. Officers of the Board shall serve for terms of one year and until a successor is elected, without limitation on the number of terms an officer may serve. The president shall serve as chairman of Board meetings. (1903, c. 503, ss. 3, 4, 6, 7; Rev., s. 5433; C. S., s. 6756; 1973, c. 1106, s. 1.)

§ 90-184. Compensation of the Board.

In addition to such reimbursement for travel and other expenses as is normally allowed to State employees, each member of the Board, for each day or substantial portion thereof he is engaged in the work of the Board may receive a per diem allowance, as determined by the Board, not to exceed thirty-five dollars ($35.00) per day. None of the expenses [of] the Board or of the members shall be paid by the State. (1903, c. 503, s. 9; Rev., s. 5434; C. S., s. 6757; 1961, c. 353, s. 4; 1973, c. 1106, s. 1.)

§ 90-185. General powers of the Board.

The Board shall have the power to:

(1) Examine and determine the qualifications and fitness of applicants for a license to practice veterinary medicine in the State.

(2) Issue, renew, deny, suspend, or revoke licenses and temporary permits to practice veterinary medicine in the State or otherwise discipline licensed veterinarians consistent with the provisions of Chapter 150A of the General Statutes and of this Article and the rules and regulations adopted thereunder.

(3) Conduct investigations for the purpose of discovering violations of this Article or grounds for disciplining licensed veterinarians.

(4) Employ full-time or part-time personnel — professional, clerical, or special — necessary to effectuate the provision of this Article and purchase or rent necessary office space, equipment and supplies.

(5) Appoint from its own membership one or more members to act as representatives of the Board at any meeting within or without the State where such representation is deemed desirable.

(6) Adopt, amend, or repeal all rules necessary for its government and all regulations necessary to carry into effect the provision of this Article, including the establishment and publication of standards of professional conduct for the practice of veterinary medicine.

The powers enumerated above are granted for the purpose of enabling the Board effectively to supervise the practice of veterinary medicine and are to be construed liberally to accomplish this objective. (1973, c. 1106, s. 1; c. 1331, s. 3.)

§ 90-186. Special powers of the Board.

In addition to the powers set forth in G.S. 90-185 above, the Board shall have the power:

(1) To fix minimum standards for continuing veterinary medical education, which standards shall be a condition precedent to the renewal of a license under this Article;

(2) To inspect any hospitals, clinics, mobile units or other places utilized by any practicing veterinarian, either by a member of the Board or its authorized representatives, which inspection shall be for the purpose of reporting such inspection to the Board on a form prescribed by the Board or seeking disciplinary action in cases of violations of practice or reasonable health or sanitary regulations duly established and published by the Board or other duly constituted State authorities having jurisdiction in such matters;

(3) To provide special registration for "animal technicians," "veterinary student interns" and "veterinary student preceptees" as defined in G.S. 90-181, and to adopt regulations concerning the training, registration and service limits of such assistants while employed by and acting under the supervision and responsibility of licensed veterinarians and to have exclusive jurisdiction in determining eligibility, and qualification requirements and in granting or refusing to grant, or to suspend or revoke registration. The Board shall have power to require a registration fee not to exceed five dollars ($5.00) for original registration and not to exceed five dollars ($5.00) for renewal. (1973, c. 1106, s. 1.)

§ 90-187. Application for license; qualifications.

(a) Any person desiring a license to practice veterinary medicine in this State shall make written application to the Board.

(b) The application shall show that the applicant is 18 years of age or more, a graduate of an accredited veterinary school, a person of good moral character, and such other information and proof as the Board may require by rule. The application shall be accompanied by a fee in the amount established and published by the Board.

(c) Graduates of nonaccredited colleges of veterinary medicine outside the United States and Canada shall furnish satisfactory proof of graduation from such a college; of successful completion of a year of acceptable veterinary medical experience in a United States or Canadian college, clinic, or private practice recognized for this purpose by the Board; of having successfully passed an examination by the United States National Board of Veterinary Medical Examiners; and of comprehension of and ability to communicate in the English language.

(d) If the Board determines that the applicant possesses the proper qualifications, it shall admit the applicant to the next examination, or if the applicant is eligible for a license without examination under G.S. 90-187.3; the Board may forthwith grant him a license. (1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C. S., s. 6758; 1951, c. 749; 1961, c. 353, s. 5; 1973, c. 1106, s. 1.)

§ 90-187.1. Examinations.

The Board shall hold at least one examination during each year and may hold such additional examinations as may appear necessary. The secretary-treasurer shall give public notice of the time and place for each examination at least 90 days in advance of the date set for the examination. A person desiring to take an examination shall make application at least 30 days before the date of the examination.

After each examination the secretary-treasurer shall notify each examinee of the result of his examination, and the Board shall issue licenses to the persons successfully completing the examination. The secretary-treasurer shall record the new licenses and issue a certificate of registration to the new licensees. (1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C. S., s. 6758; 1951, c. 749; 1961, c. 353, s. 5; 1973, c. 1106, s. 1.)

§ 90-187.2. Status of persons previously licensed.

Any person holding a valid license to practice veterinary medicine in this State on July 1, 1974, shall be recognized as a licensed veterinarian and shall be entitled to retain this status so long as he complies with the provisions of this Article, and Board rules adopted pursuant thereto. (1973, c. 1106, s. 1.)

§ 90-187.3. License without examination.

(a) At its discretion, the Board may issue a license without a written examination to a qualified applicant who furnishes satisfactory proof that he is a graduate of an accredited veterinary school and who:

(1) Is a practicing veterinarian licensed in a state, territory, or district of the United States having license requirements, at the time the applicant was first licensed, substantially equivalent to the requirements of this Article; or

(2) Is qualified under the provisions of G.S. 90-187(c).

(b) At its discretion, the Board may orally or practically examine any person qualifying for licensing under this section. (1959, c. 744; 1973, c. 1106, s. 1.)

§ 90-187.4. Temporary permit.

(a) The Board in its discretion may issue without examination a temporary permit to practice veterinary medicine in this State:

(1) To a qualified applicant for license pending examination, provided that such temporary permit shall expire the day after the notice of results of the first examination given after the permit is issued; or to an applicant lacking full qualification requirements but who, in the opinion of the Board, is competent to practice under the supervision of a licensed veterinarian.

(2) To a nonresident veterinarian validly licensed in another state, territory, or district of the United States or a foreign country, provided that such temporary permit shall be issued for a period of no more than 60 days.

(3) Such temporary permits as provided in (1) and (2) above may contain such restrictions as to time, place, or supervision, as the Board may

deem appropriate. The State Veterinarian shall be notified as to the issuance of all temporary permits.

(b) A temporary permit may be summarily revoked by majority vote of the Board without a hearing. (1903, c. 503, ss. 3, 5, 8; Rev., s. 5435; C. S., s. 6758; 1951, c. 749; 1961, c. 353, s. 5; 1973, c. 1106, s. 1.)

§ 90-187.5. License renewal.

All licenses shall expire annually on December 31 of each year but may be renewed by application to the Board and payment of the renewal fee established and published by the Board. The secretary-treasurer shall issue a new certificate of registration to all persons registering under this Article. Failure to apply for renewal within 30 days after expiration shall result in automatic revocation of license and any person who shall practice veterinary medicine after such revocation shall be practicing in violation of this Article. Provided, that any person may renew an expired license at any time within two years upon application and the payment of the prescribed renewal fee and an additional amount not in excess of ten dollars ($10.00) per year for late renewals, provided that the applicant is otherwise eligible for renewal. (1961, c. 353, s. 6; 1973, c. 1106, s. 1.)

§ 90-187.6. Special registration of veterinary assistants.

(a) "Animal technicians," "veterinary student interns," and "veterinary student preceptees" as defined in G.S. 90-181, before performing any services otherwise prohibited to persons not licensed or registered under this Article, shall be approved by and annually registered with the Board in accordance with G.S. 90-186(3) of this Article. The Board shall be responsible for all matters pertaining to the qualifications, registration, and revocation of registration of such persons, under rules duly adopted and published by the Board.

(b) The services of a technician, intern or preceptee shall be limited to services under the direction and supervision of a licensed veterinarian. He shall receive no fee or compensation of any kind for his services other than such salary or compensation as may be paid to him by the veterinarian, hospital or clinic by which he is employed. He may participate in the operation of a branch office, clinic, or allied establishment only to the extent allowable under and as defined in subsection (a) above.

(c) A registered technician, as an assistant to and under the supervision of a licensed veterinarian, may perform such duties as are required in the physical care of animals and in carrying out medical orders as prescribed by the licensed veterinarian, requiring an understanding of animal science but not requiring the professional services as set forth in G.S. 90-181(7) hereof. He may not perform any act producing an irreversible change in the animal, but may assist the veterinarian in:

(1) Obtaining and recording information about cases.
(2) Preparation of patients, instruments, equipment and medicants for surgery.
(3) Collection of specimens and performance of certain laboratory procedures.
(4) Application of wound dressings.
(5) Assisting the veterinarian in diagnostic, medical, and surgical procedures.

(d) Registered interns, in addition to all of the services permitted to registered technicians, may, under the direct personal supervision of a licensed veterinarian, perform surgery and administer therapeutic or prophylactic drugs.

(e) Registered preceptees, in addition to all of the services permitted to registered technicians and registered interns, may, upon the direction of the employing veterinarian, make ambulatory calls and hospital and clinic diagnoses, prescriptions and treatments.

(f) Any person registered as an animal or veterinary technician, veterinary student intern or veterinary student preceptee, who shall practice veterinary medicine except as provided herein, shall be guilty of a misdemeanor, subject to the penalties set forth in this Article and shall also be subject to revocation of registration.

(g) Any veterinarian directing or permitting a registered technician, intern or preceptee to perform a task or procedure not specifically allowed under this Article and the rules of the Board shall be guilty of a misdemeanor and subject to the penalties set forth in this Article or General Statutes, or both. (1973, c. 1106, s. 1.)

§ 90-187.7. Abandonment of animals; notice to owner; relief from liability for disposal; "abandoned" defined.

(a) Any animal placed in the custody of a licensed veterinarian for treatment, boarding or other care, which shall be unclaimed by its owner or his agent for a period of more than 10 days after written notice by registered or certified mail, return receipt requested, to the owner or his agent at his last known address, shall be deemed to be abandoned and may be turned over to the nearest humane society, or dog pound or disposed of as such custodian may deem proper.

(b) The giving of notice to the owner, or the agent of the owner, of such animal by the licensed veterinarian, as provided in subsection (a) of this section, shall relieve the licensed veterinarian and any custodian to whom such animal may be given of any further liability for disposal.

(c) For the purpose of this Article the term "abandoned" shall mean to forsake entirely, or to neglect or refuse to provide or perform the legal obligations for care and support of an animal by its owner, or his agent. Such abandonment shall constitute the relinquishment of all rights and claims by the owner to such animal. (1973, c. 1106, s. 1.)

§ 90-187.8. Discipline of licensees.

Upon complaint, and within the Board's discretion, the Board may revoke, or suspend the license of, or otherwise discipline, any licensed veterinarian under the provisions of Chapter 150A of the General Statutes of North Carolina. Grounds for disciplinary action shall include but not be limited to the following:

(1) The employment of fraud, misrepresentation, or deception in obtaining a license.
(2) An adjudication of insanity or incompetency.
(3) Chronic inebriety or habitual use of drugs.
(4) The use of advertising or solicitation which is false, misleading, or is otherwise deemed unprofessional under regulations adopted by the Board.
(5) Conviction of a felony or other public offense involving moral turpitude.
(6) Incompetence, gross negligence, or other malpractice in the practice of veterinary medicine.
(7) Having professional association with or knowingly employing any person practicing veterinary medicine unlawfully.

(8) Fraud or dishonesty in the application or reporting of any test for disease in animals.
(9) Failure to keep veterinary premises and equipment in a clean and sanitary condition.
(10) Failure to report, as required by the laws and regulations of the State or making false report of, any contagious or infectious disease.
(11) Dishonesty or gross negligence in the inspection of foodstuffs or the issuance of health or inspection certificates.
(12) Conviction of cruelty to animals.
(13) Revocation of a license to practice veterinary medicine by another state, territory, or district of the United States on grounds other than nonpayment of registration fee.
(14) Unprofessional conduct as defined in regulations adopted by the Board. (1903, c. 503, s. 10; Rev., s. 5436; C. S., s. 6759; 1953, c. 1041, s. 16; 1961, c. 353, s. 7; 1973, c. 1106, s. 1; c. 1331, s. 3.)

§ 90-187.9. Reinstatement.

Any person whose license is suspended or revoked may, at the discretion of the Board, be relicensed or reinstated at any time without an examination by majority vote of the Board on written application made to the Board showing cause justifying relicensing or reinstatement. (1961, c. 353, s. 8; 1973, c. 1106, s. 1.)

§ 90-187.10. Necessity for license; certain practices exempted.

No person shall engage in the practice of veterinary medicine in this State or attempt to do so without having first applied for and obtained a license for such purpose from the North Carolina Veterinary Medical Board, or without having first obtained from said Board a certificate of renewal of license for the calendar year in which such person proposes to practice and until he shall have been first licensed and registered for such practice in the manner provided in this Article and the rules and regulations of the said Board.

Nothing in this Article shall be construed to prohibit:

(1) Any person or his employee from administering to animals, the title to which is vested in himself, except when said title is so vested for the purpose of circumventing the provisions of this Article;
(2) Any person who is a regular student or instructor in a legally chartered college from the performance of those duties and actions assigned as his responsibility in teaching or research;
(3) Any veterinarian who is a member of the armed forces of the United States or who is an employee of the United States Department of Agriculture, the United States Public Health Service or other federal agency, or the State of North Carolina, or political subdivision thereof, from performing official duties while so commissioned or employed;
(4) Any person from such practices as permitted under the provisions of G.S. 90-185, House Bill 659, Chapter 17, Public Laws 1937, or House Bill 358, Chapter 5, Private Laws 1941;
(5) Any person from dehorning animals or castrating male animals;
(6) Any person from providing for or assisting in the practice of artificial insemination;
(7) Any physician licensed to practice medicine in this State, or his assistant, while engaged in medical research;
(8) Any rabies inspector duly appointed and acting within the provisions of G.S. 106-365 and G.S. 106-366;

(9) Any veterinarian licensed to practice in another state from examining livestock or acting as a consultant in North Carolina, provided he does not work in the State for more than 10 days in any calendar year and all infectious or contagious diseases diagnosed are reported to the State Veterinarian within 48 hours. (1903, c. 503, s. 12; Rev., s. 5438; C. S., s. 6761; 1961, c. 353, s. 9; 1973, c. 1106, s. 1.)

§ 90-187.11. Partnership practice; corporate practice.

Whenever the practice of veterinary medicine is carried on by a partnership, all partners must be either licensed or the holders of temporary permits.

It shall be unlawful for any corporation to practice or offer to practice veterinary medicine as defined in this Article, except as provided for in Chapter 55B of the General Statutes of North Carolina. (1961, c. 353, s. 8; 1973, c. 1106, s. 1.)

§ 90-187.12. Unauthorized practice; penalty.

If any person shall

(1) Practice or attempt to practice veterinary medicine in this State without first having obtained a license or temporary permit from the Board; or

(2) Practice veterinary medicine without the renewal of his license, as provided in G.S. 90-187.5; or

(3) Practice or attempt to practice veterinary medicine while his license is revoked, or suspended, or when a certificate of license has been refused; or

(4) Violate any of the provisions of this Article,

said person shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00), or imprisonment at the discretion of the court, or both fined and imprisoned. Each act of such unlawful practice shall constitute a distinct and separate offense. (1913, c. 129, s. 2; C. S., s. 6762; 1961, c. 353, s. 10; c. 756; 1973, c. 1106, s. 1.)

Article 12.

Podiatrists.

§§ 90-188 to 90-202.1: Recodified as §§ 90-202.2 to 90-202.14.

Editor's Note. — This Article was rewritten by Session Laws 1975, c. 672, s. 1, effective July 1, 1975, and has been recodified as Article 12A, § 90-202.2 et seq., of this Chapter.

Article 12A.

Podiatrists.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation

of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-202.2. "Podiatry" defined.

Podiatry as defined by this Article is the surgical or medical or mechanical treatment of all ailments of the human foot, except the amputation of the foot or toes or the administration of an anesthetic other than local and except the correction of clubfoot deformity and triple arthrodesis. (1919, c. 78, s. 2; C. S., s. 6763; 1945, c. 126; 1963, c. 1195, s. 2; 1971, c. 1211; 1975, c. 672, s. 1.)

Editor's Note. — This Article is Article 12 of this Chapter as rewritten by Session Laws 1975, c. 672, s. 1, effective July 1, 1975, and recodified. Where appropriate, the historical citations to the sections of the former Article have been added to the corresponding sections of the new Article.

CASE NOTES

Quoted in Whitehurst v. Boehm, 41 N.C. App. 670, 255 S.E.2d 761 (1979).

§ 90-202.3. Unlawful to practice unless registered.

No person shall practice podiatry unless he shall have been first licensed and registered so to do in the manner provided in this Article, and if any person shall practice podiatry without being duly licensed and registered, as provided in this Article, he shall not be allowed to maintain any action to collect any fee for such services. Any person who engages in the practice of podiatry unless licensed and registered as hereinabove defined, or who attempts to do so, or who professes to do so, shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine or imprisonment or both in the discretion of the court. Each act of such unlawful practice shall constitute a separate offense. (1919, c. 78, s. 1; C. S., s. 6764; 1963, c. 1195, s. 2; 1967, c. 1217, s. 2; 1975, c. 672, s. 1.)

§ 90-202.4. Board of Podiatry Examiners; how elected; terms of office; powers; duties.

There shall be established a Board of Podiatry Examiners for the State of North Carolina. This Board shall consist of three members who shall be elected by a vote of all licensed podiatrists who are practicing in the State of North Carolina and who are members of the North Carolina Podiatry Society. All of such members of the Board shall be licensed podiatrists who have practiced podiatry in North Carolina for a period of not less than five years immediately prior to their election. The members of the Board shall be elected for a term of three years: Provided, however, one of the original Board shall serve a term of one year; one, two years; and one, three years. The members of the former Board shall serve until the new Board is elected. The Board shall have authority to elect its own presiding and other officers, and may also elect a person to fill an unexpired term. The Board, in carrying out its responsibilities, shall have authority to employ personnel, full-time or part-time, as shall be deter-

mined to be necessary in the work of the Board. The Board shall have authority to pay compensation to the member of the Board holding the position of secretary-treasurer on a basis to be determined by the Board. The Board is required to keep proper and complete records with respect to all of its activities, financial and otherwise, and shall on or before January 30 of each year submit a written report to the Governor and to such other officials and/or agencies as other sections of the General Statutes may require, said report covering the activities of the Board during the previous calendar year, which report shall include a verified financial statement. The Board is authorized to adopt rules and regulations governing its proceedings and the practice of podiatry in this State, not inconsistent with the provisions of this Article. The Board shall maintain at all times an up-to-date list of the names and addresses of each licensed podiatrist in North Carolina, which list shall be available for inspection and which shall be included in the annual report referred to above. (1919, c. 78, s. 3; C. S., s. 6765; 1963, c. 1195, s. 2; 1967, c. 1217, s. 3; 1975, c. 672, s. 1.)

§ 90-202.5. Applicants to be examined; examination fee; requirements.

Any person not heretofore authorized to practice podiatry in this State shall file with the Board of Podiatry Examiners an application for examination accompanied by a fee not to exceed one hundred dollars ($100.00), together with proof that the applicant is more than 18 years of age, is of good moral character, and has obtained a preliminary education equivalent to four years of instruction in a high school and two years of instruction in a college or university approved by the American Association of Colleges and Universities. Such applicant before presenting himself for examination must be a graduate of a college of podiatric medicine accredited by the National Council of Education of American Podiatry Association. (1919, c. 78, s. 9; C. S., s. 6766; 1963, c. 1195, ss. 1, 2; 1967, c. 1217, s. 4; 1975, c. 672, s. 1.)

CASE NOTES

Educational Requirements Not Comparable with Those of Medicine. — The practice of podiatry is a narrowly restricted one; this allied health profession is not at all comparable with the practice of medicine and surgery; the educational requirements for a podiatrist are less demanding than those for physicians and surgeons. Whitehurst v. Boehm, 41 N.C. App. 670, 255 S.E.2d 761 (1979).

§ 90-202.6. Examinations; subjects; certificates.

The Board of Podiatry Examiners shall hold at least one examination annually for the purpose of examining applicants under this Article. The examination shall be at such time and place as the Board may see fit. The Board may make such rules and regulations as it may deem necessary to conduct its examinations and meetings. It shall provide, preserve and keep a complete record of all its transactions. Examinations for registration under this Article shall be in the English language and shall be written, oral, or clinical, or a combination of written, oral or clinical, as the Board may determine, and may include the following subjects: anatomy, physiology, bacteriology, chemistry, dermatology, podiatry, surgery, materia medica, pharmacology and pathology. No applicant shall be granted a license certificate by the Board unless he obtains a general average of 75 or over, and not less than fifty percent (50%) in any one subject. After such examination the Board shall without

unnecessary delay, act on same and issue license certificates to the successful candidates signed by each member of the Board; and the Board of Podiatry Examiners shall report annually to each licensed podiatrist in the State of North Carolina. (1919, c. 78, s. 4; C. S., s. 6767; 1963, c. 1195, s. 2; 1967, c. 1217, s. 5; 1975, c. 672, s. 1.)

§ 90-202.7. Reexamination of unsuccessful applicants.

An applicant failing to pass his examination shall within one year be entitled to reexamination upon the payment of an amount not to exceed one hundred dollars ($100.00), but not more than two reexaminations shall be allowed any one applicant. Should he fail to pass his third examination he shall file a new application before he can again be examined. (1919, c. 78, s. 6; C. S., s. 6768; 1967, c. 1217, s. 6; 1975, c. 672, s. 1.)

§ 90-202.8. Revocation of certificate; grounds for; suspension of certificate.

(a) The North Carolina State Board of Podiatry Examiners, in accordance with Chapter 150A (Administrative Procedure Act) of the General Assembly, shall have the power and authority to:

(1) Refuse to issue a license to practice podiatry;
(2) Refuse to issue a certificate of renewal of a license to practice podiatry;
(3) Revoke or suspend a license to practice podiatry; and
(4) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;
(2) Is a chronic or persistent user of alcohol intoxicants or habit-forming drugs or narcotics to the extent that the same impairs his ability to practice podiatry;
(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;
(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;
(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;
(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;
(7) Is mentally, emotionally, or physically unfit to practice podiatry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice podiatry unless or until such person shall have been subsequently lawfully declared to be mentally competent;
(8) Has employed or procured any person to obtain or solicit professional patronage or has personally solicited professional patronage;

(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of podiatry or in attempting to fraudulently obtain a license to practice podiatry;
(10) Has engaged in such immoral conduct as to discredit the podiatry profession;
(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;
(12) Has been negligent in the practice of podiatry;
(13) Is not professionally competent in the practice of podiatry;
(14) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;
(15) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;
(16) Has committed any fraudulent or misleading acts in the practice of podiatry;
(17) Has, directly or indirectly, advertised in any manner for professional patronage or business; provided, however, that it shall not be considered advertising for a podiatrist, duly licensed to practice in this State, to place his name, office address, telephone number, and office hours in an approved register or other publication, or to place his name, followed by the word, "podiatrist," on the door or window of his office, or to place his name before the public in any manner expressly approved by the Board;
(18) Has used or permitted another to use his name, as a podiatrist, in promoting the sale or advertisement of any product or service;
(19) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of podiatry;
(20) Has persistently maintained, in the practice of podiatry, unsanitary offices, practices, or techniques;
(21) Is a menace to the public health by reason of having a serious communicable disease;
(22) Has distributed or caused to be distributed any intoxicant, drug, or narcotic for any other than a lawful purpose; or
(23) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(b) If any person engages in or attempts to engage in the practice of podiatry while his license is suspended, his license to practice podiatry in the State of North Carolina may be permanently revoked.

(c) Action of the Board shall be subject to judicial review as provided by Chapter 150A (Administrative Procedure Act). (1919, c. 78, ss. 12, 13; C. S., s. 6772; 1953, c. 1041, ss. 17, 18; 1963, c. 1195, s. 2; 1967, c. 691, s. 45; 1973, c. 1331, s. 3; 1975, c. 672, ss. 1, 2.)

CASE NOTES

Cited in Boehm v. North Carolina Bd. of Podiatry Exmrs., 41 N.C. App. 567, 255 S.E.2d 328, cert. denied, 298 N.C. 294, 259 S.E.2d 298 (1979).

§ 90-202.9. Fees for certificates and examinations; compensation of Board.

To provide a fund in order to carry out the provisions of this Article the Board shall charge not more than one hundred dollars ($100.00) for each license issued and one hundred dollars ($100.00) for each examination. From such funds the Board shall pay its members at the rate set out in G.S. 93B-5: Provided, that at no time shall the expenses exceed the cash balance on hand. (1919, c. 78, s. 14; C. S., s. 6773; 1967, c. 1217, s. 9; 1975, c. 672, s. 1.)

§ 90-202.10. Annual fee; cancellation or renewal of license.

On or before the first day of July of each year every podiatrist engaged in the practice of podiatry in this State shall transmit to the secretary-treasurer of the said North Carolina State Board of Podiatry Examiners his signature and post-office address, the date and year of his or her certificate, together with a fee to be set by the Board of Podiatry Examiners not to exceed one hundred fifty dollars ($150.00) and receive therefor a renewal certificate. Any license or certificate granted by said Board under or by virtue of this section shall automatically be cancelled and annulled if the holder thereof fails to secure the renewal herein provided for within a period of 30 days after the first day of July of each year, and such delinquent podiatrist shall pay a penalty for reinstatement of twenty-five dollars ($25.00) for each succeeding month of delinquency until a six-month period of delinquency exists. After a six-month period of delinquency exists or after January 1 following the July 1 deadline, the said podiatrist must appear before the North Carolina Board of Podiatry Examiners and take a new examination before being allowed to practice podiatry in the State of North Carolina. (1931, c. 191; 1963, c. 1195, s. 2; 1967, c. 1217, s. 10; 1975, c. 672, s. 1; 1977, c. 621.)

§ 90-202.11. Continuing education courses required.

Beginning May 1, 1976, all registered podiatrists then or thereafter licensed in the State of North Carolina shall be required to take annual courses of study in subjects relating to the practice of the profession of podiatry to the end that the utilization and application of new techniques, scientific and clinical advances, and the achievements of research will assure expansive and comprehensive care to the public. The length of study shall be prescribed by the Board but shall not exceed 25 hours in any calendar year. Attendance must be at a course or courses approved by the Board. Attendance at any course or courses of study are to be certified to the Board upon a form provided by the Board and shall be submitted by each registered podiatrist at the time he makes application to the Board for the renewal of his license and payment of his renewal fee. The Board is authorized to treat funds set aside for the purpose of continuing education as State funds for the purpose of accepting any funds made available under federal law on a matching basis for the promulgation and maintenance of programs of continuing education. This requirement may be waived by the Board in cases of certified illness or undue hardship as provided in the rules and regulations of the Board. (1975, c. 672, s. 1.)

§ 90-202.12. Free choice by patient guaranteed.

No agency of the State, county or municipality, nor any commission or clinic, nor any board administering relief, social security, health insurance or health service under the laws of the State of North Carolina shall deny to the recipients or beneficiaries of their aid or services the freedom to choose the provider

of care or service which are within the scope of practice of a duly licensed podiatrist or duly licensed physician as defined in this Chapter. (1967, c. 690, s. 3; 1975, c. 672, s. 1.)

§ 90-202.13. Injunctions.

The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. (1975, c. 672, s. 1.)

§ 90-202.14. Not applicable to physicians.

Nothing in this Article shall apply to a physician licensed to practice medicine or to a person acting under the supervision or at his direction in the course of such practice. (1975, c. 672, s. 1.)

Article 13.

Embalmers and Funeral Directors.

§§ 90-203 to 90-210.17: Recodified as §§ 90-210.18 to 90-210.25.

Editor's Note. — This Article was rewritten by Sessions Laws 1975, c. 571, effective Oct. 1, 1975, and has been recodified as Article 13A, § 90-210.18 et seq., of this Chapter.

Article 13A.

Practice of Funeral Service.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-210.18. Construction of Article; State Board; members; election; qualifications; term; vacancies.

(a) The General Assembly declares that the practice of funeral service affects the public health, safety and welfare, and is subject to regulation and control in the public interest. The public interest requires that only qualified persons be permitted to practice funeral service in North Carolina, and that the profession merit the confidence of the public. This Article shall be liberally construed to accomplish these ends.

(b) The North Carolina Board of Mortuary Science is hereby created as a continuation of the North Carolina Board of Embalmers and Funeral Directors, which was heretofore created by Chapter 338, Public Laws 1901; by Chapter 174, Public Laws 1931; by Chapter 951, Public Laws 1949; by Chapter 1240, Public Laws 1957; and continued by Chapter 630, Public Laws 1965, and the Board of Mortuary Science is hereby created as the agency of the State for regulation of the practice of funeral service in this State. Said Board of Mortuary Science shall consist of five funeral service licensees licensed to practice in North Carolina and two funeral directors who are licensed to practice funeral directing in North Carolina, or two funeral service licensees licensed to practice in North Carolina, and who possess other qualifications hereinafter specified and who shall have been elected in an election held as hereinafter provided in which every person licensed to practice embalming, funeral directing or funeral service in North Carolina shall be entitled to vote. Each of said five funeral service licensees shall be elected for a term of five years and until his successor shall be elected and shall qualify and each of said two funeral directors or two funeral service licensees shall be elected for a term of two years and until his successor shall be elected and shall qualify. Each year there shall be elected one funeral service licensee for a term of five years and one funeral director or funeral service licensee for a term of two years. Any vacancy occurring on said Board shall be filled for the period of the unexpired term by a majority vote of the remaining members of the Board. No funeral service licensee shall be nominated for membership on said Board, or shall be elected to membership on said Board, unless, at the time of such nomination, and at the time of such election, he is licensed to practice funeral service in North Carolina and actually engaged in the practice of funeral service in North Carolina. No funeral director shall be nominated for membership on said Board or shall be elected to membership on said Board unless, at the time of such nomination and at the time of such election, he is licensed to practice funeral directing in North Carolina and actually engaged in the practice of funeral directing in North Carolina. In addition to the seven members above provided for, the chairman of the Commission for Health Services shall serve ex officio as a member of said Board and one public member of the Board appointed by the Governor who shall be a voting member of the Board.

The first member appointed by the Governor shall serve until June 30, 1977, or until his successor is appointed. Thereafter, the Governor shall appoint such member of the Board to serve for a four-year term, beginning on July 1, 1977. The member of the Board appointed by the Governor shall not be a person licensed under this Article and such person shall not be employed by a person licensed under this Article.

(c) Nominations and elections of members of the North Carolina State Board of Mortuary Science shall be as follows:

(1) An election shall be held each year to elect two persons for membership on the Board of Mortuary Science, each to take office on the first day of January following the election, one funeral service licensee to hold office for a term of five years and until his successor has been elected and shall qualify, and one funeral director or funeral service licensee to hold office for a term of two years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by January 1 of that year, then the said members elected that year shall take office immediately after the completion of the election and the five-year member shall hold office until the first of January of the fifth year thereafter and until his successor is elected and qualified and the two-year member shall hold office until the first of January of the second year thereafter and until his successor is elected and qualified.

(2) Every embalmer, funeral director and funeral service licensee with a current North Carolina license shall be eligible to vote in all elections. The holding of such a license to practice in North Carolina shall constitute registration to vote in such elections. The list of licensed embalmers, funeral directors and funeral service licensees shall constitute the registration list for elections.

(3) All elections shall be conducted by the State Board of Mortuary Science which is hereby constituted a Board of Mortuary Science Elections. If a member of the State Board of Mortuary Science whose position is to be filled at any election is nominated to succeed himself and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Mortuary Science Elections for that election and the remaining members of the Board of Mortuary Science Elections shall proceed and function without his participation.

(4) Nomination of candidates for election shall be made to the Board of Mortuary Science Elections by a written petition signed by not less than 20 embalmers, funeral directors or funeral service licensees licensed to practice in North Carolina, and filed with said Board of Mortuary Science Elections subsequent to the fifteenth day of May of the year in which the election is to be held and not later than midnight of the fifteenth day of August of such year, or not later than such earlier date (not before July 1) as may be set by the Board of Mortuary Science Elections: Provided, that not less than 10 days' notice of such earlier date shall be given to all embalmers, funeral directors and funeral service licensees qualified to sign a petition of nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Mortuary Science Elections or its designated secretary at any time prior to the closing of the polls in any election.

(5a) No person is eligible to serve two consecutive elective terms as a member of the State Board of Mortuary Science, whether the terms be two-year, five-year, or any combination of two-year and five-year terms.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Mortuary Science Elections shall prescribe, ballots containing, in alphabetical order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Mortuary Science Elections at such time as may be fixed by the Board of Mortuary Science Elections a ballot and a return official envelope addressed to said Board shall be mailed to each embalmer, funeral director and funeral service licensee licensed to practice in North Carolina, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope . . . . . .
Signature of Voter . . . . . .
Address of Voter . . . . . .
. . . . . .

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)." The Board of Mortuary Science Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election unless within the time hereinafter

provided it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Mortuary Science Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Mortuary Science Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed embalmer, funeral director or funeral service licensee may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: Provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9) If one of the nominees shall receive a majority of the votes cast, he shall be declared elected. If no candidate shall receive a majority of the votes cast, the said Board shall order a second election to determine a contest between the two candidates receiving the highest number of votes. In any election if there is a tie between candidates, the tie shall be resolved by the vote of the State Board of Mortuary Science, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations, because of lack of plural or proper nominations, or death, or withdrawal, or disqualification or any other reason, there shall be (i) only one candidate for a position, he shall be declared elected by the Board of Mortuary Science Elections, or (ii) no candidate for a position, the position shall be filled by the State Board of Mortuary Science. In the event of the death or withdrawal of a candidate after election but

before taking office, the position to which he was elected shall be filled by the State Board of Mortuary Science. In the event of the death or resignation of a member of the State Board of Mortuary Science, after taking office, his position shall be filled for the unexpired term by the State Board of Mortuary Science.

(12) An official list of all licensed embalmers, funeral directors and funeral service licensees shall be kept at an office of the Board of Mortuary Science Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed embalmer, funeral director or funeral service licensee. As soon as the voting in any election begins, a list of the licensed embalmers, funeral directors, and funeral service licensees shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned.

(13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Mortuary Science Elections for a period of six months following the close of an election.

(14) From any decision of the Board of Mortuary Science Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150A of the General Statutes of North Carolina.

(15) The Board of Mortuary Science Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed embalmers, funeral directors, and funeral service licensees.

(d) The Board of Mortuary Science Elections is authorized to appoint such secretary or secretaries and/or assistant secretary or assistant secretaries to perform such functions in connection with such nominations and elections as said Board shall determine, provided that any protestant or contestant shall have the right to a hearing by said Board in connection with any challenge of a voter, or an envelope, or a ballot or the counting of an election. Said Board is authorized to designate an office or offices for the keeping of lists of registered embalmers, funeral directors and funeral service licensees, for the issuance and receipt of envelopes and ballots. (1901, c. 338, ss. 1-3; Rev., s. 4384; C. S., s. 6777; 1931, c. 174; 1945, c. 98, s. 1; 1949, c. 951, s. 1; 1957, c. 1240, s. 1; 1965, c. 630, s. 1; 1973, c. 476, s. 128; 1975, c. 571; 1979, c. 461, ss. 1-4.)

Editor's Note. — This Article is Article 13 of this Chapter as rewritten by Session Laws 1975, c. 571, effective Oct. 1, 1975, and recodified. Where appropriate, the historical citations to the sections of the former Article have been added to the corresponding sections of the new Article.

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote subsection (a), deleted "and unless he has had a license to practice funeral service or embalming in North Carolina for not less than five consecutive years prior thereto" at the end of the sixth sentence of subsection (b), deleted "and unless he has had such license to practice funeral directing in North Carolina for not less than five consecutive years prior thereto" at the end of the seventh sentence of subsection (b), rewrote subdivision (5a) of subsection (c) and substituted "Chapter 150A" for "Article 33 of Chapter 143" in subdivision (14) of subsection (c).

§ 90-210.19. Board members' oath of office.

The members of said Board, before entering upon their duties, shall take and subscribe to the oath of office prescribed for other State officers, which said oath shall be administered by a person qualified to administer such oath and shall be filed in the office of the Secretary of State. (1901, c. 338, ss. 3, 4; Rev., s. 4385; C. S., s. 6778; 1945, c. 98, s. 2; 1949, c. 951, s. 2; 1957, c. 1240, s. 2; 1969, c. 584, s. 1; 1973, c. 476, s. 128; 1975, c. 571.)

§ 90-210.20. Definitions.

(a) "Advertisement" means the publication, dissemination, circulation or placing before the public, or causing directly or indirectly to be made, published, disseminated or placed before the public, any announcement or statement in a newspaper, magazine, or other publication, or in the form of a book, notice, circular, pamphlet, letter, handbill, poster, bill, sign, placard, card, label or tag, or over any radio or television station.

(b) "Board" means the North Carolina State Board of Mortuary Science.

(c) "Burial" includes interment in any form, cremation and the transportation of the dead human body as necessary therefor.

(d) "Embalmer" means any person engaged in the practice of "embalming" as defined below.

(e) "Embalming" means the preservation and disinfection or attempted preservation and disinfection of the dead human bodies by application of chemicals externally or internally or both and the practice of restorative art including the restoration or attempted restoration of the appearance of the dead human body.

(f) "Funeral directing" means engaging in the practice of funeral service except embalming as hereinbefore defined.

(g) "Funeral director" means any person engaged in the practice of "funeral directing" as defined above.

(h) "Funeral establishment" means every place or premises devoted to or used in the care, arrangement and preparation for the funeral and final disposition of dead human bodies and maintained for the convenience of the public in connection with dead human bodies or as the place for carrying on the profession of funeral service.

(i) "Funeral service licensee" means a person who is duly licensed and engaged in the "practice of funeral service" as below defined.

(j) "Funeral service profession" means the aggregate of all funeral service licensees and their duties and responsibilities in connection with the funeral as an organized, purposeful, time-limited, flexible, group-centered response to death.

(k) "Practice of funeral service" means engaging in the care or disposition of dead human bodies or in the practice of disinfecting and preparing by embalming or otherwise dead human bodies for the funeral service, transportation, burial or cremation, or in the practice of funeral directing or embalming as presently known, whether under these titles or designations or otherwise. It also means engaging in making arrangements for funeral service, selling funeral supplies to the public or making financial arrangements for the rendering of such services or the sale of such supplies.

(l) "Resident trainee" means a person who is engaged in preparing to become licensed for the practice of funeral directing, embalming or funeral service under the personal supervision and instruction of a person duly licensed for the practice of funeral directing, embalming or funeral service in the State of North Carolina under the provisions of this Chapter, and who is duly registered as such with the Board. (1957, c. 1240, s. 2; 1975, c. 571; 1979, c. 461, s. 6.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, inserted "arrangement" near the beginning of subsection (h).

§ 90-210.21. State institutions.

Nothing in this Article shall apply to or in any manner interfere with the duties of any officer of local or State institutions. (1957, c. 1240, s. 2; 1975, c. 571; 1979, c. 461, s. 7.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, deleted "nor shall be construed to apply to the burial of dead bodies of paupers or of inmates of State institutions when buried at the sole expense of the State" at the end of the section.

§ 90-210.22. Required meetings of the Board.

The Board shall hold at least two meetings in each year at which examinations shall be given to qualified applicants for licenses. In addition, the Board may meet as often as the proper and efficient discharge of its duties shall require. Four members shall constitute a quorum. (1901, c. 338, ss. 5, 6, 7, 8; Rev., s. 4387; C. S., s. 6780; 1949, c. 951, s. 3; 1957, c. 1240, s. 2; 1969, c. 584, s. 2; 1973, c. 476, s. 128; 1975, c. 571.)

§ 90-210.23. Powers and duties of the Board.

(a) The Board is authorized to adopt and promulgate such rules and regulations for transaction of its business and for the carrying out and enforcement of the provisions of this Article as may be necessary and as are consistent with the laws of this State and of the United States.

(b) The Board shall elect from its members a president, a vice-president and a secretary, no two offices to be held by the same person. The president and vice-president and secretary shall serve for one year and until their successors shall be elected and qualify. The Board shall have authority to engage adequate staff as deemed necessary to perform its duties.

(c) The members of the Board shall serve without compensation provided that such members shall be reimbursed for their necessary traveling expenses and the necessary expenses incident to their attendance upon the business of the Board, and in addition thereto they shall receive per diem and expense reimbursement as provided in G.S. 93B-5 for every day actually spent by such member upon the business of the Board. All expenses, salaries and per diem provided for in this Article shall be paid from funds received under the provisions of this Article and shall in no manner be an expense to the State.

(d) Every person licensed by the Board and every resident trainee shall furnish all information required by the Board reasonably relevant to the practice of the profession or business for which he is a licensee or resident trainee, and every funeral service establishment shall be subject to inspection by the Board at all reasonable times and shall furnish all information required by the Board reasonably relevant to the business therein conducted. Every licensee, resident trainee and funeral service establishment shall provide the Board with his or its current post-office address which shall be placed on the appropriate register and all notices required by law or by any rule or regulation of the Board to be mailed to any licensee, resident trainee or funeral service establishment shall be validly given when mailed to the address so provided.

The Board is empowered to hold hearings in accordance with the provisions of this Article and of Chapter 150A to subpoena witnesses and to administer oaths to or receive the affirmation of witnesses before the Board.

(e) The Board is empowered to regulate and inspect, according to law, funeral service establishments, their operation and the licenses under which they are operated, and to enforce as provided by law the rules, regulations and requirements of the Division of Health Services and of the city, town or county

wherein any such funeral service establishment is maintained and operated.

(f) The Board may establish, supervise, regulate and control programs for the resident trainee. It may approve schools of mortuary science or funeral service, graduation from which is required by this Article as a qualification for the granting of any license, and may establish essential requirements and standards for such approval of mortuary science or funeral service schools.

(g) Schools for teaching mortuary science which are approved by the Board shall have extended to them the same privileges as to the use of bodies for dissecting while teaching as those granted in this State to medical colleges, but such bodies shall be obtained through the same agencies which provide bodies for medical colleges.

(h) The Board shall adopt a common seal.

(i) The Board may perform such other acts and exercise such other powers and duties as may be provided elsewhere in this Article or otherwise by law and as may be necessary to carry out the powers herein conferred. (1901, c. 338, ss. 5, 6, 7, 8, 11; Rev., ss. 4386, 4387, 4389; C. S., ss. 6779, 6780, 6783; 1949, c. 951, s. 3; 1957, c. 1240, s. 2; 1969, c. 584, s. 2; 1973, c. 476, s. 128; 1975, c. 571; 1979, c. 461, ss. 8, 9.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "funds" for "fees" in the second sentence of subsection (c) and substituted "150A" for "150" in the second paragraph of subsection (d).

§ 90-210.24. Inspector.

(a) The Board may appoint one or more agents who shall serve at the pleasure of the Board and who shall have the title "Inspector of the Board of Mortuary Science of North Carolina." No person is eligible for appointment as inspector unless at the time of his appointment he is licensed under this Article as a funeral service licensee.

(b) To determine compliance with the provisions of this Article and regulations promulgated under this Article, inspectors may

(1) Enter the office, premises, establishment or place of business of any funeral service licensee, funeral director or embalmer in North Carolina, and any office, premises, establishment or place in North Carolina where the practice of funeral service is carried on, or where that practice is advertised as being carried on, or where a funeral is being conducted, to inspect the office, premises, or establishment, or to inspect the license or registration of any licensee and any resident trainee operating therein;

(2) Enter any hospital, nursing home, or other institution from which a dead human body has been removed by any person licensed under this Article or their designated representative to inspect records pertaining to the removal and its authorization; and

(3) May inspect criminal and probation records of licensees and applicants for licenses under this Article to obtain evidence of their character.

Inspectors may serve papers and subpoenas issued by the Board or any office or member thereof under authority of this Article, and shall perform other duties prescribed or ordered by the Board.

(c) Upon request by the Board, the Attorney General of North Carolina shall provide the inspectors with appropriate identification cards, signed by the Attorney General or his designated agent.

(d) The Board may prescribe an inspection form to be used by the inspectors in performing their duties. (1975, c. 571; 1979, c. 461, s. 10.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote this section.

§ 90-210.25. Licensing.

(a) Qualifications, Examinations, Resident Traineeship and Licensure. —

(1) To be licensed for the practice of funeral directing under this Article, a person must:

a. Be at least 18 years of age,

b. Be of good moral character,

c. Have completed a minimum of 32 semester hours or 48 quarter hours of academic instruction in a duly accredited college or university, or be a graduate of a mortuary science college approved by the Board,

d. Have completed 12 months of resident traineeship as funeral director, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and

e. Have passed an oral or written funeral director examination on the following subjects:

1. Basic health sciences, including microbiology, hygiene, and public health,

2. Funeral service administration, including psychology, funeral principles and directing, and

3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(2) To be licensed for the practice of embalming under this Article, a person must:

a. Be at least 18 years of age,

b. Be of good moral character,

c. Be a graduate of a mortuary science college approved by the Board,

d. Have completed 12 months of resident traineeship as an embalmer pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and

e. Have passed an oral or written embalmer examination on the following subjects:

1. Basic health sciences, including anatomy, chemistry, microbiology, pathology and forensic pathology,

2. Funeral service sciences, including embalming and restorative art, and

3. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(3) To be licensed for the practice of funeral service under this Article, a person must:

a. Be at least 18 years of age,

b. Be of good moral character,

c. Be a graduate of a mortuary science college approved by the Board,

d. Have completed 12 months of resident traineeship as a funeral service licensee, pursuant to the procedures and conditions set out in G.S. 90-210.25(a)(4), either before or after satisfying the educational requirement under item c. of this subsection, and

e. Have passed an oral or written funeral service examination on the following subjects:

1. Basic health sciences, including anatomy, chemistry, microbiology, pathology, forensic pathology, hygiene and public health,
2. Funeral service sciences, including embalming and restorative art,
3. Funeral service, administration including psychology, funeral principles and directing, and
4. Laws of North Carolina and rules of the Board of Mortuary Science and other agencies dealing with the care, transportation and disposition of dead human bodies.

(4) a. A person desiring to become a resident trainee shall apply to the Board on a form provided by the Board. The application shall state that the applicant is not less than 18 years of age, of good moral character, and is the graduate of a high school or the equivalent thereof, and shall indicate the licensee under whom the applicant expects to train. A person training to become an embalmer may serve under either a licensed embalmer or a funeral service licensee. A person training to become a funeral director may serve under either a licensed funeral director or a funeral service licensee. A person training to become a funeral service licensee shall serve under a funeral service licensee. The application must be sustained by oath of the applicant and be accompanied by the appropriate fee. When the Board is satisfied as to the qualifications of an applicant it shall instruct the secretary to issue a certificate of resident traineeship.

b. When a resident trainee leaves the proctorship of the licensee under whom the trainee has worked, the licensee shall file with the Board an affidavit showing the length of time served with the licensee by the trainee, and the affidavit shall be made a matter of record in the Board's office. The licensee shall deliver a copy of the affidavit to the trainee.

c. A person who has not completed the traineeship and wishes to do so under a licensee other than the one whose name appears on the original certificate may reapply to the Board for approval, without payment of an additional fee.

d. A certificate of resident traineeship shall be signed by the resident trainee and upon payment of the renewal fee shall be renewable one year after the date of original registration; but the certificate may not be renewed more than one time. The Board shall mail to each registered trainee at his last known address a notice that the renewal fee is due and that, if not paid within 30 days of the notice, the certificate will be canceled. A penalty, in addition to the renewal fee, shall be charged for a late renewal, but the renewal of the registration of any resident trainee who is engaged in the active military service of the United States at the time renewal is due may, at the discretion of the Board, be held in abeyance for the duration of that service without penalties.

e. All registered resident trainees shall report to the Board at least every three months during traineeship upon forms provided by the Board listing the work which has been completed during the preceding three months of resident traineeship. The data contained in the reports shall be certified as correct by the licensee under whom the trainee has served during the period and by the licensed person who is managing the funeral service establishment. Each report shall list the following:

1. For funeral director trainees, the conduct of any funerals during the relevant time period,

2. For embalming trainees, the embalming of any bodies during the relevant time period,
3. For funeral service trainees, both of the activities named in 1 and 2 of this subsection, engaged in during the relevant time period.

f. To meet the resident traineeship requirements of G.S. 90-210.25(a)(1), G.S. 90-210.25(a)(2) and G.S. 90-210.25(a)(3) the following must be shown by the affidavit(s) of the licensee(s) under whom the trainee worked:
1. That the funeral director trainee has, under supervision, assisted in directing at least 25 funerals during the resident traineeship,
2. That the embalmer trainee has, under supervision, assisted in embalming at least 25 bodies during the resident traineeship,
3. That the funeral service trainee has, under supervision assisted in directing at least 25 funerals and, under supervision, assisted in embalming at least 25 bodies during the resident traineeship.

g. The Board may suspend or revoke a certificate of resident traineeship for violation of any provision of this Article.

h. Each sponsor for a registered resident trainee must during the period of sponsorship be actively employed with a funeral establishment. The traineeship shall be a primary vocation of the trainee.

i. Only one resident trainee may register and serve at any one time under any one person licensed under this Article.

(5) The Board by regulation may recognize other examinations that the Board deems equivalent to its own.

All licenses shall be signed by the president and secretary of the Board and the seal of the Board affixed thereto. All licenses shall be issued, renewed or duplicated for a period not exceeding one year upon payment of the renewal fee, and all licenses, renewals or duplicates thereof shall expire and terminate the thirty-first day of December following the date of their issue unless sooner revoked and canceled; provided, that the date of expiration may be changed by unanimous consent of the Board and upon 90 days' written notice of such change to all persons licensed for the practice of funeral directing, embalming and funeral service in this State.

The holder of any license issued by the Board who shall fail to renew same on or before January 31 of the calendar year for which such license is to be renewed shall be deemed to have forfeited and surrendered such license as of such date. No license so forfeited and surrendered shall be reinstated by the Board except upon application in writing within five years following such forfeiture and upon payment of all delinquent annual renewal fees plus a reinstatement fee; provided, however, that the Board may waive the provisions of this section for the holder of any license during the period of service in the armed services of the United States upon application within six months of severance therefrom.

All licensees now or hereafter licensed in North Carolina shall take courses of study in subjects relating to the practice of the profession for which they are licensed, to the end that new techniques, scientific and clinical advances, the achievements of research and the benefits of learning and reviewing skills will be utilized and applied to assure proper service to the public.

As a prerequisite to the annual renewal of a license, the licensee must complete, during the year immediately preceding renewal, at

least five hours of continuing education courses, approved by the Board prior to enrollment; except that for renewals for calendar year 1980 the required length of study shall be a total of 15 hours in the three years immediately preceding January 1, 1980.

The Board shall not renew a license unless fulfillment of the continuing education requirement has been certified to it on a form provided by the Board, but the Board may waive this requirement for renewal in cases of certified illness or undue hardship or where the licensee lives outside of North Carolina and does not practice in North Carolina, and the Board shall waive the requirement for all licensees who have been licensed in North Carolina for a continuous period of 25 years or more.

The Board shall cause to be established and offered to the licensees, each calendar year, at least five hours of continuing education courses in subjects encompassing the license categories of embalming, funeral directing and funeral service. The Board may charge licensees attending these courses a reasonable registration fee in order to meet the expenses thereof and may also meet those expenses from other funds received under the provisions of this Article.

Any person who having been previously licensed by the Board as a funeral director or embalmer prior to July 1, 1975, shall not be required to satisfy the requirements herein for licensure as a funeral service licensee, but shall be entitled to have such license renewed upon making proper application therefor and upon payment of the renewal fee provided by the provisions of this Article. Persons previously licensed by the Board as a funeral director may engage in funeral directing, and persons previously licensed by the Board as an embalmer may engage in embalming. Any person having been previously licensed by the Board as both a funeral director and an embalmer may upon application therefor receive a license as a funeral service licensee.

(b) Persons Licensed under the Laws of Other Jurisdictions. —

(1) The Board shall grant licenses to funeral directors, embalmers and funeral service licensees, licensed in other states, territories, the District of Columbia, and foreign countries, when it is shown that the applicant holds a valid license as a funeral director, embalmer or funeral service licensee issued by the other jurisdiction, has demonstrated knowledge of the laws and regulations governing the profession in North Carolina and has submitted proof of his good moral character; and either that the applicant has continuously practiced the profession in the other jurisdiction for at least three years immediately preceding his application, or the Board has determined that the licensing requirements for the other jurisdiction are substantially similar to those of North Carolina.

(2) The Board shall periodically review the mortuary science licensing requirements of other jurisdictions and shall determine which licensing requirements are substantially similar to the requirements of North Carolina.

(3) The Board may issue special permits, to be known as courtesy cards, permitting nonresident funeral directors, embalmers and funeral service licensees to remove bodies from and to arrange and direct funerals and embalm bodies in this State, but these privileges shall not include the right to establish a place of business in or engage generally in the business of funeral directing and embalming in this State.

(c) Registration, Filing and Transportation. — The holder of any license granted by this State for those within the funeral service profession or renewal

thereof provided for in this Article shall cause registration to be filed in the office of the board of health of the county or city in which he practices his profession, or if there be no board of health in such county or city, at the office of the clerk of the superior court of such county. All such licenses, certificates, duplicates and renewals thereof shall be displayed in a conspicuous place in the funeral establishment where the holder renders service. It shall be unlawful for any railway agent, express agency, baggage master, conductor or other person acting as such, to receive the dead body of any person for shipment or transportation by railway or other public conveyance, to a point outside of this State, unless said body be accompanied by a removal or shipping permit.

(d) Establishment Permit. —

(1) No person, firm or corporation shall conduct, maintain, manage or operate a funeral establishment unless a permit for that establishment has been issued by the Board and is conspicuously displayed in the establishment.

(2) A permit shall be issued when:

a. It is shown that the funeral establishment has in charge a person, known as a manager, licensed for the practice of funeral directing or funeral service,

b. The Board receives a list of the names of all part-time and full-time licensees employed by the establishment,

c. If embalming is to be performed on the premises, it is shown that a preparation room is maintained which satisfies the requirements set out in G.S. 90-210.27, and

d. The Board receives payment of the permit fee.

(3) Applications for funeral establishment permits shall be made on forms provided by the Board and filed with the Board by the owner, a partner or an officer of the corporation by January 1 of each year, and shall be accompanied by the application fee or renewal fee, as the case may be. All permits shall expire on December 31 of each year.

A penalty for late renewal, in addition to the regular renewal fee, shall be charged for renewal of registration coming after the first day of February.

(4) The Board may suspend or revoke a permit when an owner, partner or officer of the funeral establishment violates any provision of this Article or any regulations of the Board, or when any agent or employee of the funeral establishment, with the consent of any person, firm or corporation operating the funeral establishment, violates any of those provisions, rules or regulations.

(5) Funeral establishment permits are not transferable. A new application for a permit shall be made to the Board within 30 days of a change of ownership of a funeral establishment.

(e) Revocation; Suspension; Fines; Disclosure. —

(1) Whenever the Board finds that an applicant for a license or a person to whom a license has been issued by the Board is guilty of any of the following acts or omissions and the Board also finds that the person has thereby become unfit to practice, the Board may suspend or revoke the license or refuse to issue or renew the license, in accordance with the procedures set out in Chapter 150A:

a. Conviction of a felony or a crime involving fraud or moral turpitude;

b. Fraud or misrepresentation in obtaining or renewing a license;

c. False or misleading advertising as the holder of a license;

d. Solicitation of dead human bodies by the licensee, his agents, assistants, or employees; but this paragraph shall not be construed to prohibit general advertising by the licensee;

e. Employment directly or indirectly of any resident trainee agent, assistant or other person, on a part-time or full-time basis, or on commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular licensee;

f. The direct or indirect giving of certificates of credit or the payment or offer of payment of a commission by the licensee, his agents, assistants or employees for the purpose of securing business;

g. Gross immorality, including being under the influence of alcohol or drugs while practicing funeral service;

h. Aiding or abetting an unlicensed person to perform services under this Article, including the use of a picture or name in connection with advertisements or other written material published or caused to be published by the licensee;

i. Using profane, indecent or obscene language in the presence of a dead human body, and within the immediate hearing of the family or relatives of a deceased, whose body has not yet been interred or otherwise disposed of;

j. Violating or cooperating with others to violate any of the provisions of this Article or of the rules and regulations of the Board;

k. Violation of any State law or municipal or county ordinance or regulation affecting the handling, custody, care or transportation of dead human bodies;

l. Refusing to surrender promptly the custody of a dead human body upon the express order of the person lawfully entitled to the custody thereof;

m. Knowingly making any false statement on a certificate of death;

n. Indecent exposure or exhibition of a dead human body while in the custody or control of a licensee.

(2) Where the Board finds that a licensee is guilty of one or more of the acts or omissions listed in subsection (e)(1) of this section but it is determined by the Board that the licensee has not thereby become unfit to practice, the Board may place the licensee on a term of probation in accordance with the procedures set out in Chapter 150A.

No person licensed under this Article shall remove or cause to be embalmed a dead human body when he has information indicating crime or violence of any sort in connection with the cause of death, nor shall a dead human body be cremated, until permission of the State or county medical examiner has first been obtained. However, nothing in this Article shall be construed to alter the duties and authority now vested in the office of the coroner.

No funeral service establishment shall accept a dead human body from any public officer (excluding the State or county medical examiner or his agent), or employee or from the official of any institution, hospital or nursing home, or from a physician or any person having a professional relationship with a decedent, without having first made due inquiry as to the desires of the next of kin and of the persons who may be chargeable with the funeral expenses of such decedent. If any such kin be found, his or her authority and directions shall govern the disposal of the remains of such decedent. Any funeral service establishment receiving such remains in violation hereof shall make no charge for any service in connection with such remains prior to delivery of same as stipulated by such kin; provided, however, this section shall not prevent any funeral service establishment from charging and being reimbursed for services rendered in connection with the removal of the remains of any deceased person in case of accidental or violent death, and rendering necessary professional services required until the next of kin or the persons chargeable with the expenses have been notified.

When and where a licensee presents a selection of funeral merchandise to the public to be used in connection with the service to be provided by the licensee or an establishment as licensed under this Article, a card or brochure shall be directly associated with each item of merchandise setting forth the price of the service using said merchandise and listing the services and other merchandise included in the price, if any. When there are separate prices for the merchandise and services, such cards or brochures shall indicate the price of the merchandise and of the items separately priced.

At the time funeral arrangements are made and prior to the time of rendering the service and providing the merchandise, a funeral director or funeral service licensee shall give or cause to be given to the person or persons making such arrangements a written statement duly signed by a licensee of said funeral establishment showing the price of the service as selected and what services are included therein, the price of each of the supplemental items of services or merchandise requested, and the amounts involved for each of the items for which the funeral establishment will advance moneys as an accommodation to the person making arrangements, insofar as any of the above items can be specified at that time. The statement shall have printed, typed or stamped on the face thereof: "This statement of disclosure is provided pursuant to the requirements of North Carolina G.S. 90-210.25(e)."

(f) Unlawful Practices. — If any person shall practice or hold himself out as practicing the profession or art of embalming, funeral directing or practice of funeral service without having complied with the licensing provisions of this Article, he shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than six months, or both, in the discretion of the court. (1901, c. 338, ss. 9, 10, 14; Rev., ss. 3644, 4388; 1917, c. 36; 1919, c. 88; C. S., ss. 6781, 6782; 1949, c. 951, s. 4; 1951, c. 413; 1957, c. 1240, ss. 2, 2½; 1965, cc. 719, 720; 1967, c. 691, s. 48; c. 1154, s. 2; 1969, c. 584, ss. 3, 3a, 4; 1975, c. 571; 1979, c. 461, ss. 11-21.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote subsections (a), (b), (d), and (e).

CASE NOTES

Cited in Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978); Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325 (1979).

§ 90-210.26. Good moral character.

Evidence of good moral character may be shown by the affidavits of three persons who have been acquainted with the applicant for three years immediately preceding the submission of the affidavit. (1979, c. 461, s. 22.)

Editor's Note. — Session Laws 1979, c. 461, s. 23, makes this section effective July 1, 1979.

§ 90-210.27. Preparation room.

(a) Every funeral establishment if embalming is to be performed on the premises, shall maintain a preparation room which is strictly private.

(b) No one is allowed in the preparation room while a dead human body is being prepared except licensees, resident trainees, public officials in the dis-

charge of their duties, members of the medical profession, officials of the funeral home, next of kin or other legally authorized persons.

(c) Each preparation room shall:

(1) Contain one standard type operating table;

(2) Contain facilities for adequate drainage;

(3) Contain a sanitary waste receptacle;

(4) Contain an instrument sterilizer;

(5) Have wall-to-wall floor covering of tile, concrete, or other material which can be easily cleaned;

(6) Be kept in sanitary condition and subject to inspection by the Board or its agents at all times;

(7) Have a placard or sign on the door indicating that the preparation room is private;

(8) Have a proper ventilation or purification system to maintain a nonhazardous level of airborne contamination. (1979, c. 461, s. 22.)

Editor's Note. — Session Laws 1979, c. 461, s. 23, makes this section effective July 1, 1979.

§ 90-210.28. Fees.

The Board may set and collect fees, not to exceed the following amounts:

Establishment permit	
Application	$ 50.00
Annual renewal	50.00
Late renewal penalty	35.00
Courtesy card	
Application	35.00
Annual renewal	35.00
Out-of-state licensee	
Application	50.00
Embalmer, funeral director, funeral service	
Application	50.00
Annual renewal	50.00
Reinstatement fee	100.00
Resident trainee permit	
Application	35.00
Annual renewal	10.00
Late renewal penalty	5.00

(1979, c. 461, s. 22.)

Editor's Note. — Session Laws 1979, c. 461, s. 23, makes this section effective July 1, 1979.

§ 90-210.29. Students.

(a) Students who are enrolled in duly accredited mortuary science colleges in North Carolina may engage in the practices defined in this Article if the practices are part of their academic training and if the practices are under the supervision of a licensed instructor of mortuary science or a licensee designated by the mortuary science college upon registration with the Board.

(b) The Board shall issue student permits upon verification of an applicant's enrollment in a duly accredited mortuary science college. (1979, c. 461, s. 22.)

Editor's Note. — Session Laws 1979, c. 461, s. 23, makes this section effective July 1, 1979.

Article 14.

Cadavers for Medical Schools.

§ 90-211: Repealed by Session Laws 1973, c. 476, s. 128.

Cross References. — As to donation of bodies or parts thereof to medical schools, see § 90-220.3.

§§ 90-212 to 90-216: Repealed by Session Laws 1975, c. 694, s. 1.

Article 14A.

Bequest of Body or Part Thereof.

§§ 90-216.1 to 90-216.5: Repealed by Session Laws 1969, c. 84, s. 2.

Cross References. — As to the Uniform Anatomical Gift Act, see §§ 90-220.1 to 90-220.11.

Article 14B.

Disposition of Unclaimed Bodies.

§ 90-216.6. Unclaimed bodies; disposition.

(a) All officers, employees, and agents of the State of North Carolina or of any unit of local government in the State, all undertakers doing business within the State, or any person, institution or agency otherwise having charge or control of an unclaimed body shall immediately notify and, upon the request of the Commission of Anatomy, deliver the dead body to the Commission. The Commission may take and remove the dead body itself in its discretion. No reward or fee shall be paid for such notification of the Commission. The person, institution, or agency having charge or control of an unclaimed body shall make reasonable efforts to notify any interested person of the deceased's death. The recipient to which the Commission of Anatomy distributes the body shall pay all expenses for the embalming, delivery and distribution of the body, and for the reasonable efforts made to notify such persons.

(b) As used herein, an unclaimed body shall mean a dead body which is not claimed for burial upon death and which, as appears to the person, institution or agency having charge or control of the dead body, will not be claimed for burial within 10 days of the deceased's death. The unclaimed body shall remain in the charge or control of the person, institution or agency for a period of 10 days unless the period is extended by the medical examiner or coroner having jurisdiction, or unless the period is shortened by the county director of social services upon his determination that the dead body will not be claimed for burial within 10 days of the deceased's death. Upon the expiration of such period, the person, institution or agency having charge or control of the

unclaimed body will deliver it to the Commission at such time and place specified by the Commission or permit the Commission to take and remove the body itself.

(c) All dead bodies not claimed for burial within 10 days of the deceased's death may be received and distributed by the Commission of Anatomy pursuant to the authority contained in G.S. 143B-204 and this Article and in accordance with its rules and regulations. All interests in and rights to dead bodies unclaimed for burial within 10 days of the deceased's death and received by the Commission of Anatomy shall vest in the Commission.

(d) No autopsy shall be performed on an unclaimed body without the written consent of the Commission of Anatomy except that such written consent is not required for an autopsy performed pursuant to Article 15 of Chapter 90 or Article 21 of Chapter 130 of the General Statutes.

(e) Due caution shall be taken to shield the unclaimed body from public view.

(f) Notwithstanding anything contained in this section, an unclaimed body shall not mean a dead body for which the deceased has made a gift thereof pursuant to Article 15A of Chapter 90 of the General Statutes known as the Uniform Anatomical Gift Act.

(g) Any person failing or refusing to perform any duty imposed by this section or violating any of its provisions shall be guilty of a misdemeanor, punishable by a fine and/or imprisonment in the discretion of the court.

(h) Nothing in this Article shall require the officers, employees or agents of a county to notify the Commission regarding the bodies of minors who were in the custody of the county at the time of death and for whose burial the county will arrange. In the absence of notification, the expenses of the burial shall be a charge upon the county having custody. (1975, c. 694, s. 3; 1977, c. 458.)

§§ 90-216.7 to 90-216.11: Reserved for future codification purposes.

Article 14C.

Final Disposition or Transportation of Deceased Migrant Farm Workers and Their Dependents.

§ 90-216.12. Final disposition or transportation of deceased migrant farm workers and their dependents.

(a) Notwithstanding any other provisions of the law, any person having knowledge of the death of a migrant agricultural worker or a worker's dependent shall without delay report the fact of such death to the department of social services in the county in which the body is located together with any information he may possess respecting the deceased including his identity, place of employment, permanent residence, and the name, address and telephone number of any relative and interested person. The county department of social services shall within a reasonable time of receiving such report transmit to the Department of Human Resources notice of the death and any information pertaining thereto. The Department of Human Resources shall, upon notification, make every reasonable effort to inform the nearest relative and any interested person of said death.

(b) In the event that the identity of the person cannot be determined within a reasonable period of time, or in the event that the body is unclaimed 10 days after death, the body shall be offered to the Commission of Anatomy and, upon its request, shall be delivered to the Commission as per the provisions of G.S.

90-216.6(a). In the event that the Commission of Anatomy does not request an unclaimed body offered it or the estate, and in the event that the relatives or other interested persons claiming the body are unable to provide for the final disposition of said migrant agricultural worker or his dependent, the Department of Human Resources is authorized, empowered, and directed to arrange for the final disposition of the deceased.

(c) In the event that the estate, relatives or interested persons are able to provide for final disposition but are unable to effect the transportation of the body of the deceased to his legal residence or the legal residence of the relatives or interested persons, the Department of Human Resources is authorized, empowered, and directed to allocate a sum of not more than two hundred dollars ($200.00) to defray said transportation expenses.

Payments made from the funds appropriated under this subsection shall be made in accordance with rules and regulations promulgated by the Department of Human Resources.

For purposes of this Article, a migrant agricultural worker is any worker who moves in response to the demand for seasonal agricultural labor.

For purposes of this Article, dependent means child, grandchild, spouse or parent of a migrant agricultural worker who moves with said migrant agricultural worker in response to the demand for seasonal agricultural labor. (1975, c. 891; 1977, c. 648.)

Article 15.

Autopsies.

§ 90-217. Limitation on right to perform autopsy.

The right to perform an autopsy shall be limited to those cases in which:

(1) The Chief Medical Examiner or the medical examiner of a county, acting pursuant to G.S. 130-200, directs that an autopsy be performed;

(2) A prosecuting officer or district attorney acting pursuant to G.S. 15-7 in case of homicide, directs that an autopsy be performed;

(3) The decedent directs in writing that an autopsy be performed in connection with his death;

(4) The personal representative of the estate of the decedent requests that an autopsy be performed upon the decedent; or

(5) Any of the following persons, in order of priority, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual opposition by a member of the same or prior class, authorizes an autopsy to be performed:

a. The spouse,

b. Any adult son, adult daughter or adult stepson or adult stepdaughter,

c. Any parent or stepparent, including the mother of an illegitimate child decedent,

d. Any adult brother, adult sister, or adult half brother or adult half sister,

e. Any other relative or person who accepts responsibility for burial or final disposition of the body by other customary and lawful procedures,

f. Any other person charged by law with the duty of burial or final disposition of the body by other customary and lawful procedures. (1931, c. 152; 1933, c. 209; 1967, c. 1154, s. 4; 1969, c. 444; 1973, c. 47, s. 2.)

Cross References. — As to authority of coroners, see § 152-7. As to authority of prosecuting officer, see § 15-7. As to postmortem medicolegal examinations, see §§ 130-192 to 130-202.2.

Legal Periodicals. — For note on autopsies and authority to use parts removed in treatment of the living, see 33 N.C.L. Rev. 653 (1955).

CASE NOTES

The right of burial belongs to the surviving relations in the order of inheritance. See Floyd v. Atlantic Coastline Ry., 167 N.C. 55, 83 S.E. 12 (1914); 9 N.C.L. Rev. 348.

When Autopsy May Be Performed. — An autopsy may not legally be performed without the consent of the person having the duty to bury the body, unless authorized by statute. Parker v. Quinn-McGowen Co., 262 N.C. 560, 138 S.E.2d 214 (1964).

Purpose of Autopsy. — Except in the case of an inquest, the avowed purpose of an autopsy is to advance medical knowledge and thus alleviate suffering in the living. Parker v. Quinn-McGowen Co., 262 N.C. 560, 138 S.E.2d 214 (1964).

An autopsy is a violation of the body not intended to preserve it intact — quite the contrary — and is totally unrelated to its proper burial. Parker v. Quinn-McGowen Co., 262 N.C. 560, 138 S.E.2d 214 (1964).

And Is Different from Unauthorized Embalming. — Although it has been said that an undertaker's unauthorized embalming of a body received for burial constitutes mutilation similar to that involved in an autopsy, there is a distinct difference in the two operations. Parker v. Quinn-McGowen Co., 262 N.C. 560, 138 S.E.2d 214 (1964).

Cited in Gurganious v. Simpson, 213 N.C. 613, 197 S.E. 163 (1938).

OPINIONS OF ATTORNEY GENERAL

"Adult" Is Person 18 or Older. — See opinion of Attorney General to Lena S. Davis, 41 N.C.A.G. 489 (1971).

§ 90-218. Postmortem examination of inmates of certain public institutions.

Upon the death of any inmate of any institution now maintained, or in the future established, by the State, or any city, county or other political subdivision of the State, for the care of the sick, the feebleminded or insane, the superintendent, or other administrative head of such institution in which such death occurs, is empowered to authorize a postmortem examination of the deceased person. Such examination shall be of such scope and nature as may be thought necessary or desirable to promote knowledge of the human organism and the disorders to which it is subject. (1943, c. 87, s. 1.)

§ 90-219. Postmortem examinations in certain medical schools.

The postmortem examinations and studies authorized may be made in the laboratories of incorporate medical schools of colleges and universities on such conditions as may be agreed upon by the superintendent, or other administrative head of such institution, authorizing the examination and the head of the medical school undertaking to make the examination. (1943, c. 87, s. 2.)

§ 90-220. Written consent for postmortem examinations required.

No superintendent, or other administrative head of such institution, shall authorize any postmortem examination, as described in G.S. 90-218 and 90-219, without first securing the written consent of the deceased person's husband or wife, or one of the next of kin, or nearest known relative or other person charged by law with the duty of burial, in the order named and as known. A copy of the written consent shall be filed in the office of the superintendent, or other administrative head of the institution wherein said inmate dies. (1943, c. 87, s. 3.)

Article 15A.

Uniform Anatomical Gift Act.

§ 90-220.1. Definitions.

As used in this Article:

(1) "Bank or storage facility" means a facility licensed, accredited, or approved under the laws of any state for storage or distribution of human bodies or parts thereof.

(2) "Decedent" means a deceased individual and includes a stillborn infant or fetus.

(3) "Donor" means an individual who makes a gift of all or part of his body.

(4) "Hospital" means a hospital licensed, accredited, or approved under the laws of any state and a hospital operated by the United States government, a state, or a subdivision thereof, although not required to be licensed under state laws.

(5) "Part" means organs, tissues, eyes, bones, arteries, blood, other fluids and any other portions of a human body.

(6) "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

(7) "Physician" or "surgeon" means a physician or surgeon licensed or authorized to practice medicine under the laws of any state.

(8) "State" includes any state, district, commonwealth, territory, insular possession, and any other area subject to the legislative authority of the United States of America.

(9) Repealed by Session Laws 1975, c. 32, s. 1.

(10) "Qualified individual" means:

a. An embalmer holding a valid license to practice in this State,

b. A physician's assistant approved by and registered with the Board of Medical Examiners pursuant to G.S. 90-18(13),

c. A registered or a licensed practical nurse certified by the Board of Nursing pursuant to Article 9 of Chapter 90 of the General Statutes, or

d. A student who is enrolled in an accredited school of medicine operating within this State and who has completed two or more years of a course of study leading to the awarding of a degree of doctor of medicine from such school,

and who has completed a course in eye enucleation and has been certified as competent to enucleate eyes by an accredited school of medicine operating within North Carolina. (1969, c. 84, s. 1; 1971, c. 873, s. 1; 1975, c. 32, ss. 1, 2.)

Legal Periodicals. — For note on determining the time of death of the heart transplant donor, see 51 N.C.L. Rev. 172 (1972).

§ 90-220.2. Persons who may execute an anatomical gift.

(a) Any individual of sound mind and 18 years of age or more may give all or any part of his body for any purpose specified in G.S. 90-220.3, the gift to take effect upon death.

(b) Any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purpose specified in G.S. 90-220.3:

(1) The spouse,
(2) An adult son or daughter,
(3) Either parent,
(4) An adult brother or sister,
(5) A guardian of the person of the decedent at the time of his death,
(6) Any other person authorized or under obligation to dispose of the body.

The persons authorized by this subsection may make the gift after or immediately before death; provided, however, the guardian of the person of a ward may make the gift at any time during the guardianship and the gift shall become effective upon the death of the ward unless the guardianship shall have terminated before death.

(c) If the donee has actual notice of contrary indications by the decedent or that a gift by a member of a class is opposed by a member of the same or a prior class, the donee shall not accept the gift.

(d) A gift of all or part of a body authorizes any examination necessary to assure medical acceptability of the gift for the purposes intended.

(e) The rights of the donee created by the gift are paramount to the rights of others except as provided by G.S. 90-220.7(d). (1969, c. 84, s. 1; 1977, c. 166, s. 1.)

OPINIONS OF ATTORNEY GENERAL

"Adult" Is Person 18 or Older. — See opinion of Attorney General to Lena S. Davis, 41 N.C.A.G. 489 (1971).

§ 90-220.3. Persons who may become donees; purposes for which anatomical gifts may be made.

The following persons, institutions and agencies may become donees of gifts of bodies or parts thereof for the purposes stated:

(1) Any hospital, surgeon, or physician, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation; or
(2) Any accredited medical or dental school, college or university for education, research, advancement of medical or dental science, or therapy; or
(3) Any bank or storage facility, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation; or
(4) Any specified individual for therapy or transplantation needed by him.

(5) The Commission of Anatomy for the distribution of such bodies or parts thereof for the purpose of promoting the study of anatomy in the State of North Carolina. (1969, c. 84, s. 1; 1975, c. 694, ss. 4, 5.)

§ 90-220.4. Manner of executing anatomical gifts.

(a) A gift of all or part of the body under G.S. 90-220.2(a) may be made by will. The gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated, or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective.

(b) A gift of all or part of the body under G.S. 90-220.2(a) may also be made by document other than a will. The gift becomes effective upon the death of the donor. The document, which may be a card designed to be carried on the person, must be signed by the donor in the presence of two witnesses who must sign the document in his presence. If the donor cannot sign, the document may be signed for him at his direction and in his presence and the presence of two witnesses who must sign the document in his presence. Delivery of the document of gift during the donor's lifetime is not necessary to make the gift valid.

(c) The gift may be made to a specified donee or without specifying a donee. If the latter, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to a specified donee who is not available at the time and place of death, the attending physician upon or following death, in the absence of any expressed indication that the donor desired otherwise, may accept the gift as donee.

(d) The donor may designate in his will, card, or other document of gift the surgeon or physician to carry out the appropriate procedures, subject to the provisions of G.S. 90-220.7(b). In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the gift may employ or authorize any surgeon or physician for the purpose.

In respect to a gift of an eye, a qualified individual, as defined by G.S. 90-220.1(10), may enucleate eyes for such gift after the proper certification of death by a physician and upon the express direction of any physician other than the one who certified the death of the donor.

(e) Any gift by a person designated in G.S. 90-220.2(b) shall be made by a document signed by him or made by his telegraphic, recorded telephonic, or other recorded message; provided, however, a guardian of the person of a ward, who makes a gift of all or any part of the ward's body prior to the ward's death, shall make the gift by a document signed by him and filed with the clerk of court having jurisdiction over the guardian.

(f) The making of a gift shall be deemed to include an authorization to the donee to review any medical records of the donor after the death of the donor. (1969, c. 84, s. 1; 1971, c. 873, s. 2; 1975, c. 32, s. 3; 1977, c. 166, s. 2; 1979, c. 525, s. 11.)

Effect of Amendments. — The 1979 amendment added subsection (f).

Session Laws 1979, c. 525, s. 12, provides that the amendment shall not affect pending litigation.

§ 90-220.5. Delivery of document of gift.

If the gift is made by the donor or the guardian to a specified donee, the will, card, or other document, or an executed copy thereof, may be delivered to the donee at any time to expedite the appropriate procedures immediately after death. Delivery is not necessary to the validity of the gift. The will, card, or other document, or an executed copy thereof, may be deposited in any hospital,

bank or storage facility, or registry office that accepts it for safekeeping or for facilitation of procedures after death. On request of any interested party upon or after the donor's or ward's death, the person in possession shall produce the document for examination. (1969, c. 84, s. 1; 1977, c. 166, s. 3.)

§ 90-220.6. Amendment or revocation of the gift.

(a) If the will, card, or other document or executed copy thereof, has been delivered to a specified donee, the donor may amend or revoke the gift by:

(1) The execution and delivery to the donee of a signed statement, or

(2) An oral statement made in the presence of two persons and communicated to the donee, or

(3) A statement during a terminal illness or injury addressed to an attending physician and communicated to the donee, or

(4) A signed card or document found on his person or in his effects, and made known to the donee.

A guardian may amend or revoke the gift by the execution and delivery to the donee of a signed statement.

(b) Any document of gift which has not been delivered to the donee may be revoked by the donor or guardian in the manner set out in subsection (a) or by destruction, cancellation, or mutilation of the document and all executed copies thereof.

(c) Any gift made by a will may also be amended or revoked in the manner provided for amendment or revocation of wills or as provided in subsection (a). (1969, c. 84, s. 1; 1977, c. 166, ss. 4, 5.)

§ 90-220.7. Rights and duties at death.

(a) The donee may accept or reject the gift. If the donee accepts a gift of the entire body, he shall, subject to the terms of the gift, authorize embalming and the use of the body in funeral services, upon request of the surviving spouse or other person listed in the order stated in G.S. 90-220.2(b). If the gift is of a part of the body, the donee, upon the death of the donor or ward and prior to embalming, shall, within 24 hours, cause the part to be removed without unnecessary mutilation. After removal of the part, custody of the remainder of the body vests in the surviving spouse, next of kin, or other persons under obligation to dispose of the body.

(b) The time of death shall be determined by a physician who attends the donor or ward at his death, or, if none, the physician who certifies the death. Such physician shall not participate in the procedures for removing or transplanting a part.

(c) A person who acts with due care in accord with the terms of this Article or the anatomical gift laws of another state is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for his act.

(d) The provisions of this Article are subject to the laws of this State prescribing powers and duties with respect to autopsies. (1969, c. 84, s. 1; 1977, c. 166, s. 6.)

Legal Periodicals. — For note on determining the time of death of the heart transplant donor, see 51 N.C.L. Rev. 172 (1972).

§ 90-220.8. Uniformity of interpretation.

This Article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1969, c. 84, s. 1.)

§ 90-220.9. Short title.

This Article may be cited as the Uniform Anatomical Gift Act. (1969, c. 84, s. 1.)

§ 90-220.10. Use of tissue declared service; standard of care; burden of proof.

The procurement, processing, distribution or use of whole blood, plasma, blood products, blood derivatives and other human tissues such as corneas, bones or organs for the purpose of injecting, transfusing or transplanting any of them into the human body is declared to be, for all purposes, the rendition of a service by every person or institution participating therein and, whether or not any remuneration is paid therefor, is declared not to be a sale of such whole blood, plasma, blood products, blood derivatives or other human tissues, for any purpose. No person or institution shall be liable in warranty, express or implied, for the procurement, processing, distribution or use of said items but nothing herein shall alter or restrict the liability of such person or institution in negligence or tort in consequence of said service. (1971, c. 836.)

§ 90-220.11. Giving of blood by persons 17 years of age or more.

Any person who is 17 years of age or more may give or otherwise donate his blood to any individual, hospital, blood bank or blood collection center without the consent of the parent or parents or guardian of such donor. Provided, however, that it shall be unlawful for any person under the age of 18 years to sell his blood. (1971, c. 10; c. 1093, s. 16; 1977, c. 373.)

Article 15B.

Blood Banks.

§ 90-220.12. Supervision of licensed physician required; penalty for violation.

It shall be unlawful for any person, firm or corporation to engage in the selection of blood donors or in the collection, storage, processing, or transfusion of human blood, except at the direction or under the supervision of a physician licensed to practice medicine in North Carolina. Any person, firm or corporation convicted of the violation of this section shall be guilty of a misdemeanor. (1971, c. 938.)

§ 90-220.13. Selection of donors; due care required.

In the selection of donors due care shall be exercised to minimize the risks of transmission of agents that may cause hepatitis or other diseases. (1971, c. 938.)

§ 90-220.14. Inapplicability.

Nothing in this Article shall be construed to affect the provisions of G.S. 20-16.2 and G.S. 20-139.1. (1971, c. 938.)

ARTICLE 16.

Dental Hygiene Act.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 90-221. Definitions.

(a) "Dental hygiene" as used in this Article shall mean the performance of the following functions: Complete oral prophylaxis, application of preventive agents to oral structures, exposure and processing of radiographs, administration of medicaments prescribed by a licensed dentist, preparation of diagnostic aids, and written records of oral conditions for interpretation by the dentist, together with such other and further functions as may be permitted by rules and regulations of the Board not inconsistent herewith.

(b) "Dental hygienist" as used in this Article, shall mean any person who is a graduate of a Board-accredited school of dental hygiene, who has been licensed by the Board, and who practices dental hygiene as prescribed by the Board.

(c) "License" shall mean a certificate issued to any applicant upon completion of requirements for admission to practice dental hygiene.

(d) "Renewal certificate" shall mean the annual certificate of renewal of license to continue practice of dental hygiene in the State of North Carolina.

(e) "Board" shall mean "The North Carolina State Board of Dental Examiners" created by Chapter 139, Public Laws of 1879, and Chapter 178, Public Laws of 1915 as continued in existence by G.S. 90-22. (1945, c. 639, s. 1; 1971, c. 756, s. 1.)

§ 90-222. Administration of Article.

The Board is hereby vested with the authority and is charged with the duty of administering the provisions of this Article. (1945, c. 639, s. 2.)

§ 90-223. Powers and duties of Board.

(a) The Board is authorized and empowered to:

(1) Conduct examinations for licensure,

(2) Issue licenses and provisional licenses,

(3) Issue annual renewal certificates, and

(4) Renew expired licenses.

(b) The Board shall have the authority to make or amend rules and regulations not inconsistent with this Article governing the practice of dental hygiene and the granting, revocation and suspension of licenses and provisional licenses of dental hygienists.

(1) Any rule promulgated or amended under this Article shall be filed and distributed in accordance with the provisions of Article 5 of Chapter

150A of the General Statutes of North Carolina. A copy must be distributed to all licensed dentists and all licensed dental hygienists within 30 days of final approval by the Board.

(2) The Board shall issue every two years a compilation or supplement of the Dental Hygiene Act and the Board rules and regulations, and, upon written request therefor, a directory of dental hygienists to each licensed dentist and dental hygienist.

(c) The Board shall keep on file in its office at all times a complete record of the names, addresses, license numbers and renewal certificate numbers of all persons entitled to practice dental hygiene in this State.

(d) The Board shall, in addition to any other requirements for Board approval of a school or program of dental hygiene for purposes of this Article, require that any school or program in North Carolina develop and implement a procedure for advanced placement of potentially qualified persons. This procedure shall be designed to encourage and allow credit for any person who has attained special capabilities in dental work through military service, on-the-job training or working experience, or other means not otherwise qualifying the person to be immediately eligible for licensure. The procedure shall include these elements: public announcement of the procedure, a method for persons who have special capabilities through training or experience to make application to the school or program for advanced placement, personal counseling on obtaining advanced placement, administration of specially prepared written and clinical examinations for all parts of the curriculum otherwise required for graduation, exemption from course requirements when results of the examinations so indicate, and appropriate modification of curriculum requirements, when necessary, to facilitate individual advancement in education programs. The procedure for advanced placement shall not be approved by the Board unless it is fairly designed to facilitate the substitution of military or civilian training and experience for regular curricula, taking into account that the special nature of military and certain civilian training and experience may be equivalent without necessarily being identical to the courses of the school or program. (1945, c. 639, s. 3; 1971, c. 756, s. 2; 1973, c. 871, s. 2; 1979, 2nd Sess., c. 1195, s. 14.)

Effect of Amendments. — The 1979, 2nd Sess., amendment rewrote subdivision (1) of subsection (b).

§ 90-224. Examination.

(a) The applicant for licensure must be of good moral character, have graduated from an accredited high school or hold a high school equivalency certificate duly issued by a governmental agency or unit authorized to issue the same, and be a graduate of a program of dental hygiene in a school or college approved by the Board.

(b) The Board shall have the authority to establish in its rules and regulations:

(1) The form of application;

(2) The time and place of examination;

(3) The type of examination;

(4) The qualifications for passing the examination. (1945, c. 639, s. 4; 1971, c. 756, s. 3.)

§ 90-225. License issue and display.

(a) The Board shall issue licenses to examinees who pass the Board's examination.

(b) The Board shall determine:

(1) The method and time of notifying successful candidates,

(2) The time and form for issuing licenses, and

(3) The place license must be displayed. (1945, c. 639, s. 5; 1971, c. 756, s. 4.)

§ 90-226. Provisional license.

(a) The North Carolina State Board of Dental Examiners shall, subject to its rules and regulations, issue a provisional license to practice dental hygiene to any person who is licensed to practice dental hygiene anywhere in the United States, or in any country, territory or other recognized jurisdiction, if the Board shall determine that said licensing jurisdiction imposed upon said person requirements for licensure no less exacting than those imposed by this State. A provisional licensee may engage in the practice of dental hygiene only in strict accordance with the terms, conditions and limitations of her license and with the rules and regulations of the Board pertaining to provisional license.

(b) A provisional license shall be valid until the date of the announcement of the results of the next succeeding Board examination of candidates for licensure to practice dental hygiene in this State, unless the same shall be earlier revoked or suspended by the Board.

(c) No person who has failed an examination conducted by the North Carolina State Board of Dental Examiners shall be eligible to receive a provisional license.

(d) Any person desiring to secure a provisional license shall make application therefor in the manner and form prescribed by the rules and regulations of the Board and shall pay the fee prescribed in G.S. 90-232.

(e) A provisional licensee shall be subject to those various disciplinary measures and penalties set forth in G.S. 90-229 upon a determination of the Board that said provisional licensee has violated any of the terms or provisions of this Article. (1971, c. 756, s. 5; 1975, c. 19, s. 5.)

§ 90-227. Renewal certificates.

(a) The Board shall issue annual renewal certificates to licensed dental hygienists.

(b) The Board shall have the authority to establish in its rules and regulations:

(1) The form of application for renewal certificates;

(2) The time the application must be submitted;

(3) The type of certificate to be issued;

(4) How the certificate must be displayed;

(5) The penalty for late application;

(6) The automatic loss of license if applications are not submitted. (1945, c. 639, s. 6; 1971, c. 756, s. 6.)

§ 90-228. Renewal of license.

The Board shall have the authority to renew the license of a dental hygienist who fails to obtain a renewal certificate for any year provided she

(1) Makes application for a renewal of license and

(2) Meets the qualifications established by the Board. (1945, c. 639, s. 7; 1971, c. 756, s. 7.)

§ 90-229. Disciplinary measures.

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to

(i) Refuse to issue a license to practice dental hygiene;

(ii) Refuse to issue a certificate of renewal to practice dental hygiene;

(iii) Revoke or suspend a license to practice dental hygiene;

(iv) Invoke such other disciplinary measures, censure or probative terms against a licensee as it deems proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;

(2) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;

(3) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;

(4) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs her ability to practice dental hygiene;

(5) Is incompetent in the practice of dental hygiene;

(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;

(8) Has made fraudulent or misleading statements pertaining to her skill, knowledge, or method of treatment or practice;

(9) Has committed any fraudulent or misleading acts in the practice of dental hygiene;

(10) Has, in the practice of dental hygiene, committed an act or acts constituting malpractice;

(11) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which cannot lawfully be done or performed by such person;

(12) Has engaged in any unprofessional conduct as the same may be from time to time, defined by the rules and regulations of the Board;

(13) Is mentally, emotionally, or physically unfit to practice dental hygiene or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dental hygiene unless or until such person shall have been subsequently lawfully declared to be mentally competent.

(b) As used in this section the term "licensee" includes licensees and provisional licensees and the term "license" includes licenses and provisional licenses. (1945, c. 639, s. 8; 1971, c. 756, s. 8.)

§ 90-230. Certificate upon transfer to another state.

Any dental hygienist duly licensed by the North Carolina State Board of Dental Examiners, desiring to move from North Carolina to another state, territory or foreign country, if a holder of a certificate of renewal of license from said Board, upon application to said Board and the payment to it of the fee in this Article provided, shall be issued a certificate showing her full name and address, the date of license originally issued to her, the date and number of her renewal of license, and whether any charges have been filed with the Board against her. The Board may provide forms for such certificate, requiring such additional information as it may determine proper. (1971, c. 756, s. 10.)

§ 90-231. Opportunity for licensee or applicant to have hearing.

(a) With the exception of applicants for reinstatement after revocation, every applicant for a license or provisional license to practice dental hygiene or licensee or provisional licensee to practice dental hygiene shall after notice have an opportunity to be heard before the North Carolina State Board of Dental Examiners shall take any action the effect of which would be:

(1) To deny permission to take an examination for licensing for which application has been duly made; or
(2) To deny a license after examination for any cause other than failure to pass an examination; or
(3) To withhold the renewal of a license for any cause other than failure to pay a statutory renewal fee; or
(4) To suspend a license; or
(5) To revoke a license; or
(6) To revoke or suspend a provisional license; or
(7) To invoke any other disciplinary measures, censure or probative terms against a licensee or provisional licensee,

such proceedings to be conducted in accordance with the provisions of Chapter 150A of the General Statutes of North Carolina.

(b) In lieu of or as a part of such hearing and subsequent proceedings the Board is authorized and empowered to enter any consent order relative to the discipline, censure, or probation of a licensee, provisional licensee or an applicant for a license or provisional license, or relative to the revocation or suspension of a license or provisional license.

(c) Following the service of the notice of hearing as required by Chapter 150A of the General Statutes, the Board and the person upon whom such notice is served shall have the right to conduct adverse examinations, take depositions, and engage in such further discovery proceedings as are permitted by the laws of this State in civil matters. The Board is hereby authorized and empowered to issue such orders, commissions, notices, subpoenas, or other process as might be necessary or proper to effect the purposes of this subsection; provided, however, that no member of the Board shall be subject to examination hereunder. (1945, c. 639, s. 10; 1967, c. 489, s. 1; 1971, c. 756, s. 11; 1973, c. 1331, s. 3.)

§ 90-232. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules and regulations not exceeding the following:

(1) Each applicant for examination $50.00
(2) Each renewal certificate, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dental hygienist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dental hygienist 35.00
(3) Each restoration of license 35.00
(4) Each provisional license 35.00
(5) Each certificate of license to a resident dental hygienist desiring to change to another state or territory 15.00

All fees shall be payable in advance to the Board and shall be disposed of by the Board in the discharge of its duties under this Article. (1945, c. 639, s. 11; 1965, c. 163, s. 7; 1967, c. 489, s. 2; 1971, c. 756, s. 12.)

§ 90-233. Practice of dental hygiene.

(a) A dental hygienist may practice only under the direct supervision of one or more licensed dentists. Provided, however, that this subsection (a) shall be deemed to be complied with in the case of dental hygienists employed by the Department of Human Resources and especially trained by said Department as public health dental hygienists while performing their duties within the public schools of the State under the direction of a duly licensed dentist.

(b) A dentist in private practice may not employ more than one dental hygienist at one and the same time except when permitted to do so by the rules and regulations of the Board.

(c) Dental hygiene may be practiced only by the holder of a license or provisional license currently in effect and duly issued by the Board. The following acts, practices, functions or operations, however, shall not constitute the practice of dental hygiene within the meaning of this Article:

(1) The teaching of dental hygiene in a school or college approved by the Board in a board-approved program by an individual licensed as a dental hygienist in any state in the United States.
(2) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college approved by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of G.S. 90-29(c)(3), acting as an instructor.
(3) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board.
(4) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of G.S. 90-29(c)(3). (1945, c. 639, s. 12; 1971, c. 756, s. 13; 1973, c. 476, s. 128.)

§ 90-233.1. Violation a misdemeanor.

Any person who shall violate, or aid or abet another in violating, any of the provisions of this Article shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court. (1945, c. 639, s. 13; 1971, c. 756, s. 14.)

ARTICLE 17.

Dispensing Opticians.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 90-234. Necessity for certificate of registration.

On and after the first day of July, 1951, no person or combination of persons shall for pay, or reward, either directly or indirectly, practice as a dispensing optician as hereinafter defined in the State of North Carolina without a certificate of registration issued pursuant to the provisions of this Article by the North Carolina State Board of Opticians hereinafter established. (1951, c. 1089, s. 1.)

§ 90-235. Definition.

Within the meaning of the provisions of this Article, the term "dispensing optician" defines one who prepares and dispenses lenses, spectacles, eyeglasses and/or appurtenances thereto to the intended wearers thereof on written prescriptions from physicians or optometrists duly licensed to practice their professions, and in accordance with such prescriptions interprets, measures, adapts, fits and adjusts such lenses, spectacles, eyeglasses and/or appurtenances thereto to the human face for the aid or correction of visual or ocular anomalies of the human eye. The services and appliances related to ophthalmic dispensing shall be dispensed, furnished or supplied to the intended wearer or user thereof only upon prescription issued by a physician or an optometrist; but duplications, replacements, reproductions or repetitions may be done without prescription, in which event any such act shall be construed to be ophthalmic dispensing, the same as if performed on the basis of a written prescription. (1951, c. 1089, s. 2.)

Cross References. — See notes to § 90-236.

§ 90-236. What constitutes practicing as a dispensing optician.

Any one or combination of the following practices when done for pay or reward shall constitute practicing as a dispensing optician: Interpreting prescriptions issued by licensed physicians and/or optometrists; fitting glasses on the face; servicing glasses or spectacles; measuring of patient's face, fitting frames, compounding and fabricating lenses and frames, and any therapeutic device used or employed in the correction of vision, and alignment of frames to the face of the wearer, provided, however, that the provisions of this section shall not apply to students and apprentices. (1951, c. 1089, s. 3; 1977, c. 755, s. 1.)

CASE NOTES

Neither an optician nor an optometrist is permitted to use any medicine to treat the eye in order to relieve irritation or for any other trouble which requires the use of drugs. High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

Fitting Contact Lenses. — The General Assembly has not expressly authorized the optician to fit contact lenses to the human eye, but the general terms of the statutes are broad enough to authorize the dispensing optician to do so upon prescription of a physician, oculist or optometrist. High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

So long as the dispensing optician fabricates, fits and inserts contact lenses in the eyes in accordance with the prescriptions of examining physicians or oculists, and requires the patient to return to the examining physician or oculist in order that the writer of the prescription may determine whether or not the prescription has been properly filled and the contact lenses properly measured, fabricated and fitted, such optician is not engaged in the practice of optometry within the meaning of this section. High v. Ridgeway's Opticians, 258 N.C. 626, 129 S.E.2d 301 (1963).

Applied in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

Quoted in In re Berman, 245 N.C. 612, 97 S.E.2d 232 (1957).

§ 90-237. Qualifications for dispensing optician.

No person shall be issued a certificate of registration as a registered dispensing optician by the North Carolina State Board of Opticians hereinafter established:

(1) Unless such person is qualified under the provisions of G.S. 90-240;
(2) Unless such person is at least 18 years of age;
(3) Unless such person has satisfactorily passed an examination conducted by the Board to determine his fitness to engage in the practice of a dispensing optician;
(4) Unless such person is of good moral character as evidenced by two letters of recommendation;
(5) Unless such person has completed one year of practical apprenticeship training by working full time under the supervision of a licensed optician and has demonstrated proficiency in the areas of measurement of the face, and fitting and adjusting glasses and frames to the face. (1951, c. 1089, s. 4; 1977, c. 755, s. 2.)

§ 90-238. North Carolina State Board of Opticians created; appointment and qualification of members.

There is hereby created a North Carolina State Board of Opticians whose duty it shall be to carry out the purposes and enforce the provisions of this Article. The Board shall consist of six members appointed by the Governor as follows:

(1) Five dispensing opticians, each of whom shall serve a five-year term. Each year, as the term of one dispensing optician expires, the Governor shall appoint a dispensing optician to the Board chosen from a list of names submitted by the North Carolina Opticians Association. That list shall be composed of the names of dispensing opticians licensed to practice in this State who will have been engaged in the practice of dispensing opticianry for at least five years prior to appointment to the Board.
(2) One citizen and resident of North Carolina who is not licensed to practice opticianry, who shall serve a four-year term.

Each member of the Board shall serve until his successor is appointed and qualifies; provided that no person shall serve on this Board for more than two complete consecutive terms. The members of the Board, before entering upon

their duties, shall respectively take all oaths taken and prescribed for other State officers in the manner provided by law, which shall be filed in the office of the Secretary of State. The Governor, at his option, may remove any member of the Board for good cause shown and appoint members to fill unexpired terms. (1951, c. 1089, s. 5; 1979, c. 533.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, increased the number of members of the Board from five to six and rewrote the provisions of this section relating to appointment, qualifications, and terms of the members.

§ 90-239. Organization, meetings and powers of Board.

Within 30 days after appointment of the Board, the Board shall hold its first regular meeting, and at said meeting and annually thereafter shall choose one of its members as president and one as secretary and treasurer. The Board shall make such rules and regulations not inconsistent with the law as may be necessary to the proper performance of its duties, and each member may administer oaths and take testimony concerning any matter within the jurisdiction of the Board, and a majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the time and place of meeting to be designated by the president. The secretary of the Board shall keep a full and complete record of its proceedings, which shall at all reasonable times be open to public inspection. (1951, c. 1089, s. 6.)

§ 90-240. Qualifications for taking examination; subjects examined.

Applicants to take the examination for dispensing opticians shall be high school graduates or equivalents with two years training in a recognized school of opticianry with a minimum of 1600 hours or in lieu thereof, five years of practical training and experience under a licensed optician with time spent in a recognized school credited as part of the apprenticeship period. The examination shall be confined to such knowledge as is essential to practice as a dispensing optician and shall show proficiency in the following subjects:

Ophthalmic lens surface grinding;
Prescription interpretation;
Practical anatomy of the eye;
Theory of light;
Edge grinding;
Ophthalmic lenses;
Measurements of face;
Finishing, fitting, and adjusting glasses and frames to face.

An applicant for admission on the basis of practical training shall have worked full time under the supervision of a licensed optician with concentration in ophthalmic lens surface grinding, edge grinding, ophthalmic lenses, mounting and general bench work; and prescription interpretation. (1951, c. 1089, s. 7; 1977, c. 755, s. 3.)

§ 90-241. Fees required; licensing of opticians from outside State.

The fee to be paid by an applicant for examination to determine his or her fitness to receive a certificate of registration as a registered dispensing optician shall be thirty-five dollars ($35.00); and if he shall successfully pass the examination, he shall pay the further sum of ten dollars ($10.00) on the issuance to

him of the certificate of registration. Any person holding a certificate of license to practice as a dispensing optician in another state where the qualifications are equal to or stricter than the qualifications required in this State may, upon payment of the same fees as required of other applicants

(1) Be licensed without examination, or

(2) Be allowed to take the licensure examination

as determined by the Board. If the Board determines that the qualifications of the State in which an applicant is licensed are less strict than the qualifications of this State, the Board may allow that applicant to take the licensure examination. (1951, c. 1089, s. 8; 1977, c. 755, s. 4; 1979, c. 166, ss. 2, 3.)

Effect of Amendments. — The 1979 amendment substituted "ten dollars ($10.00)" for "five dollars ($5.00)" in the first sentence and rewrote the second sentence, which formerly read: "Provided, that any person holding a certificate or license to practice as a dispensing optician in another state where the qualifications prescribed are equal to the qualifications required in this State may be licensed without examination upon the payment of the same fees as required of other applicants."

§ 90-242. Persons practicing before passage of Article.

Every person who has been engaged in the practice of a dispensing optician as defined in this Article for a period of five years or more, and who has been a resident of the State of North Carolina for two years immediately prior to the date of the passage of this Article, shall be eligible for and receive a license as a dispensing optician. Said person shall file an affidavit as proof of such practice with the Board. The secretary shall keep a record of such persons who shall be exempt from the provisions of G.S. 90-240. Upon the payment of a fee of ten dollars ($10.00) the secretary shall issue to each of such persons certificates of registration without the necessity of an examination. Failure on the part of persons so entitled within six months of the passage of this Article to make written application to the Board for a certificate of registration, accompanied by an affidavit duly signed and verified fully setting forth the grounds upon which he claims certificate and license, which shall be accompanied by a fee of ten dollars ($10.00), shall be deemed a waiver of his rights to a certificate and license under the provisions of this Article. (1951, c. 1089, s. 9.)

CASE NOTES

Refusal of License Where Applicant Not Practicing for Five Years. — It is clear that the Board had the right to refuse an application for a license requested by virtue of this section if it appeared that the applicant had not been engaged in the practice of a dispensing optician as defined in this Article for a period of five years or more. In re Berman, 245 N.C. 612, 997 S.E.2d 232 (1957).

And Mere Filing of Affidavit as to Requisite Practice Is Not Conclusive. — The mere filing of an affidavit with the State Board of Opticians as proof that the affiant had been engaged in the practice of a dispensing optician as defined in this Article for a period of five years or more prior to the enactment of Article 17, is not conclusive as to his right to receive a license, even though this section states the applicant shall file an affidavit as proof of such practice, since the essential fact for the granting of such license is that the applicant was in fact engaged in the practice of a dispensing optician during the time required by this section. In re Berman, 245 N.C. 612, 97 S.E.2d 232 (1957).

Revocation of License Procured by Misrepresentation in Affidavit. — There was competent, material and substantial evidence to support the order of the State Board of Opticians revoking a license to practice as a dispensing optician on the ground that the licensee procured it by a material misrepresentation, in that he stated in his affidavit that he had been engaged in the practice of a dispensing optician as defined in this Article for a period of five years or more, whereas in truth and in fact he had not been so engaged in such practice for such a period of

time. In re Berman, 245 N.C. 612, 97 S.E.2d 232 (1957).

§ 90-243. Certified copy of certificate.

Upon the request of any person to whom a certificate has been issued, the Board shall issue a certified copy thereof. The Board shall be entitled to a fee of ten dollars ($10.00) for the issuance of a certified copy. The Board may, by regulation, provide for fees for registering optical places of business and for registering apprentices and interns. Such registration fees shall not exceed twenty dollars ($20.00). The Board may also require that any information furnished to it as required by law or regulation must be furnished under oath. (1951, c. 1089, s. 10; 1967, c. 691, s. 49; 1979, c. 166, s. 1.)

Effect of Amendments. — The 1979 amendment substituted "ten dollars ($10.00)" for "one dollar ($1.00)" in the second sentence and added the last three sentences.

§ 90-244. Posting of certificates.

Every person to whom a certificate of registration has been granted under this Article shall display the same in a conspicuous part of the office or establishment wherein he is engaged as a dispensing optician. (1951, c. 1098, s. 11.)

§ 90-245. Collection of fees.

The secretary to the Board is hereby authorized and empowered to collect in the name and on behalf of this Board the fees prescribed by this Article and shall turn over to the State Treasurer all funds collected or received under this Article, which funds shall be credited to the North Carolina State Board of Opticians, and said funds shall be held and expended under the supervision of the Director of the Budget of the State of North Carolina exclusively for the administration and enforcement of the provisions of this Article. The secretary to the Board shall, before entering upon the duties of the office, execute a satisfactory bond with a duly licensed surety or other surety approved by the Director of the Budget, said bond to be in the penal sum of not less than two thousand dollars ($2,000) and conditioned upon the faithful performance of the duties of the office and the true and correct accounting of all funds received by such secretary by virtue of such office. Nothing in this Article shall be construed to authorize any expenditure in excess of the amount available from time to time in the hands of the State Treasurer derived from the fees collected under the provisions of this Article and received by the State Treasurer in the manner aforesaid. (1951, c. 1089, s. 12.)

§ 90-246. Yearly license fees.

For the use of the Board in performing its duties under this Article, every registered dispensing optician shall in each year after the year 1951 pay to the North Carolina State Board of Opticians a sum not exceeding forty dollars ($40.00), the amount to be fixed by the Board, as a license fee for the year. Such payment shall be made prior to the first day of April in each year and in case of default in payment by a registered dispensing optician, his certificate of registration may be revoked by the Board at the next regular meeting of the Board, after notice as herein provided. But no license shall be revoked for nonpayment if the person so notified shall, before or at the time of consideration, pay his fee and such penalty as may be imposed by the Board. A penalty imposed on any one person so notified as a condition of allowing his

license to stand shall not exceed five dollars ($5.00). The Board may collect any dues or fees provided in this section by suit in the name of the Board. The notice hereinbefore mentioned shall be in writing addressed to the persons in default of the payments of dues herein mentioned at the last address shown by the records of the Board and shall be sent by the secretary of the Board by registered mail with proper postage attached at least 20 days before the date upon which revocation of the license is to be considered, and the secretary shall keep a record of the fact and the date of such mailing. The notice herein provided for shall state the time and place of consideration of revocation of license of persons to whom such notice is addressed. (1951, c. 1089, s. 13; 1977, c. 755, s. 5.)

§ 90-247. Meeting of the Board.

The Board shall meet at least once each year for the purpose of transacting all business of the Board and to conduct examinations of applicants for certificates of registration as herein provided and at such other times as may be necessary, said meetings to be held at such time and place as the president of the Board may determine. Special meetings of the Board shall be called by the president upon the written request of three members thereof. (1951, c. 1089, s. 14.)

§ 90-248. Compensation and expenses of Board members and secretary.

Each member of the Board shall receive for his services for the time actually in attendance upon Board meetings the amount of per diem provided by G.S. 138-5 and shall be reimbursed for actual necessary expenses incurred in the discharge of such duties not to exceed five dollars ($5.00) per day for subsistence plus the actual traveling expenses or an allowance of five cents (5¢) per mile while such member uses his personally owned automobile. The compensation of the secretary shall be fixed by the Board in an amount not to exceed one thousand dollars ($1,000) per annum. (1951, c. 1089, s. 15; 1953, c. 894; 1965, c. 730; 1969, c. 445, s. 6.)

§ 90-249. Powers of the Board.

The Board shall have the power to make rules and regulations not inconsistent with the laws of the State of North Carolina to empower the Board to have authority to make rules and regulations with respect to the following areas of the field of opticianry in North Carolina:

(1) Misrepresentation to the public
(2) Baiting or deceptive advertising
(3) Finding of repetitive violators of the law
(4) Requiring of continuing education
(5) Location of registrants in the State
(6) Legally established optical place of business registered with Board
(7) Photograph for files for identification purposes
(8) Educational qualifications to sit for examination and subject matter
(9) Terms of licensure examination and reexamination
(10) Reinstatement of licensure
(11) Renewal fees, late penalty (up to number of dollars)
(12) Recognized schools of opticianry accredited by the National Academy of Opticians
(13) Apprenticeship requirements and registration of apprentices

(14) Additional training requisite to licensure.

The Board shall have the power to revoke any certificate of registration granted by it under this Article for conviction of crime.

The Board shall likewise have the power to revoke licenses and certificates of registration upon the finding by the Board that the holder of such certificate has been guilty of unethical methods of practice. It shall be considered unethical practice to advertise in any manner by words or phrases of similar import which convey or which are calculated to convey the impression to the public that the eyes are examined by persons licensed under this Article or by the use of words and phrases of a character tending to deceive or mislead the public or in the nature of price or baiting advertising; use of advertising directly or indirectly by any method or nature which seeks or solicits on any installment plan; house to house canvassing or peddling directly or through any agent or employee for the purpose of selling, fitting or supplying frames, mountings, lenses or other ophthalmic materials.

Any person whose certificate has been revoked for any cause may, after the expiration of 90 days, and within two years from the date of revocation, apply to the Board to have the same reinstated, and upon a showing satisfactory to the Board and in the discretion of the Board, the certificate of registration or license may be restored to such person.

The procedure for revocation and suspension of a license shall be in accordance with the provisions of Chapter 150A of the General Statutes. (1951, c. 1089, s. 16; 1953, c. 1041, s. 19; 1973, c. 1331, s. 3; 1977, c. 755, s. 6.)

CASE NOTES

Constitutionality. — This section and § 90-255, insofar as they affect advertising, are patently unconstitutional under the First Amendment. Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

Board May Revoke License Procured by Fraud or Misrepresentations. — Certain grounds for revocation of a license issued by the Board are set forth in this section. Fraud or misrepresentation, which is material, in the procurement of the license is not one of them, but the Board has inherent power, independent of statutory authority, to revoke a license it improperly issued by reason of material fraud or misrepresentation in its procurement. In re Berman, 245 N.C. 612, 97 S.E.2d 232 (1957).

The crucial findings of fact of the State Board of Opticians being supported by the evidence, it was error for the superior court on appeal to reverse the judgment of the Board revoking the license theretofore granted to the applicant under § 90-242 on the ground that its issuance was procured by misrepresentations. In re Berman, 245 N.C. 612, 97 S.E.2d 232 (1957).

§ 90-250. Sale of optical glasses.

No optical glass or other kindred products or instruments of vision shall be dispensed, ground or assembled in connection with a given formula prescribed by a licensed physician or optometrist except under the supervision of a licensed dispensing optician and in a registered optical establishment or office. Provided, however, that the provisions of this section shall not prohibit persons or corporations from selling completely assembled spectacles without advice or aid as to the selection thereof as merchandise from permanently located or established places of business. (1951, c. 1089, s. 17.)

CASE NOTES

Applied in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-251. Licensee allowing unlicensed person to use his certificate or license.

Each licensee licensed under the provisions of this Article who shall rent, loan or allow the use of his registration certificate or license to an unlicensed person for any unlawful use shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred dollars ($100.00) or imprisoned for not more than 12 months, or both, in the discretion of the court, and shall forfeit his license. (1951, c. 1089, s. 18.)

§ 90-252. Necessity for dispensing optician to supervise place of business; false and deceptive advertising.

Any person, firm or corporation owning, managing or conducting a store, shop or place of business and not having in its employ a licensed dispensing optician for the supervision of such store, office, place of business or optical establishment, or including an advertisement, whether in newspaper, radio, book, magazine or other printed matter the words, "optician, licensed optician, optical establishment, optical office," or any combination of such terms within or without such store as to mislead the public, that the same is a legally established optical place of business duly licensed as such or managed or conducted by persons holding a dispensing optician's license, when in fact such license or permit is not held by such person, firm or corporation, or some person in the employ and in charge of such optical business, shall upon conviction be fined not less than one hundred dollars ($100.00) or be imprisoned for not more than 12 months, or both, in the discretion of the court. (1951, c. 1089, s. 19.)

CASE NOTES

Cited in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-253. Exemptions from Article.

Nothing in this Article shall be construed to apply to a licensed physician or optometrist, nor to any individual, partnership or corporation who is now and shall in the future engage in supplying ophthalmic prescriptions and supplies to physicians, optometrists, dispensing opticians or optical scientists. (1951, c. 1089, s. 20.)

CASE NOTES

Constitutionality. — Classifications in this section, exempting physicians, optometrists and ophthalmic wholesalers from this chapter's requirement, that eyeglasses be dispensed only by licensed dispensing opticians, based on the presumption that these individuals possess such advanced training and skill that it would be illogical to require that they dispense glasses through a licensed optician, bear a rational relationship to the state's objective of forestalling the evils that could result from untrained and unlicensed personnel fitting and dispensing optical goods and thus are not violative of equal protection. Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-254. General penalty for violation.

Any person, firm or corporation who shall violate any provision of this Article for which no other penalty has been provided shall, upon conviction, be fined not more than two hundred dollars ($200.00) or imprisoned for a period of not more than 12 months, or both, in the discretion of the court. (1951, c. 1089, s. 21.)

CASE NOTES

Cited in Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-255. Gifts, premiums or discounts unlawful; refund of fees; illegal advertising.

It shall be unlawful for any person, firm or corporation to offer or give any gift or premium or discount, directly or indirectly, or in any form or manner participate in the division, assignment, rebate or refund of fees or parts thereof or to engage in advertising in any form or manner that would urge the public to seek the services of any specific professional person or group of persons engaged in the field of refraction and visual care. (1951, c. 1089, s. 23.)

CASE NOTES

Constitutionality. — Section 90-249 and this section, insofar as they affect advertising, are patently unconstitutional under the First Amendment. Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979).

§ 90-255.1. Sale of flammable frames.

No person shall distribute, sell, exchange or deliver, or have in his possession with intent to distribute, sell, exchange or deliver any eyeglass frame or sunglass frame which contains any form of cellulose nitrate or other highly flammable materials. Any person violating the provisions of this subsection [section] shall be guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not more than five hundred dollars ($500.00), or imprisonment for not more than six months or by both such fine and imprisonment in the discretion of the court. (1971, c. 239, s. 1.)

ARTICLE 18.

Physical Therapy.

§§ 90-256 to 90-270: Recodified as §§ 90-270.24 to 90-270.39.

Editor's Note. — This Article was rewritten by Session Laws 1979, c. 487, effective July 1, 1979, and has been recodified as Article 18B, §§ 90-270.24 to 90-270.39.

ARTICLE 18A.

Practicing Psychologists.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 90-270.1. Title.

This Article shall be known and may be cited as the "Practicing Psychologist Licensing Act." (1967, c. 910, s. 1.)

§ 90-270.2. Definitions.

(a) "Accredited education institution" means a college or university chartered by the State and accredited by the appropriate regional association of colleges and secondary schools.

(b) "Board" means the North Carolina State Board of Examiners of Practicing Psychologists.

(c) "Licensed practicing psychologist" means an individual to whom a license has been issued pursuant to the provisions of this Article, and whose license is in force and not suspended or revoked.

(d) "Practice of psychology" within the meaning of this Article is defined as rendering, or offering to render, professional psychological services to individuals, singly or in groups, whether in the general public or in organizations, either public or private, for a fee, monetary or otherwise.

(e) "Professional psychological services" means the application of psychological principles and procedures for the purposes of understanding, predicting, or influencing the behavior of individuals in order to assist in their attainment of maximum personal growth; optimal work, family, school and interpersonal relationships; and healthy personal adjustment. The application of psychological principles and procedures includes some of all or [some or all of] the following, but is not restricted to: interviewing, counseling, and psychotherapy; administering and interpreting instruments for the assessment and evaluation of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, and motivation; diagnosis, prevention, and amelioration of adjustment problems; hypnosis; the resolution of interpersonal and social conflict; educational and vocational counseling; personnel selection; and the evaluation and planning for effective work and learning situations. Teaching, writing, the giving of public speeches or lectures, and research concerned with psychological principles, or the application of psychological principles, are not included in professional psychological services within the meaning of this Article.

(f) "Psychological associate" is an individual, licensed within the meaning of this Article, who offers to render, or renders professional psychological services such as interviewing or administering and interpreting tests of mental abilities, interests, aptitudes, and personality characteristics for such purposes as psychological evaluation, or for educational, vocational or personnel selec-

tion, guidance or placement. The psychological associate does not engage in overall personality appraisal or classification, personality counseling or personality readjustment techniques except under qualified supervision in accordance with the duly adopted rules and regulations of the Board.

(g) "Psychotherapy" within the meaning of this Article means the use of learning or other psychological behavioral modification methods in a professional relationship to assist a person or persons to modify feelings, attitudes, and behavior which are intellectually, socially, or emotionally maladjustive or ineffectual. (1967, c. 910, s. 2; 1977, c. 670, s. 1; 1979, c. 670, s. 1.)

Effect of Amendments. — The 1979 amendment substituted "associate" for "examiner" in both places in subsection (f).

CASE NOTES

Constitutionality. — Where the only question presented by petitioner's application to the Board was whether he was entitled to receive a temporary license as a practicing psychologist, questions of the constitutionality of § 90-270.4 and subsection (d) of this section were not properly before the court reviewing the Board's decision, and the court exceeded its authority in undertaking to deal with them. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978).

§ 90-270.3. Practice of medicine and optometry not permitted.

Nothing in this Article shall be construed as permitting licensed practicing psychologists or psychological associates to engage in any manner in all or any of the parts of the practice of medicine or optometry licensed under Articles 1 and 6 of Chapter 90 of the General Statutes, including, among others, the diagnosis and correction of visual and muscular anomalies of the human eyes and visual apparatus, eye exercises, orthoptics, vision training, visual training and developmental vision. A licensed practicing psychologist or psychological associate shall assist his client in obtaining professional help for all aspects of his problems that fall outside the boundaries of his own competence, including provision for the diagnosis and treatment of relevant medical or optometric problems. (1967, c. 910, s. 3; 1977, c. 670, s. 2; 1979, c. 670, s. 2.)

Effect of Amendments. — The 1979 amendment substituted "associates" for "examiners" in the first sentence and "associate" for "examiner" in the second sentence.

§ 90-270.4. Exemptions to this Article.

(a) Nothing in this Article shall be construed as limiting the activities, services, and use of official title on the part of any person in the regular employ of a federal, county or municipal government, or other political subdivision or agency thereof, or of the State Department of Public Instruction, or of a duly accredited or chartered educational institution, insofar as such activities and services are a part of the duties and responsibilities of his position. Such duties and responsibilities may include, but are not restricted to, teaching, writing, conducting research, the giving of public speeches or lectures, the giving of legal testimony, consulting with publishers, serving on boards, commissions, and review committees of public and nonprofit private agencies, with or without remuneration so long as such activities do not involve the practice of psychology as defined in this Article.

Nothing in this Article shall be construed as limiting the activities, services, and use of official titles on the part of any person in the regular employ of the State of North Carolina or whose employment is included under the State Personnel Act who has served in a position of employment involving the practice of psychology as defined in this Article, providing that such person has served in this capacity for a continuous period of five years prior to July 1, 1979. All such State employees, other than employees of the Department of Public Instruction who are exempt from licensing under this act, whose activities involve the practice of psychology and who are not licensed, or who have not practiced for five continuous years in a position involving the practice of psychology, are allowed to continue in such activities which involve the practice of psychology in their employment until December 31, 1984, the purpose of this provision being to allow those who do engage in activities involving the practice of psychology to meet the qualifications of licensing for the practice of psychology as defined in this Article. In addition to the requirements for licensing contained in Article 18A, an employee of a State agency or department who has served in a position involving the practice of psychology for five consecutive years by December 31, 1984, and who has graduate training in psychology and experience as the Board finds to be the equivalent of a master's degree in psychology, shall be permitted to take the examination for licensing as a psychological associate. Provided, however, that any agency or department of the State of North Carolina which employs psychologists may petition the State Personnel Commission for exemption from the requirements of this act, which exemption shall be granted upon a showing that there is an insufficient number of licensed psychologists available to fill all authorized psychologists' positions in such agency or department.

(b) Nothing in this Article shall be construed as limiting the activities, services and use of title designating training status of a student, intern, or fellow preparing for the practice of psychology under qualified supervision in an accredited educational institution or service facility, provided that such activities and services constitute a part of his course of study.

(c) Nothing in this Article shall be construed as limiting the activities and services of any persons who are salaried employees of federal, State, county, municipal or other political subdivisions, or any agencies thereof, or a duly chartered or accredited educational institution, or private business, provided such employees are performing those duties for which they are employed by such organizations, and within the confines of such organization, and provided that they or their organization are not engaged in the practice of psychology as defined in this Article. In case the organization is a private business engaged in the practice of psychology as defined in this Article, such salaried employees shall be supervised by a licensed psychologist or a psychological associate.

(d) Nothing in this Article shall be construed as restricting the use of the term "social psychologist" by any person who has been graduated with a doctoral degree in sociology or social psychology from an institution whose credits in sociology or social psychology are acceptable by an accredited educational institution, and who has passed comprehensive examinations in the field of social psychology as part of the requirement for the doctoral degree or has had equivalent specialized training in social psychology, and who has filed with the Board a statement of the facts demonstrating his compliance with the aforesaid conditions of this subsection.

(e) Nothing in this Article shall be construed to limit or restrict physicians and surgeons or optometrists authorized to practice under the laws of North Carolina or to restrict qualified members of other professional groups who render counseling and other helping services including counselors, clergymen, social workers, and other similar professions, or to restrict qualified members of any other professional groups in the practice of their respective professions, provided they do not hold themselves out to the public by any title or

description stating or implying that they are practicing psychologists or psychological associates, or are licensed to practice psychology.

(f) Nothing in this Article is to be construed as prohibiting a psychologist who is not a resident of North Carolina from rendering professional psychological services in this State for not more than five days in any calendar year. (1967, c. 910, s. 4; 1977, c. 670, s. 3; 1979, c. 670, ss. 3, 4; c. 1005, s. 1.)

Effect of Amendments. — The first 1979 amendment substituted "associate" for "examiner" at the end of the second sentence of subsection (c) and substituted "associates" for "examiners" near the end of subsection (e).

The second 1979 amendment, effective Jan. 1, 1980, in the first sentence of the first paragraph of subsection (a) deleted "State" following "of a federal," deleted "any" preceding "agency thereof," and inserted "or of the State Department of Public Instruction;" and added the second paragraph of subsection (a).

CASE NOTES

Constitutionality. — Where the only question presented by petitioner's application to the Board was whether he was entitled to receive a temporary license as a practicing psychologist, questions of the constitutionality of this section and § 90-270.2(d) were not properly before the court reviewing the Board's decision, and the court exceeded its authority in undertaking to deal with them. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978).

§ 90-270.5. Temporary licenses.

(a) A nonresident psychologist who is either licensed or certified by a similar Board of another state, or territory of the United States, or of a foreign country or province whose standards, in the opinion of the Board, are, at the date of his certification or licensure, equivalent to or higher than the requirement of this Article, may be issued a temporary license by the Board for the practice of psychology in this State for a period not to exceed 30 consecutive business days, or 45 business days in any 90-day period; provided that such a psychologist submits to the Board on a minimum of 10 days' written notice evidence of certification or licensing, along with a report of the nature of his intended practice.

(b) A nonresident psychologist who meets all other requirements of G.S. 90-270.11(a) or 90-270.11(b) for licensing, and is not licensed or certified in his place of residence, may be issued a temporary license by the Board for the practice of psychology in this State for the same period and under the same conditions as in G.S. 90-270.5(a) above, except that summary of his qualifications in lieu of evidence of certification or licensing must be submitted to the Board for its appraisal.

(c) A psychologist who comes to reside in North Carolina, and who is otherwise qualified for licensing may be issued a temporary license by the Board at the appropriate level for the practice of psychology until such time as the Board conducts its regular licensing examinations.

(d) A psychologist who meets all other requirements of G.S. 90-270.11(a) for licensing, except the two years of acceptable and appropriate experience, may be issued a temporary license by the Board for the practice of psychology for a period not exceeding two years, provided he practices under the supervision of a licensed practicing psychologist or a psychologist acceptable to the Board as an eligible supervisor.

(e) Fees for temporary licenses shall be as prescribed by the Board.

(f) An applicant for licensure as a practicing psychologist or as a psychological associate, who meets all requirements for licensure except having passed the examination, may be issued a temporary license after receiving the degree required by G.S. 90-270.11 until he or she can take the next regularly

scheduled examination and can be notified of the results. (1967, c. 910, s. 5; 1977, c. 670, s. 4; 1979, c. 670, s. 3.)

Effect of Amendments. — The 1979 amendment substituted "associate" for "examiner" in subsection (f).

OPINIONS OF ATTORNEY GENERAL

The Practicing Psychologists Licensing Act exempts professionals such as counselors in school agencies, social workers, clergymen, and others from its requirements. See opinion of Attorney General to Ruth E. Cook, Member, N.C. House of Representatives, 46 N.C.A.G. 205 (1977).

§ 90-270.6. Board of Examiners in Psychology; appointment; term of office; composition.

For the purpose of carrying out the provisions of this Article, there is hereby created a North Carolina State Board of Examiners of Practicing Psychologists, which shall consist of five members to be appointed by the Governor. At all times three members shall be licensed practicing psychologists and two members shall be licensed psychological examiners [associates]. In the event that the composition of the Board on the effective date of this act does not conform to that prescribed in the preceding sentence, such composition shall be corrected thereafter by appropriate appointments as terms expire and as vacancies occur on the Board. Due consideration shall also be given to the adequate representation of the various fields and areas of practice of psychology. Terms of office shall be three years. All terms of service on the Board expire June 30 in appropriate years. As the term of a member expires, or as a vacancy occurs for any other reason, the North Carolina Psychological Association, or its successor, shall, with the advice of the chairmen of the graduate departments of psychology in the State, for each vacancy, submit to the Governor a list of the names of three eligible persons, and from this list the Governor shall make the appointment for a full term, or for the remainder of the unexpired term, if any. Each Board member shall serve until his successor has been appointed. (1967, c. 910, s. 6; 1977, c. 670, s. 5; 1979, c. 670, s. 3; c. 1005, s. 2.)

Effect of Amendments. — The first 1979 amendment substituted "associate" for "examiner" in the second sentence as it stood before the second 1979 amendment.

The second 1979 amendment, effective Jan. 1, 1980, rewrote the second sentence, which formerly read: "At all times four members shall be licensed practicing psychologists, and the fifth shall be either a licensed psychological examiner or a licensed practicing psychologist." The amendment also added the present third sentence.

§ 90-270.7. Qualifications of Board members.

Each member of the Board shall have the following qualifications:

(1) Be a resident of this State and a citizen of the United States;
(2) He shall hold a doctoral or master's degree in psychology;
(3) Be at the time of his appointment, and shall have been for at least five years prior thereto, actively engaged as a psychologist in one or more branches of psychology or in the education and training of doctoral or postdoctoral students of psychology or in psychological research, and such activity during the two years preceding appointment shall have occurred primarily in this State. (1967, c. 910, s. 7; 1977, c. 670, s. 6.)

§ 90-270.8. Compensation of members; expenses; employees.

Members of the Board shall receive no compensation for their services, but shall receive their necessary expenses incurred in the performance of duties required by this Article, as prescribed for State boards generally. The Board may employ necessary personnel for the performance of its functions, and fix the compensation therefor, within the limits of funds available to the Board; however, the Board shall not employ any of its own members to perform inspectional or similar ministerial tasks for the Board. In no event shall the State of North Carolina be liable for expenses incurred by the Board in excess of the income derived from this Article. (1967, c. 910, s. 8.)

§ 90-270.9. Election of officers; meetings; adoption of seal and appropriate rules.

The Board shall annually elect a chairman and vice-chairman from among its membership. The Board shall meet annually, at a regular time set by the Board, in the City of Raleigh, and it may hold additional meetings and conduct business at any place in the State. Three members of the Board shall constitute a quorum. The Board may empower any member to conduct any proceeding, hearing or investigation necessary to its purposes, but any final action requires a quorum of the Board. The Board shall adopt an official seal, which shall be affixed to all licenses issued by it. The Board shall make such rules and regulations not inconsistent with law, as may be necessary to regulate its proceedings and otherwise to implement the provisions of this Article. (1967, c. 910, s. 9.)

CASE NOTES

Rule Concerning Educational Requirements. — The Board did not exceed its rulemaking authority under this section in adopting a rule which required that the applicant's doctoral degree, if other than one based on a Ph.D. program in psychology at an accredited educational institution, must have been based on a minimum of 60 semester hours of graduate study in standard psychology courses. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) (decided prior to 1977 amendment of § 90-270.11).

§ 90-270.10. Annual report.

On June 30 of each year, beginning with the year 1968, the Board shall submit a report to the Governor of the Board's activities since the preceding July 1, including the names of all practicing psychologists and psychological associates to whom licenses have been granted under this Article, any cases heard and decisions rendered in matters before the Board, the recommendations of the Board as to future actions and policies, and a financial report. Each member of the Board shall review and sign the report before its submission to the Governor. Any Board member shall have the right to record a dissenting view. (1967, c. 910, s. 10; 1979, c. 670, s. 3.)

Effect of Amendments. — The 1979 amendment substituted "associates" for "examiners" in the first sentence.

§ 90-270.11. Licensing and examination.

(a) Practicing Psychologist. —

(1) The Board shall issue a license to practice psychology to any applicant who pays an application fee of fifty dollars ($50.00) and an additional examination fee of fifty dollars ($50.00), who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the Board that he:

a. Is at least 21 years of age;

b. Is of good moral character;

c. Has received his doctoral degree based on a planned and directed program of studies, the content of which was psychological in nature, from an accredited educational institution; and subsequent to receiving his doctoral degree has had at least two years of acceptable and appropriate supervised experience germane to his area of practice as a psychologist;

d. Has not within the preceding six months failed an examination given by the Board.

(2) In order for a psychological associate to be upgraded to a practicing psychologist, the applicant must comply with the requirements set forth in subdivision (1) hereof; however, a fifty dollar ($50.00) examination fee only shall be required.

(b) Psychological Associate. —

(1) The Board shall issue a license to practice psychology to any applicant who pays an application fee of fifty dollars ($50.00) and an additional examination fee of fifty dollars ($50.00), who passes a satisfactory examination in psychology, and who submits evidence verified by oath and satisfactory to the Board that he:

a. Is at least 21 years of age;

b. Is of good moral character;

c. Has received a master's degree in psychology from an accredited educational institution;

d. Has not within the preceding six months failed an examination given by the Board.

(2) The Board shall not prescribe any educational requirements other than the master's degree in psychology required by this subsection.

(c) Examinations. — The examinations required by subsections (a) and (b) of this section shall be of a form and content prescribed by the Board, and may be oral, written, or both. The examinations shall be administered annually, or more frequently as the Board may prescribe, at a time and place to be determined by the Board. (1967, c. 910, s. 11; 1971, c. 889, ss. 2, 3; 1975, c. 675, ss. 1, 2; 1977, c. 620, s. 7; 1979, c. 670, ss. 5, 6; 1979, 2nd Sess., c. 1176.)

Effect of Amendments. — The 1979 amendment substituted "associate" for "examiner" in subdivision (a)(2), and substituted "Associate" for "Examiner" near the beginning of subsection (b).

The 1979, 2nd Sess., amendment added subdivision (2) to subsection (b).

CASE NOTES

Nature of Doctoral Degree Program. — The Board did not exceed its rulemaking authority under § 90-270.9 in adopting a rule which required that the applicant's doctoral degree, if other than one based on a Ph.D. program in psychology at an accredited educational institution, must have been based on a minimum of 60 semester hours of graduate study in standard psychology courses. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) (decided prior to 1977 amendment of § 90-270.11).

The requirement of the statute that the applicant must have received "his doctoral degree based on a program of studies the content of which was primarily psychological from an accredited educational institution," was neither vague nor uncertain. On the contrary, such a requirement calls for application of objective standards which both bear a rational relationship to the purposes of the Practicing Psychologist Licensing Act and furnish sufficiently clear guidelines to control the Board in the exercise of its licensing and rule-making functions. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) (decided prior to 1977 amendment).

The Board is not bound by the expressions of opinions of an applicant and his teacher on the question of whether a course taken by the applicant was psychological in nature. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) (decided prior to 1977 amendment).

The legislature in this section provided the Board with clear and objective standards to guide it in the exercise of its delegated licensing authority. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) (decided prior to 1977 amendment).

Board's Findings Are Conclusive. — It is the function of the Board, and not that of the reviewing court, to resolve conflicts in the evidence and to make findings of fact. The Board's findings of fact, when supported by competent, material, and substantial evidence in view of the entire record, are conclusive on appeal. In re Partin, 37 N.C. App. 302, 246 S.E.2d 519 (1978) (decided prior to 1977 amendment).

Cited in Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 25 N.C. App. 131, 212 S.E.2d 657 (1975); Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978).

§ 90-270.12: Repealed by Session Laws 1977, c. 670, s. 8.

§ 90-270.13. Licensing of psychologist licensed or certified in other states; licensing of diplomates of American Board of Examiners in Professional Psychology.

(a) The Board may grant a license without examination to any person meeting the other requirements of either G.S. 90-270.11(a) or 90-270.11(b) and who at the time of application is licensed or certified as a psychologist by a similar board of another state, territory or district whose standards, in the opinion of the Board, are not lower than those required by this Article. The provisions of this section shall apply only when such states, territories, or districts grant similar privilege to residents of this State.

(b) The Board may grant a license without examination to any person who has been granted a diploma by the American Board of Examiners in Professional Psychology. (1967, c. 910, s. 13.)

§ 90-270.14. Renewal of licenses.

A license issued under this Article must be renewed annually on or before the first day of January, the requirements for such renewal being:

(1) Each application for renewal must be accompanied by a renewal fee of twenty dollars ($20.00). If a license is not renewed on or before the first day of January of each year, an additional fee of two dollars ($2.00) shall be charged for late renewal; and

(2) The Board may establish recommendations for continuing education for psychologists licensed and registered in this State. (1967, c. 910, s. 14; 1971, c. 889, s. 1; 1975, c. 675, s. 3; 1979, c. 710.)

Effect of Amendments. — The 1979 amendment inserted "the requirements for such renewal being," designated the former second and third sentences as present subdivision (1), and added subdivision (2).

§ 90-270.15. Refusal, suspension, or revocation of licenses.

(a) A license applied for, or issued under this Article may be refused, suspended, or revoked by the Board upon proof that the person to whom the license was issued:

(1) Has been convicted of a felony; or

(2) Has been guilty of fraud or deceit in securing the license or any renewal thereof; or

(3) Is an habitual drunkard or is addicted to the use of deleterious habit-forming drugs; or

(4) Has been guilty of unprofessional conduct as defined by the then-current code of ethics published by the American Psychological Association;

(5) Has violated any provision of this Article or of the duly adopted rules and regulations of the Board;

(6) Has employed a psychologist who has no valid license issued under this Article, nor a temporary license as provided by G.S. 90-270.5.

(b) A license issued under this Article shall be suspended by the Board after failure to renew a license for a period of more than six months after the annual renewal date.

(c) The procedure for revocation, suspension, or refusal of a license shall be in accordance with the provisions of Chapter 150A of the General Statutes.

(d) A person whose license has been refused or revoked under the terms of this section may reapply to the Board for licensure after the passage of one calendar year from the date of such revocation. The Board may reinstate a suspended license upon payment of a special fee of fifteen dollars ($15.00), and may require reexamination for reinstatement. (1967, c. 910, s. 15; 1973, c. 1331, s. 3; 1977, c. 670, s. 9; 1979, c. 1005, s. 4.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, added subdivision (a) (6).

§ 90-270.16. Prohibited acts.

(a) After June 30, 1968, no person shall represent himself to be a practicing psychologist, or psychological associate, or engage in, or offer to engage in, the practice of psychology without a valid license issued under this Article.

(b) After June 30, 1968, no person who is not licensed under this Article shall represent himself to be a licensed practicing psychologist or psychological associate; nor shall he use a title or description, including the term "psychology," any of its derivatives, such as "psychologic," "psychological," or "psychologist," or modifiers such as "practicing" or "certified," in such a manner which would imply that he is licensed under this Article; nor shall he practice, or offer to practice, psychology as defined in this Article, except as otherwise permitted herein. The use by a person who is not licensed under this Article of such terms, whether in titles or descriptions or otherwise, is not prohibited by this Article except when used in connection with the practice of psychology as defined in this Article; such use of these terms by a person not licensed under this Article shall not be construed as implying that a person is licensed under this Article or as practicing or offering to practice psychology.

(c) No practicing psychologist or psychological examiner [associate] shall employ any psychologist who does not possess a valid license issued under this Article or who has not been temporarily licensed under the provisions of G.S. 90-270.5. (1967, c. 910, s. 16; 1979, c. 670, s. 3; c. 1005, s. 3.)

Effect of Amendments. — The first 1979 amendment substituted "associate" for "examiner" in subsection (a) and in the first sentence of subsection (b).

The second 1979 amendment, effective Jan. 1, 1980, added subsection (c).

§ 90-270.17. Violations and penalties.

Any person who violates G.S. 90-270.16 is guilty of a misdemeanor and upon conviction shall be punishable by a fine of not more than five hundred dollars ($500.00), or imprisonment for not more than six months, or both fine and imprisonment. Each violation shall constitute a separate offense. (1967, c. 910, s. 17.)

§ 90-270.18. Disposition of fees.

All fees derived from the operation of this Article shall be deposited with the State Treasurer to the credit of a revolving fund for the use of the Board in carrying out its functions. The financial records of the Board shall be subjected to an annual audit, supervised by the State Auditor, and paid for out of the funds of the Board. (1967, c. 910, s. 19.)

§§ 90-270.19 to 90.270.23: Reserved for future codification purposes.

ARTICLE 18B.

Physical Therapy.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-270.24. Definitions.

In this Article, unless the context otherwise requires, the following definitions shall apply:

(1) "Board" means the North Carolina Board of Physical Therapy Examiners.

(2) "Physical therapist" means any person who practices physical therapy in accordance with the provisions of this Article.

(3) "Physical therapist assistant" (or 'physical therapy assistant') means any person who assists in the practice of physical therapy in accordance with the provisions of this Article, and who works under the supervision of a physical therapist by performing such patient-related activities as assigned to him by a physical therapist which are commensurate with his education and training, but not the interpretation and implementation of referrals from licensed medical doctors and dentists, the performance of evaluations, and determination and modification of treatment programs.

(4) "Physical therapy" means the evaluation or treatment of any person by the employment of the effective properties of physical measures and the use of therapeutic exercises and rehabilitative procedures, with or without assistive devices, for the purposes of preventing, correcting, or alleviating a physical or mental disability. Physical therapy includes the performance of specialized tests of neuromuscular function, administration of specialized therapeutic procedures, interpretation and implementation of referrals from licensed medical doctors and dentists, and establishment and modification of physical therapy programs for patients.

(5) "Physical therapy aide" means any nonlicensed person who is supervised on the premises by a physical therapist or physical therapist assistant when performing simple mechanical or machine-assisted acts in the care of the patient which are commensurate with his on-the-job training but do not require the knowledge and skill of a physical therapist or physical therapist assistant. (1951, c. 1131, s. 1; 1969, c. 556; 1979, c. 487.)

Editor's Note. — This Article is former Article 18, §§ 90-256 through 90-270 of this Chapter, as rewritten by Session Laws 1979, c. 487, effective July 1, 1979, and recodified. Where appropriate, the historical citations to sections in the former Article have been added to corresponding sections in the Article as rewritten.

§ 90-270.25. Board of Examiners.

The North Carolina Board of Physical Therapy Examiners is hereby created. The Board shall consist of seven members, including one medical doctor licensed and residing in North Carolina, four physical therapists, and two physical therapist assistants. The medical doctor, physical therapists and physical therapist assistants shall be appointed by the Governor from a list compiled by the North Carolina Physical Therapy Association, Inc., following a poll of all physical therapists and physical therapist assistants licensed and residing in North Carolina. Each physical therapist member of the Board shall be licensed and reside in this State; provided that he shall have not less than three years' experience as a physical therapist immediately preceding his appointment and shall be actively engaged in the practice of physical therapy in North Carolina during his incumbency. Each physical therapist assistant member shall be licensed and reside in this State; provided that he shall have not less than three years' experience as a physical therapist assistant immediately preceding his appointment and shall be actively engaged in practice as a physical therapist assistant in North Carolina during his incumbency.

Members shall be appointed to serve three year terms, or until their successors are appointed, to commence on January 1 in respective years; provided that members of the Board on July 1, 1979, shall continue to serve for the remainder of their terms, respectively, or until their successors are appointed. In the event that a member of the Board for any reason shall become ineligible to or cannot complete his term of office, another appointment shall be made by the Governor in accordance with the procedure stated above to fill the remainder of the term. No member may serve for more than two successive three-year terms.

The Board each year shall designate one of its physical therapist members as chairman and one member as secretary-treasurer. Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing boards generally. (1951, c. 1131, s. 2; 1969, c. 445, s. 7; c. 556; 1979, c. 487.)

§ 90-270.26. Powers of the Board.

The Board shall have the following general powers and duties:

(1) Examine and determine the qualifications and fitness of applicants for a license to practice physical therapy in this State;

(2) Issue, renew, deny, suspend, or revoke licenses to practice physical therapy in this State or otherwise discipline licensed physical therapists and physical therapist assistants;

(3) Conduct investigations for the purpose of determining whether violations of this Article or grounds for disciplining licensed physical therapists or physical therapist assistants exist;

(4) Employ such professional, clerical or special personnel necessary to carry out the provisions of this Article, and may purchase or rent necessary office space, equipment and supplies;

(5) Conduct administrative hearings in accordance with Article 3 of Chapter 150A of the General Statutes when a "contested case" as defined in G.S. 150A-2(2) arises under this Article;

(6) Appoint from its own membership one or more members to act as representatives of the Board at any meeting where such representation is deemed desirable;

(7) Establish reasonable fees for applications for examination, certificates of licensure and renewal, and other services provided by the Board;

(8) Adopt, amend, or repeal any rules or regulations necessary to carry out the purposes of this Article and the duties and responsibilities of the Board.

The powers and duties enumerated above are granted for the purpose of enabling the Board to safeguard the public health, safety and welfare against unqualified or incompetent practitioners of physical therapy, and are to be liberally construed to accomplish this objective. (1979, c. 487.)

§ 90-270.27. Records to be kept; copies of record.

The Board shall keep a record of proceedings under this Article and a record of all persons licensed under it. The record shall show the name of every living licensee, his last known place of business and last known place of residence and the date and number of his licensure certificate as a physical therapist or physical therapist assistant. Any interested person in the State is entitled to obtain a copy of that record on application to the Board and payment of such reasonable charge as may be fixed by it based on the costs involved. (1951, c. 1131, s. 12; 1969, c. 556; 1979, c. 487.)

§ 90-270.28. Disposition of funds.

All fees and other moneys collected and received by the Board shall be used for the purposes of implementing this Article. The financial records of the Board shall be subjected to an annual audit and paid for out of the funds of the Board. (1951, c. 1131, s. 14; 1969, c. 556; 1979, c. 487.)

§ 90-270.29. Qualifications of applicants for examination; application; fee.

Any person who desires to be licensed under this Article and who

(1) Is of good moral character;

(2) If an applicant for physical therapy licensure, has been graduated from a physical therapy program accredited by an agency recognized by either the U.S. Office of Education or the Council on Postsecondary Accreditation; and

(3) If an applicant for physical therapist assistant licensure, has been graduated from a physical therapist assistant educational program accredited by an agency recognized by either the U. S. Office of Education or the Council on Postsecondary Education; or has had training or experience deemed equivalent to such an educational program by the Board; provided that such training or experience must be completed by July 1, 1982;

may make application on a form furnished by the Board for examination for licensure as a physical therapist or physical therapist assistant. At the time of making such application, the applicant shall pay to the secretary-treasurer of the Board the fee prescribed by the Board, no portion of which shall be returned. (1951, c. 1131, s. 3; 1959, c. 630; 1969, c. 556; 1979, c. 487.)

§ 90-270.30. Licensure of foreign-trained physical therapists.

Any person who has been trained as a physical therapist in a foreign country and desires to be licensed under this Article and who

(1) Is of good moral character;

(2) Holds a diploma from an educational program for physical therapists approved by the Board;

(3) Submits documentary evidence to the Board that he has completed a course of professional instruction substantially equivalent to that obtained by an applicant for licensure under G.S. 90-270.29; and

(4) Demonstrates satisfactory proof of proficiency in the English language;

may make application on a form furnished by the Board for examination as a foreign-trained physical therapist. At the time of making such application, the applicant shall pay to the secretary-treasurer of the Board the fee prescribed by the Board, no portion of which shall be returned. (1959, c. 630; 1969, c. 556; 1979, c. 487.)

§ 90-270.31. Certificates of licensure.

(a) The Board shall furnish a certificate of licensure to each applicant successfully passing the examination for licensure as a physical therapist or physical therapist assistant, respectively.

(b) The Board shall furnish a certificate of licensure to any person who is a physical therapist or physical therapist assistant registered or licensed under the laws of another state or territory, if the individual's qualifications were at the date of his registration or licensure substantially equal to the requirements under this Article. When making such application, the applicant shall pay to the secretary-treasurer of the Board the fee prescribed by the Board, no portion of which shall be returned. (1951, c. 1131, ss. 4, 6; 1959, c. 630; 1969, c. 556; 1979, c. 487.)

§ 90-270.32. Renewal of license; lapse; revival.

(a) Every licensed physical therapist or physical therapist assistant shall, during the month of January of every year, apply to the Board for a renewal of licensure and pay to the secretary-treasurer the prescribed fee. Licenses that are not so renewed shall automatically lapse.

(b) The manner in which lapsed licenses shall be revived or extended shall be established by the Board in its discretion. (1951, c. 1131, s. 7; 1959, c. 630; 1969, c. 556; 1979, c. 487.)

§ 90-270.33. Fees.

The Board is authorized to charge and collect fees established by its rules and regulations, but fees shall not exceed the following schedule for the specified items:

(1) Each application for examination $100.00
(2) Certificate of licensure pursuant to G.S. 90-270.31(b) . . . 75.00
(3) License renewal 25.00

(1951, c. 1131, s. 2; 1969, c. 445, s. 7; c. 556; 1979, c. 487.)

§ 90-270.34. Exemptions from licensure; certain practices exempted.

(a) The following persons shall be permitted to practice physical therapy in this State without obtaining a license under this Article upon the terms and conditions specified herein:

(1) Students enrolled in accredited physical therapist or physical therapist assistant educational programs, while engaged in completing a clinical requirement for graduation, which must be performed under the supervision of a licensed physical therapist;
(2) Physical therapists licensed in other jurisdictions while enrolled in graduate educational programs in this State that include the evaluation and treatment of patients as part of their experience required for credit, so long as the student is not at the same time gainfully employed in this State as a physical therapist;
(3) Practitioners of physical therapy employed in the United States armed services, United States Public Health Service, Veterans Administration or other federal agency;
(4) Physical therapists or physical therapist assistants licensed in other jurisdictions who are teaching or participating in special physical therapy education projects, demonstrations or courses in this State, in which their participation in the evaluation and treatment of patients is minimal;
(5) A physical therapy aide while in the performance of those acts and practices specified in G.S. 90-270.24(5).

(b) Nothing in this Article shall be construed to prohibit:

(1) Any act in the practice of his profession by a person duly licensed in this State;
(2) The administration of simple massages and the operation of health clubs so long as not intended to constitute or represent the practice of physical therapy;
(3) The performance by any person of simple mechanical or machine-assisted acts in the physical care of a patient, not requiring the knowledge and skill of a physical therapist, under orders or directions of a licensed medical doctor or dentist. (1951, c. 1131, ss. 9, 11; 1959, c. 630; 1969, c. 556; 1979, c. 487.)

§ 90-270.35. Unlawful practice.

If any person shall:

(1) Practice, attempt to practice, teach, consult, or supervise in physical therapy or hold himself out as being able to do so in this State without first having obtained a license from the Board;
(2) Use in connection with his name any letters, words, or insignia indicating or implying that he is a physical therapist or physical therapist assistant unless he is licensed in accordance with this Article;

(3) Practice or attempt to practice physical therapy while his license is revoked or suspended;
(4) Practice physical therapy except by referral from a licensed medical doctor or dentist;
(5) Violate any of the provisions of this Article;

said person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined or imprisoned, or both fined and imprisoned, in the discretion of the court. Each act of such unlawful practice shall constitute a distinct and separate offense. (1951, c. 1131, ss. 9, 11; 1969, c. 556; 1979, c. 487.)

§ 90-270.36. Grounds for disciplinary action.

Grounds for disciplinary action shall include but not be limited to the following:

(1) The employment of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license, or the renewal thereof;
(2) The use of drugs or intoxicating liquors to an extent which affects professional competency;
(3) Conviction of an offense under any municipal, State, or federal narcotic or controlled substance law, until proof of rehabilitation can be established;
(4) Conviction of a felony or other public offense involving moral turpitude, until proof of rehabilitation can be established;
(5) An adjudication of insanity or incompetency, until proof of recovery from the condition can be established;
(6) Engaging in any act or practice violative of any of the provisions of this Article or of any of the rules and regulations adopted by the Board, or aiding, abetting or assisting any other person in the violation of the same;
(7) The commission of an act or acts of malpractice, gross negligence or incompetence in the practice of physical therapy;
(8) Practice as a licensed physical therapist or physical therapist assistant without a valid certificate of renewal;
(9) Engaging in conduct that could result in harm or injury to the public. (1951, c. 1131, s. 8; 1959, c. 630; 1969, c. 556; 1973, c. 1331, s. 3; 1979, c. 487.)

§ 90-270.37. Enjoining illegal practices.

(a) The Board may, if it finds that any person is violating any of the provisions of this Article, apply in its own name to the superior court for a temporary or permanent restraining order or injunction to restrain such person from continuing such illegal practices. All such actions by the Board for injunctive relief shall be governed by the Rules of Civil Procedure and Article 37, Chapter 1 of the General Statutes.

(b) The venue for actions brought under this section shall be the superior court of any county in which such illegal or unlawful acts are alleged to have been committed, in the county in which the defendants in such action reside, or in the county in which the Board maintains its offices and records. (1979, c. 487.)

§ 90-270.38. Title.

This Article may be cited as the "Physical Therapy Practice Act." (1951, c. 1131, s. 15; 1969, c. 556; 1979, c. 487.)

§ 90-270.39. Osteopaths, chiropractors, and podiatrists not restricted.

Nothing in this Article shall restrict the use of physical therapy modalities by licensed osteopaths, chiropractors, or podiatrists. (1951, c. 1131, s. 15.1; 1969, c. 556; 1979, c. 487.)

§§ 90-270.40 to 90-270.44: Reserved for future codification purposes.

ARTICLE 18C.

Marital and Family Therapy Certification Act.

§ 90-270.45. Title of Article.

This Article shall be known as the "Marital and Family Therapy Certification Act." (1979, c. 697, s. 1.)

Editor's Note. — Session Laws 1979, c. 697, s. 4, provides: "This act shall become effective October 1, 1979, and shall expire October 1, 1985."

§ 90-270.46. Policy and purpose.

Marital and family therapy in the State of North Carolina is declared to be a professional practice which affects the public safety and welfare and requires appropriate certification and control in the public interest.

It is the purpose of this Article to establish a certification agency, a structure, and procedures which will insure that the public has a means of protecting itself from unprofessional, improper, unauthorized and unqualified use of certain titles by persons who practice marital and family therapy. This Article shall be liberally construed to carry out these policies and purposes. (1979, c. 697, s. 1.)

§ 90-270.47. Definitions.

As used in this Article, unless the context clearly requires a different meaning:

(1) "Allied mental health field" and "degree" mean:
   a. Master's or doctoral degree in clinical social work;
   b. Master's or doctoral degree in psychiatric nursing;
   c. Doctoral degree in clinical or counseling psychology;
   d. Doctor of medicine or doctor of osteopathy degree with an appropriate residency training in psychiatry; or
   e. Master's or doctoral degree in any mental health field wherein the course of study is equivalent to the master's degree in marital and family therapy.

(2) "Board" means the North Carolina Marital and Family Therapy Certification Board.

(3) "Certified marital and family therapist" means a person to whom a certificate has been issued pursuant to the provisions of this Article, which certificate is in force and not suspended or revoked as of the particular time in question.

(4) "Practice of marital and family therapy" means the rendering of professional marital and family therapy or counseling services to individuals, family groups and marital pairs, singly or in groups, whether

such services are offered directly to the general public or through organizations, either public or private, for a fee, monetary or otherwise. "Marital and family therapy" is a specialized field of therapy which centers largely upon the family system and the relationship between husband and wife. "Marital and family therapy" consists of the application of principles, methods, educational and therapeutic techniques for the purpose of resolving emotional conflict, altering old attitudes and establishing new ones in the area of marriage and family life.

(5) "Recognized educational institution" means any educational institution which grants a bachelor's, master's, or doctor's degree and which is recognized by the Board or by a nationally or regionally recognized educational or professional accrediting body. (1979, c. 697, s. 1.)

§ 90-270.48. Prohibited acts.

Except as specifically provided elsewhere in this Article, commencing January 1, 1980, no person who is not certified under this Article shall use a title or description such as "certified marital or marriage therapist, counselor, advisor or consultant," "certified marital or marriage and family therapist, counselor, advisor or consultant," or any other name, style or description denoting that the person is a certified marital and family therapist. Nothing herein shall prohibit any person from advertising the performance of marital and family therapy or counseling services, the persons from whom it may be obtained and prices. (1979, c. 697, s. 1.)

§ 90-270.49. North Carolina Marital and Family Therapy Certification Board.

(a) Establishment. — There is hereby established as an agency of the State of North Carolina the North Carolina Marital and Family Therapy Certification Board, which shall be composed of seven Board members, one of which shall be designated as chairperson, to be appointed in the manner provided for in G.S. 90-270.50. Of the first Board members appointed, three shall continue in office for two years, two for three years, and two, including the chairperson for four years, respectively. Their successors shall be appointed for terms of four years each, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Board member whom he shall succeed. Upon the expiration of his term of office, a Board member shall continue to serve until his successor shall have been appointed and shall have qualified. No person may be appointed more than once to fill an unexpired term or more than two consecutive full terms. The Governor shall designate one Board member to serve as chairperson during the term of his appointment to the Board. No person may serve as chairperson for more than four years.

The Governor may remove any member of the Board or the chairperson from his position as chairperson for neglect of duty or malfeasance or conviction of a felony or crime of moral turpitude while in office but for no other reason.

No Board member shall participate in any matter before the Board in which he has a pecuniary interest, personal bias, or other similar conflict of interest.

(b) Quorum and Principal Office. — Four of the members of the Board shall constitute a quorum of the Board. The principal office of the Board shall be at such location in the State of North Carolina as the Board shall from time to time specify.

(c) Board Employees. — The Board is authorized to employ, subject to the provisions of Chapter 126 of the General Statutes, such attorneys, experts, and other employees as it may from time to time find necessary for the proper

performance of its duties and for whom the necessary funds are appropriated. (1979, c. 697, s. 1.)

Editor's Note. — Session Laws 1979, c. 697, s. 3, provides: "The Board shall be subject to the provisions of Chapter 93B of the General Statutes. No State appropriations shall be subject to the administration of this Board."

§ 90-270.50. Appointment and qualification of Board members.

(a) Nominations for Appointment. — The Governor shall appoint members of the Board only from among the candidates who meet the following qualifications:

(1) Four members shall be practicing marital and family therapists who meet the educational and experience requirements stated in this Article for persons applying after January 1, 1981; and each shall have been at least five years immediately preceding appointment actively engaged as a marital and family therapist in rendering professional services in marital and family therapy, or in the education and training of doctoral or postdoctoral students of marital and family therapy, and shall have spent the majority of the time devoted by him to such activity during the two years preceding his appointment, in this State. The initial appointees, appointed pursuant to this section, shall be deemed to be and shall become certified practicing marital and family therapists immediately upon their appointment and qualification as members of the Board.

(2) Three members shall be representatives of the general public who have no direct affiliation with the practice of marital and family therapy.

(b) The appointment of any member of the Board shall automatically terminate 30 days after the date such member is no longer a resident of the State of North Carolina.

(c) If before the expiration of his term any member shall die, resign, become disqualified, or otherwise cease to be a Board member, the vacancy shall be filled by the Governor by appointment for the unexpired term. (1979, c. 697, s. 1.)

§ 90-270.51. Board meetings.

(a) The Board shall administer and enforce the provisions of this Article.

(b) Subject to the provisions of Chapter 150A, the Board shall have the power and authority to adopt, amend, or repeal reasonable rules and regulations for the purpose of carrying out the provisions of this Chapter, but not inconsistent herewith, which rules and regulations shall become effective when filed as provided by law.

(c) The Board shall examine and pass on the qualifications of all applicants for certificates under this Article, and shall issue a certificate to each successful applicant therefor.

(d) The Board may adopt a seal which may be affixed to all certificates issued by the Board.

(e) The Board may authorize expenditures deemed necessary to carry out the provisions of this Article from the fees which it collects, but in no event shall expenditures exceed the revenues of the Board during any fiscal year. (1979, c. 697, s. 1.)

§ 90-270.52. Certification application.

Each person desiring to obtain a certificate under this Article shall make application thereof to the Board upon such form and in such manner as the Board shall prescribe and shall furnish evidence satisfactory to the Board that he:

(1) Is of good moral character;
(2) Has not engaged or is not engaged in any practice or conduct which would be a ground for denial, revocation or suspension of a certificate under G.S. 90-270.60;
(3) Is qualified for certification pursuant to the requirements of this Article. (1979, c. 697, s. 1.)

§ 90-270.53. Application for certificate before January 1, 1981.

Any person who applies on or before January 1, 1981, shall be issued a certificate by the Board if he meets the qualifications set forth in subdivisions (1), (2), and (3) of G.S. 90-270.52 and provides satisfactory evidence to the Board that he either:

(1) Meets educational and experience qualifications as follows:
   a. Educational requirements: Possesses a minimum of a master's degree or the equivalent from a recognized educational institution in the field of marriage or family therapy or a degree in an allied mental health field or shall be a clergyman or a physician whose official transcripts establish that he has completed an appropriate course of study in an allied mental health field.
   b. Experience requirements: At least 3,000 hours of clinical experience in the practice of marital and family therapy, not more than 500 hours of which experience was obtained while the candidate was a student in a master's degree program and at least 2,500 of which experience was obtained subsequent to the granting of such degree in the field of marital and family therapy or an allied mental health field; or
(2) Was certified prior to January 1, 1981, in this State in an allied mental health profession and satisfies the educational requirements for certification as a certified marital and family therapist set forth in (1)a., of this section. (1979, c. 697, s. 1.)

§ 90-270.54. Application for certificate after January 1, 1981.

Any person who applies to the Board after January 1, 1981, shall be issued a certificate by the Board if he meets the qualifications set forth in subdivisions (1), (2), and (3) of G.S. 90-270.52 and provides satisfactory evidence to the Board that he:

(1) Meets educational and experience qualifications as follows:
   a. Educational requirements: Possesses a minimum of a master's degree or the equivalent from a recognized educational institution in the field of marital and family therapy or counseling, or a degree in an allied mental health field, which degree is evidenced by the applicant's official transcripts which establish that he has completed an appropriate course of study in an allied mental health field.
   b. Experience requirements: At least 1,500 hours of clinical experience in the practice of marital and family therapy, not more than

500 hours of which experience was obtained while the candidate was a student in a master's degree program and at least 1,000 of which experience was obtained subsequent to the granting of such degree in the field of marital and family therapy or an allied mental health field; (with ongoing supervision consistent with standards approved by the Board); and

(2) Passes a written and/or oral examination administered by the Board. (1979, c. 697, s. 1.)

§ 90-270.55. Examination.

(a) The Board shall conduct an examination at least once a year at a time and place designated by the Board.

(b) Examinations may be written or oral as determined by the Board.

(c) Examinations shall include questions in such theoretical and applied fields to test an applicant's knowledge and competence to engage in the practice of marital and family therapy.

(d) An applicant shall be held to have passed an examination upon affirmative vote of a majority of the members of the Board present and voting.

(e) Any person who fails an examination conducted by the Board shall not be admitted to a subsequent examination for a period of at least six months. (1979, c. 697, s. 1.)

§ 90-270.56. Reciprocal certificates.

The Board shall issue a certificate by reciprocity to any person licensed or certified as a marital and family therapist in another state whose requirements for the license or certificate are equivalent to or exceed the requirements of this State, provided the applicant submits an application on forms prescribed by the Board and pays the original certification fee prescribed by this Article. (1979, c. 697, s. 1.)

§ 90-270.57. Fees.

The Board shall charge for each examination and certificate provided for in this Chapter a fee not exceeding fifty dollars ($50.00). This fee shall be payable to the Board by the applicant at the time of filing application. In no case shall the examination fee be refunded, unless in the discretion of the Board the applicant shall be deemed ineligible for examination. (1979, c. 697, s. 1.)

§ 90-270.58. Renewal of certificate.

The Board shall require the renewal of all certificates of qualification annually on the first day of July, and shall charge and collect a fee not to exceed twenty-five dollars ($25.00) for such renewal. (1979, c. 697, s. 1.)

§ 90-270.59. Disposition of funds.

All fees and other moneys collected and received by the Board shall be used for the purpose of implementing this Article. (1979, c. 697, s. 1.)

§ 90-270.60. Denial, revocation or suspension of certification.

(a) Grounds for Denial, Revocation, or Suspension. — The Board is authorized to deny, revoke or suspend a certificate granted pursuant to this Article on the following grounds:

(1) Conviction of a felony under the laws of the United States or of any state of the United States;

(2) Conviction of any crime, an essential element of which is dishonesty, deceit, or fraud;

(3) Fraud or deceit in obtaining a certificate as a certified marital and family therapist;

(4) Dishonesty, fraud or gross negligence in the practice of marital and family therapy;

(5) Violation of any rule of professional ethics and professional conduct adopted by the Board.

(b) Any disciplinary action taken shall be in accordance with the provisions of Chapter 150A of the General Statutes. (1979, c. 697, s. 1.)

§ 90-270.61. Penalties.

Any person not certified as a marital and family therapist under this Article, who on or after January 1, 1980, holds himself out to be or advertises that he is a certified marital and family therapist in violation of this Article shall, upon conviction, be guilty of a misdemeanor and be punished by a fine not exceeding two hundred dollars ($200.00) for the first offense and five hundred dollars ($500.00) for each subsequent offense. (1979, c. 697, s. 1.)

§ 90-270.62. Injunction.

As an additional remedy, the Board may proceed in a superior court to enjoin and restrain any uncertified person from violating the prohibitions of this Article. The Board shall not be required to post bond to such proceeding. (1979, c. 697, s. 1.)

Article 19.

Sterilization Operations.

§ 90-271. Operation lawful upon request of married person or person over 18.

It shall be lawful for any physician or surgeon licensed by this State when so requested by any person 18 years of age or over, or less than 18 years of age if legally married, to perform upon such person a surgical interruption of vas deferens or Fallopian tubes, as the case may be, provided a request in writing is made by such person prior to the performance of such surgical operation, and provided, further, that prior to or at the time of such request a full and reasonable medical explanation is given by such physician or surgeon to such person as to the meaning and consequences of such operation; and provided, further, that the surgical interruption of Fallopian tubes is performed in a hospital or ambulatory surgical facility licensed by the Department of Human Resources. (1963, c. 600; 1965, cc. 108, 941; 1971, c. 1231, s. 1; 1973, c. 476, s. 152; c. 998, s. 1; 1977, c. 7; 1979, c. 728.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, inserted "or ambulatory surgical facility" near the end of the section.

OPINIONS OF ATTORNEY GENERAL

Necessary Procedure for Sterilization of an Unmarried Minor. — See opinion of Attorney General to Mr. William W. Aycock, Jr., Attorney for Edgecombe County Department of Social Services, 40 N.C.A.G. 162 (1970).

§ 90-272. Operation on unmarried minor.

Any such physician or surgeon may perform a surgical interruption of vas deferens or Fallopian tubes upon any unmarried person under the age of 18 years when so requested in writing by such minor and in accordance with the conditions and requirements set forth in G.S. 90-271, provided that the juvenile court of the county wherein such minor resides, upon petition of the parent or parents, if they be living, or the guardian or next friend of such minor, shall determine that the operation is in the best interest of such minor and shall enter an order authorizing the physician or surgeon to perform such operation. (1963, c. 600; 1971, c. 1231, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Applicable to Operation Performed on Federal Reservation. — See opinion of Attorney General to Capt. Earl R. Peters, U.S. Navy, 42 N.C.A.G. 212 (1973).

Necessary Procedure for Sterilization of an Unmarried Minor. — See opinion of Attorney General to Mr. William W. Aycock, Jr., Attorney for Edgecombe County Department of Social Services, 41 N.C.A.G. 162 (1970).

§ 90-273: Repealed by Session Laws 1973, c. 998, s. 2.

§ 90-274. No liability for nonnegligent performance of operation.

Subject to the rules of law applicable generally to negligence, no physician or surgeon licensed by this State shall be liable either civilly or criminally by reason of having performed a surgical interruption of vas deferens or Fallopian tubes authorized by the provisions of this Article upon any person in this State. (1963, c. 600.)

§ 90-275. Article does not affect eugenical or therapeutical sterilization laws.

Nothing in this Article shall be deemed to affect the provisions of Article 7 of Chapter 35 of the General Statutes of North Carolina. (1963, c. 600.)

ARTICLE 20.

Nursing Home Administrator Act.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 3. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-275.1. Title.

This Article shall be known and may be cited as the "Nursing Home Administrator Act." (1969, c. 843, s. 1.)

§ 90-276. Definitions.

For the purposes of this Article, and as used herein:

(1) The term "Board" means the North Carolina State Board of Examiners for Nursing Home Administrators hereinafter created.

(2) The term "nursing home" means any institution or facility defined as such for licensing purposes under G.S. 130-9(c) [G.S. 130-9(e)] of the General Statutes, whether proprietary or nonprofit, including but not limited to, nursing homes owned or administered by the federal or state government or any agency or political subdivision thereof, and nursing homes operated in combination with a home for the aged or any other facility. Provided, this Article shall not apply to any institution conducted by and for the adherents of any church or religious denomination for the purpose of providing facilities for the care and treatment of the sick who depend solely upon spiritual means through prayer for healing in the practice of the religion of such church or denomination and exempt from licensing, and, notwithstanding any other provision of this Article, no license and registration or provisional license shall be required of any individual responsible for planning, organizing, directing, controlling and administering such institution.

(3) The term "nursing home administrator" means a person who administers, manages, supervises, or is in general administrative charge of a nursing home, whether such individual has an ownership interest in such home, and whether his functions and duties are shared with one or more individuals. (1969, c. 843, s. 1.)

Editor's Note. — The reference to § 130-9 (e) has been inserted in brackets as a suggested correction of the reference in the 1969 act to § 130-9 (c).

§ 90-277. Composition of Board.

There is hereby created the State Board of Examiners for Nursing Home Administrators which shall consist of eight members. The Secretary of Human Resources or his designee shall be an ex officio member who shall serve as secretary for the Board and have no vote. The remaining seven members shall be voting members who meet the following criteria:

(1) They shall be individuals representative of the professions and institutions concerned with the care and treatment of chronically ill or infirm elderly patients.

(2) Less than a majority of the board members shall be representative of a single profession or institutional category.

(3) The noninstitutional members shall have no direct financial interest in nursing homes, with nursing home administrators being considered as representatives of institutions for the purpose of interpreting the applicability of this subdivision.

(4) Three of the Board members shall be licensed nursing home administrators.

Effective July 1, 1973, the Governor shall appoint three members, one of whom shall be a licensed nursing home administrator, for terms of three years, and four members, two of whom shall be licensed nursing home administrators, for terms of two years. Thereafter, all terms shall be three years. However, no member shall serve more than two consecutive full terms. Any vacancy occurring in the position of an appointive member shall be filled by the Governor for the unexpired term in the same manner as for new appointments. Appointive members may be removed by the Governor for cause after due notice and hearing. (1969, c. 843, s. 1; 1973, c. 728.)

§ 90-278. Qualifications for licensure.

The Board shall have authority to issue licenses to qualified persons as nursing home administrators, and shall establish qualification criteria for such nursing home administrators.

(1) A license as a nursing home administrator shall be issued to any person upon the Board's determination that:

a. He is at least 21 years of age, of good moral character and of sound physical and mental health; and

b. He has satisfactorily completed a course in instruction and training prescribed by the Board, which course shall be so designed as to content and so administered as to present sufficient knowledge of the needs properly to be served by nursing homes, the laws governing the operation of nursing homes and the protection of the interests of patients therein, and the elements of good nursing home administration; or have presented evidence satisfactory to the Board of sufficient education, training or experience in the foregoing fields to administer, supervise and manage a nursing home; and

c. He has passed an examination administered by the Board and designed to test for competence in the subject matters referred to in paragraph b hereof.

(2) A provisional license shall be issued to any person upon the Board's determination that he has met the requirements in subdivision (1)a hereof and is certified by the Secretary of Human Resources as having served as administrator of a licensed nursing home for a period of one year immediately preceding the effective date of this Article. All such provisional licenses shall terminate two years after issuance or June 30, 1972, whichever is earlier, and none shall be issued by the Board thereafter.

(3) A temporary license may be issued under requirements and conditions prescribed by the Board to any person to act or serve as administrator of a nursing home without meeting the requirements for full licensure, but only when there are unusual circumstances preventing compliance with the procedures for licensing elsewhere provided by this Article. The temporary license shall be issued by the secretary only for the period prior to the next meeting of the Board, at which time the Board may renew such temporary license for a further period only up to one year. (1969, c. 843, s. 1; 1973, c. 476, s. 128.)

§ 90-279. Licensing function.

The Board shall license nursing home administrators in accordance with rules and regulations issued and from time to time revised by it. A nursing home administrator's license shall not be transferable and shall be valid until expiration or until suspended or revoked for violation of this Article or of the standards established by the Board pursuant to this Article. Denial of issuance or renewal, suspension or revocation by the Board shall be subject to the provisions of Chapter 150A of the General Statutes entitled "Uniform Revocation of Licenses." (1969, c. 843, s. 1; 1973, c. 1331, s. 3.)

§ 90-280. Fees; display of license; duplicate license; inactive list.

(a) Each applicant for an examination administered by the Board and each applicant for a training program sponsored or supervised by the Board shall pay a fee set by the Board not to exceed the cost of administering the examination or of sponsoring or supervising the training program.

(b) Each person licensed as a nursing home administrator shall be required to pay a license fee in an amount set by the Board not to exceed one hundred fifty dollars ($150.00). A license shall expire on the thirtieth day of September of the second year following its issuance and shall be renewable biennially upon payment of a renewal fee set by the Board not to exceed one hundred fifty dollars ($150.00).

(c) Each person licensed as a nursing home administrator shall display his license certificate in a conspicuous place in his place of employment.

(d) Any person licensed as a nursing home administrator may receive a duplicate license by payment of a fee set by the Board not to exceed twenty-five dollars ($25.00).

(e) Any person licensed as a nursing home administrator who is not acting, serving, or holding himself out to be a nursing home administrator may have his name placed on an inactive list for such period of time not to exceed five years upon payment of a fee set by the Board not to exceed the amount of twenty-five dollars ($25.00). (1969, c. 843, s. 1; 1977, c. 652; 1979, 2nd Sess., c. 1282.)

Effect of Amendments. — The 1979, 2nd Sess., amendment added subsections (d) and (e).

§ 90-281. Collection of funds.

All fees and other moneys collected and received by the Board shall be handled as provided by law and as prescribed by the State Treasurer. Such funds shall be used and expended by the Board to pay the compensation and travel expenses of members and employees of the Board and other expenses necessary for the Board to administer and carry out the provisions of this

Article. The financial records of the Board shall be subjected to an annual audit, supervised by the State Auditor, and paid for out of the funds of the Board. (1969, c. 843, s. 1.)

§ 90-282. Advisory council.

The Board may create an advisory council to make recommendations and to supply information to the Board pertaining to the administration and enforcement of this Article, but the advisory council shall have no executive, administrative, or appointive powers or duties. (1969, c. 843, s. 1.)

§ 90-283. Organization of Board; compensation; employees and services.

The Board shall elect from its membership a chairman and vice-chairman, and shall adopt rules and regulations to govern its proceedings. Board members shall be entitled to receive only such compensation and reimbursement as is prescribed by Chapter 138 of the General Statutes for State boards generally. At any meeting a majority of the voting members shall constitute a quorum. The Board may, in accordance with the State Personnel Act, employ any necessary personnel to assist it in the performance of its duties and may contract for such services as may be necessary to carry out the provisions of this Article. (1969, c. 843, s. 1.)

§ 90-284. Exclusive jurisdiction of Board.

The Board shall have exclusive authority to determine the qualifications, skill and fitness of any person to serve as an administrator of a nursing home under the provisions of this Article, and the holder of a license under the provisions of this Article shall be deemed qualified to serve as the administrator of a nursing home for all purposes. (1969, c. 843, s. 1.)

§ 90-285. Functions and duties of the Board.

The Board shall meet at least once annually in Raleigh or any other location designated by the chairman and shall have the following functions and duties:

(1) Develop, impose and enforce rules and regulations setting out standards which must be met by individuals in order to receive and hold a license as a nursing home administrator, which standards shall be designed to insure that nursing home administrators shall be individuals who are of good character and who are otherwise suitable, by training or experience in the field of institutional administration, to serve as nursing home administrators.

(2) Develop and apply appropriate methods and procedures, including examination and investigations, for determining whether individuals meet such standards, and administer an examination at least twice each year at such times and places as the Board shall designate.

(3) Issue licenses to qualified individuals; and for cause, after due notice and hearing, revoke, suspend, or deny renewal of licenses previously issued by the Board in any case where the individual holding such license is determined substantially to have failed to conform to the requirements of such standards.

(4) Establish and implement procedures designed to insure that individuals licensed as nursing home administrators will, during any period that they serve as such, comply with the requirements of such standards.

(5) Receive, investigate, and take appropriate action with respect to any charge or complaint filed with the Board to the effect that any individual licensed as a nursing home administrator has failed to comply with the requirements of such standards.

(6) Conduct a continuing study and investigation of nursing homes and nursing home administrators within the State in order to make improvements in the standards imposed for the licensing of administrators and of procedures and methods for the enforcement of such standards, and to raise the quality of nursing home administration in such other ways as may be effective.

(7) Conduct, or cause to be conducted by contract or otherwise, one or more courses of instruction and training sufficient to meet the requirements of this Article, and make provisions for the conduct of such courses and their accessibility to residents of this State, unless it finds that there are sufficient courses conducted by others within this State. In lieu thereof the Board may approve courses conducted within and without this State as sufficient to meet the education and training requirements of this Article.

(8) Make rules and regulations, not inconsistent with law, as may be necessary for the proper performance of its duties, and to take such other actions as may be necessary to enable the State to meet the requirements set forth in section 1908 of the Social Security Act, the federal rules and regulations promulgated thereunder, and other pertinent federal authority.

(9) Receive and disburse any funds appropriated or given to the Board, including any federal funds, to carry out the purposes of this Article.

(10) Maintain a register of all applications for licensing and registration of nursing home administrators, which register shall show: the place or residence, name and age of each applicant; the name and address of employer or business connection of each applicant; the date of application; information of educational and experience qualifications; the action taken by the Board and the dates; the serial number of the license issued to the applicant; and such other pertinent information as may be deemed necessary. (1969, c. 843, s. 1.)

§ 90-286. Renewal of license.

Every holder of a nursing home administrator's license shall renew it biennially, by making application to the Board. Renewals of licenses shall be granted as a matter of course, unless the Board finds that the applicant has acted or failed to act in such a manner, or under circumstances, as would constitute grounds for suspension, revocation, or denial of renewal of a license, as provided by this Article and the rules and regulations issued pursuant to this Article. (1969, c. 843, s. 1.)

§ 90-287. Reciprocity with other states.

The Board may issue a nursing home administrator's license, without examination, to any person who holds a current license as a nursing home administrator from another jurisdiction, provided that the Board finds that the standards for licensure in such other jurisdiction are at least the substantial equivalent of those prevailing in this State, and that the applicant is otherwise qualified. (1969, c. 843, s. 1.)

§ 90-288. Misdemeanor.

It shall be unlawful and constitute a misdemeanor punishable upon conviction by a fine or imprisonment in the discretion of the court,

(1) For any person to act or serve in the capacity as, or hold himself out to be, a nursing home administrator, or use any title, sign, or other indication that he is a nursing home administrator, unless he is the holder of a valid license as a nursing home administrator, issued in accordance with the provisions of this Article, and

(2) For any person to violate any of the provisions of this Article or any rules and regulations issued pursuant thereto. (1969, c. 843, s. 1.)

Article 21.

Determination of Need for Medical Care Facilities.

§§ 90-289 to 90-291: Repealed by Session Laws 1973, c. 113.

Article 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

Repeal of Article. — This Article is repealed, effective July 1, 1983, by Session Laws 1977, c. 712, s. 4. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90-292. Declaration of policy.

It is declared to be a policy of the State of North Carolina that, in order to safeguard the public health, safety, and welfare; to protect the public from being misled by incompetent, unscrupulous, and unauthorized persons and from unprofessional conduct on the part of qualified speech and language pathologists and audiologists and to help assure the availability of the highest possible quality speech and language pathology and audiology services to the communicatively handicapped people of this State, it is necessary to provide regulatory authority over persons offering speech and language pathology and audiology services to the public. (1975, c. 773, s. 1.)

§ 90-293. Definitions.

As used in this Article, unless the context otherwise requires:

(1) "Audiologist" means any person who engages in the practice of audiology. A person is deemed to be an audiologist if he offers services to the public under any title incorporating the terms of "audiology," "audiologist," "audiological," "hearing clinic," "hearing clinician,"

"hearing therapist," or any similar title or description of service; provided, however, that a person licensed under Chapter 93D of the General Statutes may use the term "National Hearing Aid Society, Certified Hearing Aid Audiologist" except in public representations, advertising and telephone directory listings.

(2) "Board" means the Board of Examiners for Speech and Language Pathologists and Audiologists.

(3) "License" means a license issued by the Board under the provisions of this Article, including a temporary license.

(4) "Person" means an individual, organization, or corporate body, except that only individuals can be licensed under this Article.

(5) "Speech and language pathologist" means any person who represents himself to the public by title or by description of services, methods, or procedures as one who evaluates, examines, instructs, or counsels persons suffering from conditions or disorders affecting speech and language. A person is deemed to be a speech and language pathologist if he offers such services under any title incorporating the words "speech pathology," "speech pathologist," "speech correction," "speech correctionist," "speech therapy," "speech therapist," "speech clinic," "speech clinician," "language pathologist," "language therapist," "logopedist," "communication disorders," "communicologist," "voice therapist," "voice pathologist," or any similar title or description of service.

(6) "The practice of audiology" means the application of principles, methods, and procedures of measurement, testing, evaluation, prediction, consultation, counseling, instruction, habilitation, or rehabilitation related to hearing and disorders of hearing for the purpose of identifying, preventing, ameliorating, or modifying such disorders and conditions in individuals and/or groups of individuals. A person licensed under this Article may not engage in the dispensing, fitting and selling of hearing aids unless that person is also licensed under Chapter 93D of the General Statutes. For the purpose of this subdivision, the words "habilitation" and "rehabilitation" shall include auditory training, speech reading, hearing aid use evaluation and recommendations, and fabrication of earmolds and similar accessories for clinical testing purposes only.

(7) "The practice of speech and language pathology" means the application of principles, methods, and procedures for the measurement, testing, evaluation, prediction, counseling, instruction, habilitation, or rehabilitation related to the development and disorders of speech, voice, or language for the purpose of identifying, preventing, ameliorating, or modifying such disorders.

(8) "Unethical conduct" means:

a. The obtaining of any fee by fraud or misrepresentation.

b. Employing directly or indirectly any suspended or unregistered person to perform any work covered by this Article.

c. Using or causing or promoting the use of any advertising matter, promotional literature, testimonial, guarantee, warranty, label, brand, insignia, or any other representation, however disseminated or published, which is misleading, deceiving, improbable, or untruthful.

d. Falsely representing that the services of a licensed physician will be employed in the practice of speech and language pathology or audiology, or using the term "doctor" in reference to anyone other than a licensed physician involved in said practice, or falsely implying in any manner that the services of a licensed physician are routinely used in said practice. (1975, c. 773, s. 1.)

§ 90-294. License required; Article not applicable to certain activities.

(a) Licensure shall be granted in either speech and language pathology or audiology independently. A person may be licensed in both areas if he is qualified.

(b) No person may practice or hold himself out as being able to practice speech and language pathology or audiology in this State unless such person holds a current, unsuspended, unrevoked license issued by the Board as provided in this Article or holds a current, unsuspended, unrevoked license of endorsement pursuant to G.S. 90-296. The license required by this section shall be kept conspicuously posted in such person's office or place of business at all times. Nothing in this Article, however, shall be considered to prevent a qualified person licensed in this State under any other law from engaging in the profession for which such person is licensed.

(c) The provisions of this Article do not apply to:

(1) The activities, services and use of an official title by a person employed by an agency of the federal government and solely in connection with such employment, except that an individual is not exempt from this Article who does work as a speech and language pathologist or audiologist outside the scope of such employment for which a fee may be paid directly or indirectly to such person by or for the recipient of the service.

(2) The activities and services of a student or trainee in speech and language pathology or audiology pursuing a course of study in an accredited college or university, or working in a training center program approved by the Board, if these activities and services constitute a part of such person's course of study.

(3) The activities and services of a person who has recently become a resident of the State whose application for licensing with or without examination has been received by the Board, pending disposition of such application, if the person was licensed to perform such services by a state with standards equivalent to or exceeding those of this State, as determined by the Board.

(4) A person who holds a valid and current credential as a speech and language pathologist or audiologist issued by the North Carolina Department of Public Instruction or who is employed by the North Carolina Schools for the Deaf and Blind, if such person practices speech and language pathology or audiology in a salaried position solely within the confines or under the jurisdiction of the Department of Public Instruction or the Department of Human Resources respectively.

(d) Nothing in this Article shall apply to a physician licensed to practice medicine, or to any person employed by such a physician in the course of his practice of medicine.

(e) This Article shall not be construed to prevent any person licensed in this State under Chapter 93D of the General Statutes of North Carolina from the practice of fitting and selling hearing aids.

(f) The provisions of this Article do not apply to registered nurses and licensed practical nurses or other certified technicians trained to perform audiometric screening tests in industrial operations and whose work is under the supervision of a company physician, consulting physician, or licensed audiologist.

(g) The provisions of this Article do not apply to persons who are now or may become engaged in counseling or instructing laryngectomees in the methods, techniques or problems of learning to speak again.

(h) No license under this Article is required for persons originally employed by any agency of State government between October 1, 1975, and July 1, 1977, for the practice of speech and language pathology or audiology within and during the course and scope of employment with such agency. (1975, c. 773, s. 1; 1977, c. 692, s. 3.)

§ 90-295. Qualifications of applicants for licensure.

To be eligible for licensure by the Board as a speech and language pathologist or audiologist, the applicant must:

(1) Possess at least a master's degree in speech and language pathology or audiology or qualifications deemed equivalent by the Board under regulations duly adopted under this Article. Such degree or equivalent qualifications shall be from an accredited institution.

(2) Submit transcripts from one or more accredited colleges or universities presenting evidence of the completion of 60 semester hours constituting a well-integrated program of course study dealing with the normal aspects of human communication, development thereof, disorders thereof, and clinical techniques for evaluation and management of such disorders.

a. Twelve of these 60 semester hours must be obtained in courses that provide information that pertains to normal development and use of speech, language and hearing.

b. Thirty of these 60 semester hours must be in courses that provide information relative to communication disorders and information about and training in evaluation and management of speech, language, and hearing disorders. At least 24 of these 30 semester hours must be in courses in the professional area (speech and language pathology or audiology) for which the license is requested, and no less than six semester hours may be in audiology for the license in speech and language pathology or in speech and language pathology for the license in audiology. Moreover, no more than six semester hours may be in courses that provide credit for clinical practice obtained during academic training.

c. Credit for study of information pertaining to related fields that augment the work of the clinical practitioner of speech and language pathology and/or audiology may also apply toward the total 60 semester hours.

d. Thirty of the total 60 semester hours that are required for a license must be in courses that are acceptable toward a graduate degree by the college or university in which they are taken. Moreover, 21 of those 30 semester hours must be within the 24 semester hours required in the professional area (speech and language pathology or audiology) for which the license is requested or within the six semester hours required in the other area.

(3) Submit evidence of the completion of a minimum of 300 clock hours of supervised, direct clinical experience with individuals who present a variety of communication disorders. This experience must have been obtained within the training institution or in one of its cooperating programs.

(4) Present written evidence from a licensed and/or American Speech and Hearing Association certified speech and language pathologist or audiologist supervisor of nine months of full-time professional experience in which bona fide clinical work has been accomplished in the major professional area (speech and language pathology or audiology) in which the license is being sought. This experience must follow the

completion of the requirements listed in subdivisions (1), (2) and (3). Full time is defined as at least nine months in a calendar year and a minimum of 30 hours per week. Half time is defined as at least 18 months in two calendar years and a minimum of 20 hours per week.

(5) Pass an examination approved by the Board. The Board shall determine the subject and scope of the examination. Written examinations may be supplemented by such oral examinations as the Board shall determine. An applicant who fails his examination may be reexamined at a subsequent examination upon payment of another examination fee. (1975, c. 773, s. 1.)

§ 90-296. Examinations.

(a) An applicant for registration who has satisfied the requirements of G.S. 90-295 shall appear at a time and place and before persons the Board designates, to be examined by written and/or practical tests, in order to determine such person's qualifications to practice speech and language pathology and audiology.

(b) The Board shall give at least two examinations of the type prescribed in subsection (a) of this section in each year, and additional examinations as the volume of applications makes appropriate.

(c) An examination shall not be required as a prerequisite for a license for a person who holds a certificate of clinical competence issued by the American Speech and Hearing Association in the specialized area for which such person seeks a license. (1975, c. 773, s. 1.)

§ 90-297. Registration and issuance of licenses; licenses for persons licensed in other jurisdiction or engaged in practice on October 1, 1975.

(a) Upon payment of fee, the Board shall license each applicant who satisfactorily completes the license requirements.

(b) If the Board determines that another state or jurisdiction has requirements equivalent to or higher than those in effect pursuant to this Article for the practice of audiology or speech pathology, and that state or jurisdiction has a program equivalent to or stricter than the program for determining whether applicants pursuant to this Article are qualified to practice audiology or speech pathology, the Board may issue licenses to applicants therefor who hold current, unsuspended, and unrevoked certificates or licenses to practice audiology or speech pathology in the other state or jurisdiction upon payment of the license fee.

(c) The Board shall waive the examination and educational requirements for those applicants who, on October 1, 1975, are actively engaged in the practice of speech and language pathology or audiology upon proof of bona fide practice presented to the Board on or before February 28, 1978.

(d) Notice that proof of bona fide practice must be presented to the Board in accordance with subsection (c) of this section shall be given by the Board on or before December 1, 1977, to the following:

(1) Members of the North Carolina Speech, Hearing and Language Association who are not licensed under this Article;

(2) Speech and language pathologists and audiologists certified by the State Department of Public Instruction who are not licensed under this Article; and

(3) All institutions reasonably known to have speech and language pathologists and audiologists in their employment. (1975, c. 773, s. 1; 1977, c. 692, ss. 1, 2.)

§ 90-298. Temporary license.

(a) An applicant who fulfills all of the requirements of G.S. 90-295 except those requirements relating to experience, as set forth in subdivision (4) of G.S. 90-295, and who has not previously applied to take the examination provided under subdivision (5) of G.S. 90-295, may apply to the Board for a temporary license.

(b) Upon receiving an application for a temporary license accompanied by a fee in an amount established by the General Assembly, the Board shall issue a temporary license, which entitles the applicant to practice speech and language pathology or audiology for a period of eight weeks after the conclusion of the next examination given after the date of issue.

(c) No temporary license shall be issued by the Board under this section unless the applicant shows to the satisfaction of the Board that the applicant is or will be supervised and trained by a person who holds a valid license under this Article.

(d) If a person who holds a temporary license issued under this section does not take the next examination given after the date of issue, the temporary license shall not be renewed. (1975, c. 773, s. 1.)

§ 90-299. Licensee to notify Board of place of practice.

(a) A person who holds a license shall notify the Board in writing of the address of the place or places where he engages or intends to engage in the practice of speech and language pathology or audiology.

(b) The Board shall keep a record of the places of practice of licensees.

(c) Any notice required to be given by the Board to a licensee may be given by mailing it to him at the address of the last place of practice of which he has notified the Board. (1975, c. 773, s. 1.)

§ 90-300. Renewal of licenses.

A licensee shall annually pay to the Board a fee in an amount established by the General Assembly for a renewal of his license. A 30-day grace period shall be allowed after expiration of a license during which the license may be renewed on payment of a fee in an amount established by the General Assembly. The Board may suspend the license of any person who fails to renew his license before the expiration of the 30-day grace period. After expiration of the grace period, the Board may renew such a license upon the payment of a fee in an amount established by the General Assembly. No person who applies for renewal whose license was suspended for failure to renew shall be required to submit to any examination as a condition of renewal. (1975, c. 773, s. 1.)

§ 90-301. Grounds for suspension or revocation of license.

Any person licensed under this Article may have his license revoked or suspended for a fixed period by the Board under the provisions of North Carolina General Statutes, Chapter 150A, for any of the following causes:

(1) His license has been secured by fraud or deceit practiced upon the Board.

(2) Fraud or deceit in connection with his services rendered as an audiologist or speech pathologist.

(3) Unprofessional conduct as defined by the rules established by the Board or violation of the code of ethics made and published by the Board.

(4) Violation of any lawful order, rule or regulation rendered or adopted by the Board.

(5) Any violation of the provisions of this Article. (1975, c. 773, s. 1.)

§ 90-302. Prohibited acts and practices.

No person may:

(1) Sell, barter, transfer or offer to sell or barter a license.

(2) Purchase or procure by barter a license with intent to use it as evidence of the holder's qualification to practice audiology or speech pathology.

(3) Alter a license.

(4) Use or attempt to use a valid license which has been purchased, fraudulently obtained, counterfeited or materially altered.

(5) Make a false, material statement in an application for a North Carolina license. (1975, c. 773, s. 1.)

§ 90-303. Board of Examiners for speech and language pathology and audiology; qualifications, appointment and terms of members; vacancies; meetings, etc.

(a) There shall be a Board of Examiners for Speech and Language Pathologists and Audiologists, which shall be composed of five members, who shall all be residents of this State. Two members shall have a paid work experience in audiology for at least five years and hold a certificate of clinical competence in audiology of the American Speech and Hearing Association. Two members shall have paid work experience in speech pathology for at least five years and hold a certificate of clinical competence in speech pathology of the American Speech and Hearing Association. One member shall be physician who is licensed to practice medicine in the State of North Carolina.

(b) The members of the Board shall be appointed by the Governor.

(c) The initial Board shall have members appointed for terms of one year, two years, three years, four years, and five years. Thereafter, Board members shall be appointed for a term of five years.

(d) Members of the Board shall receive no compensation for their service, but shall receive the same per diem, subsistence and travel allowance as provided in G.S. 138-5. (1975, c. 773, s. 1.)

§ 90-304. Powers and duties of Board.

The powers and duties of the Board are as follows:

(1) To administer, coordinate, and enforce the provisions of this Article, establish fees, evaluate the qualifications of applicants, supervise the examination of applicants, and issue subpoenas, examine witnesses, and administer oaths, and investigate persons engaging in practices which violate the provisions of this Article.

(2) To conduct hearings and keep records and minutes as necessary to an orderly dispatch of business.

(3) To adopt responsible rules and regulations including but not limited to regulations which establish ethical standards of practice and to amend or repeal the same.

(4) To issue annually a list stating the names of persons currently licensed under the provisions of this Article.

(5) To employ such personnel as determined by its needs and budget.

(6) To adopt seals by which it shall authenticate their proceedings, copies of the proceedings, records and the acts of the Board, and licenses. (1975, c. 773, s. 1.)

§ 90-305. Fees.

Persons subject to licensure under this Article shall pay the following fees to the Board:

(1) Application fee	$25.00
(2) Examination fee	25.00
(3) Initial license fee	25.00
(4) Renewal license	25.00
(5) Temporary license	25.00
(6) Delinquency fee	10.00

(1975, c. 773, s. 1.)

§ 90-306. Penalty for violation.

Any person, partnership or corporation which engages in the professional practices required to be licensed under this Article without obtaining such license, and who is not expressly exempt from the provisions of this Article, shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00) or be imprisoned for a period not exceeding six months, or both, in the discretion of the Court. (1975, c. 773, s. 1.)

§ 90-307. Severability.

If any part of this Article is for any reason held unconstitutional, inoperative, or void, such holding of invalidity shall not affect the remaining portions of the Article; and it shall be construed to have been the legislative intent to pass this Article without such unconstitutional, invalid, or inoperative part therein; and the remainder of this Article, after the exclusion of such part or parts, shall be valid as if such parts were not contained therein. (1975, c. 773, s. 1.)

§§ 90-308 to 90-319: Reserved for future codification purposes.

Article 23.

Right to Natural Death; Brain Death.

§ 90-320. General purpose of Article.

(a) The General Assembly hereby recognizes that an individual's rights as a citizen of this State include the right to a peaceful and natural death. This Article is to establish a procedure for the exercise of that right and to state expressly the extent of a physician's obligation to preserve the life of his patient in situations where artificial means may be used to sustain the circulatory and respiratory functions for an indefinite period.

(b) Nothing in this Article shall be construed to authorize any affirmative or deliberate act or omission to end life other than to permit the natural process of dying. Nothing in this Article shall impair or supersede any legal right or legal responsibility which any person may have to effect the withholding or withdrawal of life-sustaining procedures in any lawful manner. In such respect the provisions of this Article are cumulative. (1977, c. 815; 1979, c. 715, s. 1.)

Effect of Amendments. — The 1979 amendment added the second paragraph of subsection (b).

Legal Periodicals. — For a comment discussing North Carolina's Natural Death Act, see 14 Wake Forest L. Rev. 771 (1978).

§ 90-321. Right to a natural death.

(a) As used in this Article the term:

(1) "Declarant" means a person who has signed a declaration in accordance with subsection (c);

(2) "Extraordinary means" is defined as any medical procedure or intervention which in the judgment of the attending physician would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function;

(3) "Physician" means any person licensed to practice medicine under Article 1 of Chapter 90 of the laws of the State of North Carolina.

(b) If a person has declared, in accordance with subsection (c) below, a desire that his life not be prolonged by extraordinary means; and the declaration has not been revoked in accordance with subsection (e); and

(1) It is determined by the attending physician that the declarant's present condition is

a. Terminal; and

b. Incurable; and

(2) There is confirmation of the declarant's present condition as set out above in subdivision (b)(1) by a physician other than the attending physician;

then extraordinary means may be withheld or discontinued upon the direction and under the supervision of the attending physician.

(c) The attending physician may rely upon a signed, witnessed, dated and proved declaration:

(1) Which expresses a desire of the declarant that no extraordinary means be used to prolong his life if his condition is determined to be terminal and incurable; and

(2) Which states that the declarant is aware that the declaration authorizes a physician to withhold or discontinue the extraordinary means; and

(3) Which has been signed by the declarant in the presence of two witnesses who state that they (i) are not related within the third degree to the declarant or to the declarant's spouse and (ii) would not be entitled to any portion of the estate of the declarant upon his death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it then provided, and (iii) are not the attending physician, an employee of the attending physician or of a health facility in which the declarant is a patient, or of a nursing home or any group care home in which the declarant resides and (iv) is not a person who has a claim against any portion of the estate of the declarant at the time of the declaration; and

(4) Which has been proved before a clerk or assistant clerk of superior court, or a notary public who certifies substantially as set out in subsection (d) below.

(d) The following form is specifically determined to meet the requirements above:

"Declaration of A Desire For A Natural Death

"I . . . . . ., being of sound mind, desire that my life not be prolonged by extraordinary means if my condition is determined to be terminal and incurable. I am aware and understand that this writing authorizes a physician to withhold or discontinue extraordinary means.

"This the . . . . . day of . . . . . ., ...

Signature . . . . . .

"I hereby state that the declarant, ..., signed the above declaration in my presence and that I am not related to the declarant by blood or marriage and I would not be entitled to any portion of the estate of the declarant under any existing will or codicil of the declarant, or as an heir under the Intestate Succession Act if the declarant died on this date without a will. I also state that I am not the declarant's attending physician or an employee of the declarant's attending physician, or an employee of a health facility in which the declarant is a patient or an employee of a nursing home or any group care home where the declarant resides. I further state that I do not now have any claim against the declarant.

Witness . . . . . .,
Witness . . . . . ."

The clerk or the assistant clerk, or a notary public may, upon proper proof, certify the declaration as follows:

"Certificate

"I, ..., Clerk (Assistant Clerk) of Superior Court or Notary Public (circle one as appropriate) for . . . . . County hereby certify that . . . . . and . . . . . ., witnesses, appeared before me and swore that they witnessed . . . . . ., declarant, sign the attached declaration; and also swore that at the time they witnessed the declaration (i) they were not related within the third degree to the declarant or to the declarant's spouse, and (ii) they would not be entitled to any portion of the estate of the declarant upon the declarant's death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it provided at that time, and (iii) they were not a physician attending the declarant or an employee of an attending physician or of a health facility in which the declarant was a patient or of a nursing home or any group care home in which the declarant resided, and (iv) they did not have a claim against the declarant. I further certify that I am satisfied as to the genuineness and due execution of the declaration. This the . . . . . of . . . . . ., ...

. . . . . .
Clerk (Assistant Clerk) of Superior Court
or Notary Public (circle one as appropriate)
for the County of . . . . . ."

The above declaration may be proved by the clerk or the assistant clerk, or a notary public in the following manner:

(1) Upon the testimony of the two witnesses; or
(2) If the testimony of only one witness is available, then
    a. Upon the testimony of such witness, and
    b. Upon proof of the handwriting of the witness who is dead or whose testimony is otherwise unavailable, and

c. Upon proof of the handwriting of the declarant, unless he signed by his mark; or upon proof of such other circumstances as will satisfy the clerk or assistant clerk of the superior court, or a notary public as to the genuineness and due execution of the declaration.

(3) If the testimony of none of the witnesses is available, such declaration may be proved by the clerk or assistant clerk, or a notary public

a. Upon proof of the handwriting of the two witnesses whose testimony is unavailable, and

b. Upon compliance with paragraph c of subdivision (2) above.

Due execution may be established, where the evidence required above is unavoidably lacking or inadequate, by testimony of other competent witnesses as to the requisite facts.

The testimony of a witness is unavailable within the meaning of this subsection when the witness is dead, out of the State, not to be found within the State, insane or otherwise incompetent, physically unable to testify or refuses to testify.

If the testimony of one or both of the witnesses is not available the clerk or the assistant clerk, or a notary public of superior court may, upon proper proof, certify the declaration as follows:

"Certificate

"I . . . . . ., Clerk (Assistant Clerk) of Court for the Superior Court or Notary Public (circle one as appropriate) of . . . . . County hereby certify that based upon the evidence before me I am satisfied as to the genuineness and due execution of the attached declaration by . . . . . ., declarant, and that the declarant's signature was witnessed by . . . . . ., and . . . . . ., who at the time of the declaration met the qualifications of G.S. 90-321(c)(3).

"This the . . . . . day of . . . . . ., ...

. . . . . .
Clerk (Assistant Clerk) of Superior Court
or Notary Public (circle one as
appropriate) for . . . . . .
County."

(e) The above declaration may be revoked by the declarant, in any manner by which he is able to communicate his intent to revoke, without regard to his mental or physical condition. Such revocation shall become effective only upon communication to the attending physician by the declarant or by an individual acting on behalf of the declarant.

(f) The execution and consummation of declarations made in accordance with subsection (c) shall not constitute suicide for any purpose.

(g) No person shall be required to sign a declaration in accordance with subsection (c) as a condition for becoming insured under any insurance contract or for receiving any medical treatment.

(h) The withholding or discontinuance of extraordinary means in accordance with this section shall not be considered the cause of death for any civil or criminal purposes nor shall it be considered unprofessional conduct. Any person, institution or facility against whom criminal or civil liability is asserted because of conduct in compliance with this section may interpose this section as a defense.

(i) Any certificate in the form provided by this section prior to July 1, 1979, shall continue to be valid. (1977, c. 815; 1979, c. 112, ss. 1-6.)

Effect of Amendments. — The 1979 amendment inserted "or a notary public" in subdivision (c)(4), inserted "or a notary public" following "clerk or the assistant clerk" throughout subsection (d), inserted "or Notary Public (circle one as appropriate)" in two places in each of the two certificates in subsection (d), and added subsection (i).

Legal Periodicals. — For a comment discussing North Carolina's Natural Death Act, see 14 Wake Forest L. Rev. 771 (1978).

For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

§ 90-322. Procedures for natural death in the absence of a declaration.

(a) If a person is comatose and there is no reasonable possibility that he will return to a cognitive sapient state, and:

(1) It is determined by the attending physician that the person's present condition is:
   a. Terminal; and
   b. Incurable; and
   c. Irreversible; and

(2) There is confirmation of the person's present condition as set out above in this subsection, by a majority of a committee of three physicians other than the attending physician; and

(3) A vital function of the person is being sustained by extraordinary means;

then, extraordinary means may be discontinued in accordance with subsection (b).

(b) If a person's condition has been determined to meet the conditions set forth in subsection (a) and no instrument has been executed as provided in G.S. 90-321 the extraordinary means to prolong life may be discontinued upon the direction and under the supervision of the attending physician at the request (i) of the person's spouse, or (ii) of a guardian of the person, or (iii) of a majority of the relatives of the first degree, in that order. If none of the above are available then at the discretion of the attending physician the extraordinary means may be discontinued upon the direction and under the supervision of the attending physician.

(c) Repealed by Session Laws 1979, c. 715, s. 2.

(d) The discontinuance of such extraordinary means shall not be considered the cause of death for any civil or criminal purpose nor shall it be considered unprofessional conduct. Any person, institution or facility against whom criminal or civil liability is asserted because of conduct in compliance with this section may interpose this section as a defense. (1977, c. 815; 1979, c. 715, s. 2.)

Effect of Amendments. — The 1979 amendment substituted "irreversible" for "There has been an irreversible cessation of brain function" in clause c of subdivision (a)(1), substituted "extraordinary means may be discontinued in accordance with subsection (b)" for "in addition to any other medically recognized criteria for determining death, the person may be pronounced dead" in subdivision (a)(3), substituted "person's condition has been determined to meet the conditions set forth in subsection (a) and no instrument has been executed as provided in G.S. 90-321" for "person has been pronounced dead in accordance with subsection (a)" in the first sentence of subsection (b), and deleted subsection (c), which read: "If a person has been determined to be dead in accordance with subsection (a) and the person is a donor within the meaning of G.S. 90-220.1(3), or a gift of all or any part of the person's body has been made under the provisions of G.S. 90-220.2(b), the extraordinary means may be continued in order to facilitate the purposes of the Uniform Anatomical Gift Act."

Legal Periodicals. — For a comment discussing North Carolina's Natural Death Act, see 14 Wake Forest L. Rev. 771 (1978).

For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

CASE NOTES

This section has no application to a homicide case. The procedures in subsection (a) and (b) and the exculpatory clause in subsection (d) are not for the protection of criminal assailants. State v. Holsclaw, 42 N.C. App. 696, 257 S.E.2d 650 (1979).

§ 90-323. Death; determination by physician.

The determination that a person is dead shall be made by a physician licensed to practice medicine applying ordinary and accepted standards of medical practice. Brain death, defined as irreversible cessation of total brain function, may be used as a sole basis for the determination that a person has died, particularly when brain death occurs in the presence of artificially maintained respiratory and circulatory functions. This specific recognition of brain death as a criterion of death of the person shall not preclude the use of other medically recognized criteria for determining whether and when a person has died. (1979, c. 715, s. 3.)

Chapter 90A.

Sanitarians and Water and Wastewater Treatment Facility Operators.

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Sanitarians.

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Article 1.

Sanitarians.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 90A-1. Definitions.

(a) For the purpose of this Chapter, "Board" means the State Board of Sanitarian Examiners.

(b) For the purpose of this Chapter, "sanitarian" means a person who is qualified by education and experience in the biological and sanitary sciences to engage in the promotion and protection of the public health by the application of technical knowledge to solve problems of a sanitary nature and the development of methods for the control of man's environment for the protection of health, safety, and well-being. (1959, c. 1271, s. 1.)

§ 90A-2. State Board of Sanitarian Examiners created; composition; appointment and term of office.

In order to provide for the effective promotion of public health and the proper protection of life and property by those qualified in biological and sanitary sciences, there is hereby created a State Board of Sanitarian Examiners. The Board shall consist of the Secretary of Human Resources, or his duly authorized representative; the Dean of the School of Public Health, University of North Carolina, or his duly authorized representative; a sanitary engineer employed by the Department of Human Resources; and four sanitarians, one local health director, and one public-spirited citizen to be appointed by the Governor. Prior to January 1, 1960, the Governor shall appoint one sanitarian for a term of one year; one sanitarian for a term of two years; one sanitarian and one local health director for a term of three years; and one sanitarian and one public-spirited citizen for a term of four years. Thereafter, as the term of an appointed member expires, or as a vacancy in the appointed membership occurs for any reason, the Governor shall appoint a successor for a term of four years, or for the remainder of the unexpired term, as the case may be.

The sanitarians appointed by the Governor must be registered sanitarians under the provisions of this Chapter; provided, however, that this requirement shall not apply to members of the original Board during their initial terms of office. (1959, c. 1271, s. 2; 1973, c. 476, s. 128.)

§ 90A-3. Compensation and expenses of Board members; employees; administrative expenses.

Members of the Board shall receive ten dollars ($10.00) per day for each day actually spent in the performance of duties required by this Chapter, plus actual travel expense. The Board may employ necessary personnel for the performance of its functions, and fix the compensation therefor, within the limits of funds available to the Board. The total expense of the administration of this Chapter shall not exceed the total income therefrom; and none of the expenses of said Board or the compensation or expenses of any officer thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt, or other financial obligation binding upon the State of North Carolina. (1959, c. 1271, s. 3.)

§ 90A-4. Chairman of Board; meetings; quorum; rules and regulations; seal; authority to administer oaths; membership by public employee.

The Board shall annually elect a chairman from among its membership. The Board shall meet annually in the City of Raleigh, at a time set by the Board, and it may hold additional meetings and conduct business at any place in the State. Five members of the Board shall constitute a quorum to do business. The Board may designate any member to conduct any proceeding, hearing, or investigation necessary to its purposes, but any final action requires a quorum of the Board. The Board is authorized to adopt such rules and regulations as may be necessary for the efficient operation of the Board. The Board shall have an official seal and each member shall be empowered to administer oaths in the taking of testimony upon any matters pertaining to the functions of the Board. Membership on the Board of any public employee shall not constitute dual office holding but merely additional duties of such employee. (1959, c. 1271, s. 4.)

§ 90A-5. Reports by Board.

The Board shall file such reports as are required by Chapter 93B of the General Statutes of North Carolina. (1959, c. 1271, s. 5.)

§ 90A-6. Examination and certification of sanitarians; fee; qualifications.

(a) The Board shall issue a certificate as a registered sanitarian to any applicant who pays a fee set by the Board but not to exceed twenty dollars ($20.00), who passes an examination to the satisfaction of the Board, and who submits evidence verified by oath and satisfactory to the Board that he:

(1) Is at least 21 years of age;
(2) Is of good moral character;
(3) Is a citizen of the United States, or has legally declared his intentions of becoming one;
(4) Has received a degree from a four-year educational institution rated as acceptable by the Board as provided in G.S. 90A-7, with a major in biological and/or physical sciences; and
(5) Has had at least three years' experience, under the supervision of a registered sanitarian or under other equivalent supervision, in the field of environmental sanitation, or at least two years of such experience in the field of environmental sanitation plus one year of graduate study in sanitary science.

(b) The examination required by subsection (a) of this section shall be in a form prescribed by the Board, and may be oral, written, or both. The examination for unlicensed applicants shall be held annually, or more frequently as the Board may by rule prescribe, at a time and place to be determined by the Board. Persons failing to pass the examination shall be refunded one half of the examination fee. Failure to pass an examination shall not prohibit such person from being examined at a subsequent time. (1959, c. 1271, s. 6.)

§ 90A-7. Rating of educational institutions.

For the purpose of determining the qualifications of applicants for certification and registration under this Chapter, the Board may accept the ratings of educational institutions as issued by accrediting bodies acceptable to the Board. (1959, c. 1271, s. 7.)

§ 90A-8. Certification and registration of persons performing sanitarian functions after January 1, 1960.

Any person who, within six months after January 1, 1960, submits to the Board under oath evidence satisfactory to the Board that he was performing functions as a sanitarian (as defined in G.S. 90A-1) on January 1, 1960, shall be certified as a registered sanitarian upon the payment of a fee of not more than ten dollars ($10.00) as determined by the Board. The provisions of this section shall not apply to persons performing functions as a sanitarian's aide (as defined by the North Carolina Merit System Council) on January 1, 1960. (1959, c. 1271, s. 8.)

§ 90A-9. Certification and registration of sanitarian certified in other states.

The Board may, without examination, grant a certificate as a registered sanitarian to any person who, at the time of application, is certified as a registered sanitarian by a similar board of another state, district or territory whose standards are acceptable to the Board but not lower than those required by this Chapter. A fee of not more than twenty dollars ($20.00), as determined by the Board, must be paid by the applicant to the Board for the issuance of a certificate under the provisions of this section. (1959, c. 1271, s. 9.)

§ 90A-10. Renewal of certificates.

(a) A certificate as a registered sanitarian issued pursuant to the provisions of this Chapter must be renewed annually on or before the first day of January. Each application for renewal must be accompanied by a renewal fee to be determined by the Board, but not to exceed ten dollars ($10.00). The Board is authorized to charge an extra two-dollar ($2.00) late renewal fee for renewals made after the first day of January of each year.

(b) Any person who fails to renew his certificate for a period of two consecutive years may be required by the Board to take and pass the same examination as unlicensed applicants before allowing such person to renew his certificate. (1959, c. 1271, s. 10.)

§ 90A-11. Suspension and revocation of certificates.

(a) The Board shall have the power to refuse to grant, or may suspend or revoke, any certificate issued under the provisions of this Chapter for any of the causes hereafter enumerated:

(1) Conviction of a felony;
(2) Fraud, deceit, or perjury in obtaining registration under the provisions of this Chapter;
(3) Habitual use of morphine, opium, cocaine, or any drug having a similar effect;
(4) Habitual drunkenness;
(5) Defrauding the public or attempting to do so; or
(6) Failing, for a period of more than six months after the renewal date, to renew his certificate, and has continued during that period to represent himself as a registered sanitarian.

(b) The procedure to be followed by the Board when it contemplates refusing to allow an applicant to take an examination, or to revoke or suspend a certificate issued under the provisions of this Chapter, shall be in accordance with the provision of Chapter 150A of the General Statutes of North Carolina. (1959, c. 1271, s. 11; 1973, c. 1331, s. 3.)

§ 90A-12. Representing oneself as registered sanitarian without certificate prohibited; appending letters "R.S." to name.

No person shall offer his service as a registered sanitarian or use, assume or advertise in any way any title or description tending to convey the impression that he is a registered sanitarian unless he is the holder of a current certificate of registration issued by the Board. A holder of a current certificate of registration may append to his name the letters, "R.S." (1959, c. 1271, s. 12.)

§ 90A-13. Violations; penalty; injunction.

It shall be unlawful for any person to represent himself as a registered sanitarian without being duly registered and the holder of a currently valid certificate of registration issued by the Board. Any person violating any of the provisions of this Chapter shall be guilty of a misdemeanor and punishable in the discretion of the court. The Board is authorized to apply to any judge of the superior court for an injunction in order to prevent any violation or threatened violation of the provisions of this Chapter. (1959, c. 1271, s. 13.)

§§ 90A-14 to 90A-19: Reserved for future codification purposes.

Article 2.

Certification of Water Treatment Facility Operators.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 90A-20. Purpose.

It is the purpose of this Article to protect the public health and to conserve and protect the water resources of the State; to protect the public investment in water treatment facilities; to provide for the classifying of public water treatment facilities; to require the examination of water treatment facility operators and the certification of their competency to supervise the operation of water treatment facilities; and to establish the procedures for such classification and certification. (1969, c. 1059, s. 2.)

§ 90A-21. Water Treatment Facility Operators Board of Certification.

(a) Board Membership. — There is hereby established within the Department of Human Resources a Water Treatment Facility Operators Board of Certification (hereinafter termed the "Board of Certification") composed of

seven members to be appointed by the Secretary of Human Resources as follows:

(1) One member who is currently employed as a water treatment facility operator;
(2) One member who is manager of a North Carolina municipality using a surface water supply;
(3) One member who is manager of a North Carolina municipality using a treated groundwater supply;
(4) One member who is employed as a director of utilities, water superintendent, or equivalent position with a North Carolina municipality;
(5) One member employed by a private water utility or private industry and who is responsible for the operation or supervision of a water supply and treatment facility;
(6) One member who is a faculty member of a four-year college or university whose major field is related to water supply; and
(7) One member employed by the Department of Human Resources and working in the field of water supply who shall serve as chairman of the Board of Certification.

(b) Terms of Office. — The chairman of the Board of Certification shall serve at the pleasure of the Secretary of Human Resources. All other members shall serve terms of three years, except that the Secretary of Human Resources shall make initial appointments for terms of one year for two members, two years for two members, and three years for two members in order that terms of the members will be staggered. Appointments to fill a vacancy during the term of a member shall be for the unexpired term only. Any member may be appointed for more than one term in the discretion of the Secretary of Human Resources.

(c) Powers and Responsibilities. — The Board of Certification shall establish all rules, regulations and procedures with respect to the certification program and advise and assist the Secretary of Human Resources in its administration.

(d) Compensation. — Members of the Board of Certification shall receive ten dollars ($10.00) per day for each day actually spent in the performance of their duties, plus actual travel expenses incurred in connection with the performance of their duties as provided by law for members of State boards and commissions generally. (1969, c. 1059, s. 2; 1973, c. 476, s. 128.)

§ 90A-22. Classification of water treatment facilities.

The Board of Certification, with the advice and assistance of the Secretary of Human Resources, shall classify all surface water treatment facilities and all facilities for treating groundwater supplies that are used, or intended for use, as part of a public water supply system with due regard for the size of the facility, its type, character of water to be treated, other physical conditions affecting the treatment of the water, and with respect to the degree of skill, knowledge, and experience that the operator responsible for the water treatment facility must have to supervise successfully the operation of the facilities so as to adequately protect the public health. (1969, c. 1059, s. 2; 1973, c. 476, s. 128.)

§ 90A-23. Grades of certificates.

The Board of Certification, with the advice and assistance of the Secretary of Human Resources, shall establish grades of certification for water treatment facility operators corresponding to the classification of water treatment facilities. The grades of certification shall be ranked so that a person holding a certification in the highest grade is thereby affirmed competent to operate water treatment facilities in the highest classification and any water

treatment facility in a lower classification; a person holding a certification in the next highest grade is affirmed as competent to operate water treatment facilities in the next highest classification and any lower classification; and in a like manner through the range of grades of certification and classification of water treatment facilities. (1969, c. 1059, s. 2; 1973, c. 476, s. 128.)

§ 90A-24. Operator qualifications and examination.

The Board of Certification, with the advice and assistance of the Secretary of Human Resources shall establish minimum requirements of education, experience and knowledge for each grade of certification for water treatment facility operators, and shall establish procedures for receiving applications for certification, conducting examinations and making investigations of applicants as may be necessary and appropriate to the end that prompt and fair consideration be given every application and the water treatment facilities of the State may be adequately supervised by certified operators. (1969, c. 1059, s. 2; 1973, c. 476, s. 128.)

§ 90A-25. Issuance of certificates.

(a) An applicant, upon meeting satisfactorily the appropriate requirements shall be issued a suitable certificate by the Board of Certification designating the level of his competency. Certificates shall be permanent unless revoked for cause or replaced by one of a higher grade.

(b) Certificates may be issued, without examination, in a comparable grade to any person who holds a certificate in any state, territory or possession of the United States, if in the judgment of the Board of Certification the requirements for operators under which the person's certificate was issued do not conflict with the provisions of this Article, and are of a standard not lower than that specified under rules and regulations adopted under this Article.

(c) Certificates in an appropriate grade will be issued to operators who, on July 1, 1969, hold certificates of competency issued under the voluntary certification program now being administered through the Division of Sanitary Engineering of the Department of Human Resources with the cooperation of the North Carolina Water Works Operators Association, the North Carolina Section of the American Water Works Association, and the North Carolina League of Municipalities.

(d) Certificates in an appropriate grade will be issued without examination to any person or persons certified by the governing board in the case of a city, town, county, sanitary district, or other political subdivision, or by the owner in the case of a private utility or industry, to have been in responsibile charge of its water treatment facilities on the date the Board of Certification notifies the governing board, or owner, of the classification of its water treatment facility, and if the application for such certification is made within one year of the date of notification. A certificate so issued will be valid for use by the holder only in the water treatment facility in which he was employed at the time of his certification.

(e) Temporary certificates in any grade may be issued without examination to any person employed as a water treatment facility operator when the Board of Certification finds that the supply of certified operators, or persons with training necessary to certification, is inadequate. Temporary certificates shall be valid for only one year but may be renewed. Temporary certificates may be issued with such special conditions or requirements relating to the place of employment of the person holding the certificate, his supervision on a consulting or advisory basis, or other matters as the Board of Certification may deem necessary to protect the public health. (1969, c. 1059, s. 2; 1973, c. 476, s. 128.)

§ 90A-26. Revocation of certificate.

The Board of Certification, in accordance with the procedure set forth in Chapter 150A of the General Statutes of North Carolina, may revoke the certificate of an operator when it is found that the operator has practiced fraud or deception; that reasonable care, judgment, or the application of his knowledge or ability was not used in the performance of his duties; or that the operator is incompetent or unable to properly perform his duties. (1969, c. 1059, s. 2; 1973, c. 1331, s. 3.)

§ 90A-27. Application fee.

The Board of Certification, in establishing procedures for receiving applications for certification, shall impose fees, or schedules of fees, adequate to meet the anticipated costs of administering the classification and certification programs. (1969, c. 1059, s. 2.)

§ 90A-28. Promotion of training and other powers.

The Board of Certification and the Secretary of Human Resources are authorized to take all necessary and appropriate steps in order to effectively and fairly achieve the purposes of this Article, including, but not limited to, the providing of training for operators and cooperating with educational institutions and private and public associations, persons, or corporations in the promotion of training for water treatment facility personnel. (1969, c. 1059, s. 2; 1973, c. 476, s. 128.)

§ 90A-29. Certified operators required.

On and after July 1, 1971, every person, firm, or corporation, municipal or private, owning or having control of a water treatment facility shall have the obligation of assuring that the operator in responsible charge of such facility is duly certified by the Board of Certification under the provisions of this Article. No person, after July 1, 1971, shall perform the duties of an operator, in responsible charge of a water treatment facility, without being duly certified under the provisions of this Article. (1969, c. 1059, s. 2.)

§§ 90A-30 to 90A-34: Reserved for future codification purposes.

Article 3.

Certification of Wastewater Treatment Plant Operators.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

§ 90A-35. Purpose.

It is the purpose of this Article to protect the public health and to conserve and protect the quality of the water resources of the State and maintain the quality of receiving streams as assigned by the North Carolina Environmental Management Commission; to protect the public investment in wastewater treatment facilities; to provide for the classifying of wastewater treatment plants; to require the examination of wastewater treatment plant operators and the certification of their competency to supervise the operation of such facilities; and to establish procedures for such classification and certification. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23.)

Cross References. — As to the Wastewater Treatment Plant Operators Certification Commission, see §§ 143B-300, 143B-301.

§ 90A-36: Repealed by Session Laws 1973, c. 1262, s. 44.

§ 90A-37. Classification of wastewater treatment facilities.

The Wastewater Treatment Plant Operators Certification Commission, with the advice and assistance of the Secretary of Natural Resources and Community Development, shall classify all wastewater treatment facilities under the jurisdiction of the North Carolina Environmental Management Commission, as provided in G.S. 143-215.1, and those operated by institutions and agencies of the State of North Carolina. In making the classification, the Wastewater Treatment Plant Operators Certification Commission shall give due regard, among other factors, to the size of the facility, the nature of the wastes to be treated or removed from the wastewater, the treatment process to be employed, and the degrees of skill, knowledge and experience that the operator of the wastewater treatment facility must have to supervise the operation of the facility so as to adequately protect the public health and maintain the water quality standards in the receiving waters as assigned by the North Carolina Environmental Management Commission. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 554, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "Wastewater Treatment Plant Operators Certification Commission" for "Board of Certification" in both places in the section and substituted "G.S. 143-215.1" for "G.S. 130-161" in the first sentence.

§ 90A-38. Grades of certificates.

The Wastewater Treatment Plant Operators Certification Commission, with the advice and assistance of the Secretary of Natural Resources and Community Development, shall establish grades of certification for wastewater treatment plant operators corresponding to the classification of wastewater treatment facilities. The grades of certification shall be ranked so that a person holding a certification in the highest grade is thereby affirmed competent to operate wastewater treatment facilities in the highest classification and any treatment facility in a lower classification; a person holding a certification in the next highest grade is affirmed as competent to operate wastewater treatment facilities in the next-to-the-highest classification and any lower classification; and in a like manner through the range of grades of certification

and classification of wastewater treatment facilities. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 554, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "Wastewater Treatment Plant Operators Certification Commission" for "Board of Certification" in the first sentence.

§ 90A-39. Operator qualifications and examination.

The Wastewater Treatment Plant Operators Certification Commission, with the advice and assistance of the Secretary of Natural Resources and Community Development, shall establish minimum requirements of education, experience and knowledge for each grade of certification for wastewater treatment plant operators, and shall establish procedures for receiving applications for certification, conducting examinations, and making investigations of applicants as may be necessary and appropriate to the end that prompt and fair consideration be given every application and the wastewater treatment facilities within the State may be adequately supervised by certified operators. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 554, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "Wastewater Treatment Plant Operators Certification Commission" for "Board of Certification."

§ 90A-40. Issuance of certificates.

(a) An applicant, upon meeting satisfactorily the appropriate requirements, shall be issued a suitable certificate by the Wastewater Treatment Plant Operators Certification Commission designating the level of his competency. Certificates shall be permanent unless revoked for cause or replaced by one of a higher grade.

(b) Certificates may be issued, without examination, in a comparable grade to any person who holds a certificate in any state, territory or possession of the United States, if in the judgment of the Wastewater Treatment Plant Operators Certification Commission the requirements for operators under which the person's certificate was issued do not conflict with the provisions of this Article, and are of a standard not lower than that specified under rules and regulations adopted under this Article.

(c) Certificates in the appropriate grade will be issued, without examination, to operators who, on July 1, 1969, hold certificates of competency issued under the voluntary certification program now being administered through the Department of Natural and Economic Resources or Environmental Management Commission, with the cooperation of the Sanitary Engineering Division of the Department of Human Resources, the North Carolina League of Municipalities, and the North Carolina Water Pollution Control Association.

(d) Certificates in an appropriate grade will be issued without examination to any person or persons certified by the governing board in the case of a city, town, county, sanitary district, or other political subdivision, or by the owner in the case of a private utility or industry, to have been in responsible charge of its wastewater treatment facilities on the date the Wastewater Treatment Plant Operators Certification Commission notifies the governing board, or owner, of the classification of its treatment facility, and if the application for such certification is made within one year of the date of notification. A certificate so issued will be valid for use by the holder only in the treatment facility for which he had responsible charge at the time of his certification. Provided: that no certification shall be issued under this subsection after July 1, 1979.

Operators of these facilities receiving initial notification of classification after July 1, 1979, shall be eligible for a temporary certificate to be valid as provided in subsection (e).

(e) Temporary certificates, in any grade and without examination, may be issued to any person employed as a wastewater treatment plant operator when the Wastewater Treatment Plant Operators Certification Commission finds that the supply of certified operators, or persons with training and experience necessary to certification, is inadequate or when certificates without examination would formerly have been granted under subsection (d) of this section. Temporary certificates shall be valid for only one year, but may be renewed. Temporary certificates may be issued with such special conditions or requirements relating to the place of employment of the person holding the certificate, his supervision on a consulting or advisory basis, or other matters as the Wastewater Treatment Plant Operators Certification Commission may deem necessary to protect the public health and maintain the water quality standards in the receiving waters as assigned by the North Carolina Environmental Management Commission. (1969, c. 1059, s. 3; 1973, c. 476, s. 128; c. 1262, s. 23; 1979, c. 554, ss. 2-4.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "Wastewater Treatment Plant Operators Certification Commission" for "Board of Certification" in subsections (a), (b), (d), and (e), added the last two sentences of subsection (d), and added "or when certificates without examination would formerly have been granted under subsection (d) of this section" at the end of the first sentence of subsection (e).

§ 90A-41. Revocation of certificate.

The Wastewater Treatement Plant Operators Certification Commission, in accordance with the procedure set forth in Chapter 150A of the General Statutes of North Carolina, may revoke the certificate of an operator when it is found that the operator has practiced fraud or deception; that reasonable care, judgment, or the application of his knowledge or ability was not used in the performance of his duties; or that the operator is incompetent or unable to properly perform his duties. (1969, c. 1059, s. 3; 1973, c. 1331, s. 3; 1979, c. 554, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "Wastewater Treatment Plant Operators Certification Commission" for "Board of Certification."

§ 90A-42. Fees.

The Wastewater Treatment Plant Operators Certification Commission, in establishing procedures or implementing the requirements of this Article, shall impose the following schedule of fees:

(1) Examination including Certificate, $15.00;
(2) Temporary Certificate, $25.00;
(3) Temporary Certification Renewal, $50.00;
(4) Conditional Certificate, $25.00;
(5) Voluntary Conversion Certificate, $10.00;
(6) Reciprocity Certificate, $25.00;
(7) Annual Renewal Fee, $5.00;
(8) Replacement of Certificate, $5.00; and

(9) Reinstatement of Operator Certification after lapse for nonpayment of Annual Renewal Fee, $5.00 in addition to the Regular Renewal Fee called for in number (7) hereinabove.

(1969, c. 1059, s. 3; 1979, c. 554, s. 5.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, rewrote this section, which formerly read: "The Board of Certification, in establishing procedures for receiving applications for certification, shall impose fees, or schedules of fees, adequate to meet the anticipated costs of administering the classification and certification programs."

§ 90A-43. Promotion of training and other powers.

The Wastewater Treatment Plant Operators Certification Commission and the Secretary of Natural Resources and Community Development are authorized to take all necessary and appropriate steps in order to effectively and fairly achieve the purposes of this Article, including, but not limited to, the providing of training for operators and cooperating with educational institutions and private and public asssociations, persons, or corporations in the promotion of training for wastewater treatment personnel. (1969, c. 1059, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, c. 554, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "Wastewater Treatment Plant Operators Certification Commission" for "Board of Certification."

§ 90A-44. Certified operators required.

On and after July 1, 1971, every person, firm, or corporation, municipal or private, owning or having control of a wastewater treatment works shall have the obligation of assuring that the operator in responsible charge of such plant is duly certified by the Wastewater Treatment Plant Operators Certification Commission under the provisions of this Article. No person, after July 1, 1971, shall perform the duties of an operator, in responsible charge of a wastewater treatment works, without being duly certified under the provisions of this Article. (1969, c. 1059, s. 3; 1979, c. 554, s. 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "Wastewater Treatment Plant Operators Certification Commission" for "Board of Certification" in the first sentence.

Chapter 91.

Pawnbrokers.

Sec.
91-1. Pawnbroker defined.
91-2. License; business confined to municipalities.
91-3. Municipal authorities to grant and control license; bond.
91-4. Records to be kept.
91-5. Pawn ticket.
91-6. Sale of pledges.
91-7. Usury law applicable.
91-8. Violation of Chapter misdemeanor.

§ 91-1. Pawnbroker defined.

Any person, firm, or corporation who shall engage in the business of lending or advancing money on the pledge and possession of personal property, or dealing in the purchasing of personal property or valuable things on condition of selling the same back again at stipulated prices, is hereby declared and defined to be a pawnbroker. (1915, c. 198, s. 1; C. S., s. 7000.)

Cross References. — As to effect of secured transaction provisions of Uniform Commercial Code, see § 25-9-201.

§ 91-2. License; business confined to municipalities.

No person, firm, or corporation shall engage in the business of lending money, or other things, for profit or on account of specific articles of personal property deposited with the lender in pledge in this State, which business is commonly known as that of pawnbrokers, except in incorporated cities and towns, and without first having obtained a license to do so from such incorporated cities and towns, and by paying the county, State, and municipal tax required by law, and otherwise complying with the requirements made in this and succeeding sections. (1915, c. 198, s. 1; C. S., s. 7001.)

Local Modification. — Cumberland: 1957, c. 1155, s. 1; Onslow: 1957, c. 1155; 1967, c. 768.

Cross References. — As to the State license tax, see § 105-50.

§ 91-3. Municipal authorities to grant and control license; bond.

The board of aldermen, or other governing body, of any city or town in this State may grant to such person, firm, or corporation as it may deem proper, and who shall produce satisfactory evidence of good character, a license authorizing such person, firm, or corporation to carry on the business of a pawnbroker, which said license shall designate the house in which such person, firm, or corporation shall carry on said business, and no person, firm, or corporation shall carry on the business of a pawnbroker without being duly licensed, nor in any other house than the one designated in the said license. Every person, firm, or corporation so licensed to carry on the business of a pawnbroker shall, at the time of receiving such license, file with the mayor of the city or town granting the same, a bond payable to such city or town in the sum of one thousand dollars ($1,000), to be executed by the person so licensed and by two responsible sureties, or a surety company licensed to do business in the State of North Carolina, to be approved of by such mayor, which said bond shall be for the faithful performance of the requirements and obligations pertaining to the business so licensed. The board of aldermen, or other governing body, shall

have full power and authority to revoke such license and sue for forfeiture of the bond upon a breach thereof. Any person who may obtain a judgment against a pawnbroker and upon which judgment execution is returned unsatisfied, may maintain an action in his own name upon the said bond of said pawnbroker, in any court having jurisdiction of the amount demanded, to satisfy said judgment. (1915, c. 198, s. 2; C. S., s. 7002.)

Local Modification. — Cumberland: 1957, c. 1155, s. 2; Onslow: 1957, c. 1155; 1967, c. 768.

§ 91-4. Records to be kept.

Every pawnbroker shall keep a book in which shall be legibly written, at the time of each transaction involving the pawning, pledging or selling of used goods, articles or things between any person and the pawnbroker, his employee or agent, the following information:

An account and description of the used goods, articles, or things including if applicable, the manufacturer's name, the model, the model number, the serial number of the used goods, articles or things, and any engraved numbers or initials found on the goods, articles or things;

The amount of money paid or loaned thereon and the rate of interest to be paid, if applicable;

The date of the transaction; and

The name and residence of the person pawning, pledging, or selling the used goods, articles, or things.

The pawnbroker or his employee or agent shall require that the person pawning, pledging, or selling the used goods, articles, or things, present two forms of positive identification to him before the pawnbroker may complete any transaction regarding the pawning, pledging, or buying of used goods, articles, or things; provided, however, that the presentation of any one state or federal government issued identification containing a photographic representation imprinted thereon shall constitute compliance with the identification requirements of this paragraph. The pawnbroker or his employee or agent shall legibly record this identification information next to the person's name and residence in the book heretofore required to be kept.

Such book shall be a permanent record to be kept at all times on the premises of the place of business of the pawnbroker and shall be made available, during regular business hours, to any law-enforcement officer who requests to inspect the book. A copy of the records required to be kept by this section shall be filed within 48 hours of the transaction in the office of the sheriff of the county in which the pawnshop is located and the chief of police of the city or town issuing the license to such pawnbroker. (1915, c. 198, s. 3; C. S., s. 7003; 1977, c. 361, s. 1.)

§ 91-5. Pawn ticket.

Every such pawnbroker shall at the time of each loan deliver to the person pawning or pledging any used goods, articles, or things, a ticket or memorandum or note signed by him containing the substance of the entry required to be made by him in his book as set out in G.S. 91-4. The said tickets or memorandums so issued shall be numbered consecutively and dated the day issued. (1951, c. 198, s. 3; C. S., s. 7004; 1965, c. 84; 1977, c. 361, s. 2.)

Local Modification. — Cumberland: 1957, c. 1155, s. 3; Onslow: 1957, c. 1155; 1967, c. 768.

§ 91-6. Sale of pledges.

No pawnbroker shall sell any pawn or pledge until the same shall have remained 60 days in his possession after the maturity of the debt for which the property was pledged. And no pawnbroker shall advertise or sell at his place of business as unredeemed pledges any articles of property other than those received by him as pawns or pledges in the usual course of his business at the place where he is licensed to do business. (1915, c. 198, s. 4; C. S., s. 7005.)

Cross References. — As to sale of pledged goods, see § 105-50.

§ 91-7. Usury law applicable.

The provisions of this Chapter shall not be construed to relieve any person from the penalty incurred under the laws against usury in this State. (1915, c. 198, s. 5; C. S., s. 7006.)

§ 91-8. Violation of Chapter misdemeanor.

Any person, firm, or corporation violating the provisions of this Chapter shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (1915, c. 198, s. 5; C. S., s. 7007.)

Chapter 92.

Photographers.

§§ 92-1 to 92-29: Deleted.

Cross References. — As to prevention of certain fraudulent practices by photographers, see §§ 66-59 through 66-64. As to coupons redeemable in products of photography, see §§ 66-59 through 66-64. As to privilege tax on photographers, see §§ 105-41, 105-48.1.

Editor's Note. — This Chapter, which had its origin in Public Laws 1935, c. 155, enacted to regulate the practice of photography through the agency of an examining board, has been deleted because of its invalidity.

CASE NOTES

Chapter Held Unconstitutional. — Chapter 92 of the General Statutes, relating to the licensing and supervision of photographers, was held unconstitutional as violative of former Art. I, §§ 1, 17 and 31 of the State Constitution (See now N.C. Const., Art. I, §§ 1, 19 and 34). State v. Ballance, 229 N.C. 764, 51 S.E.2d 731 (1949).

Chapter 93.

Public Accountants.

Sec.
93-1. Definitions; practice of law.
93-2. Qualifications.
93-3. Unlawful use of title "certified public accountant" by individual.
93-4. Use of title by firm.
93-5. Use of title by corporation.
93-6. Practice as accountants permitted; use of misleading titles prohibited.
93-7. Registration of accountants already practicing.
93-8. Public practice of accounting by corporations prohibited.
93-9. Assistants need not be certified.
93-10. Persons certified in other states.
93-11. Not applicable to officers of State, county or municipality.
93-12. Board of Certified Public Accountant Examiners.
93-12.1. Effect of new requirements.
93-13. Violation of Chapter; penalty.

§ 93-1. Definitions; practice of law.

(a) Definitions. — As used in this Chapter certain terms are defined as follows:

(1) An "accountant" is a person engaged in the public practice of accountancy who is neither a certified public accountant nor a public accountant as defined in this Chapter.

(2) "Board" means the Board of Certified Public Accountant Examiners as provided in this Chapter.

(3) A "certified public accountant" is a person engaged in the practice of accountancy who holds a certificate as a certified public accountant issued to him under the provisions of this Chapter.

(4) A "public accountant" is a person engaged in the public practice of accountancy who is registered as a public accountant under the provisions of this Chapter.

(5) A person is engaged in the "public practice of accountancy" who holds himself out to the public as an accountant and in consideration of compensation received or to be received offers to perform or does perform, for other persons, services which involve the auditing or verification of financial transactions, books, accounts, or records, or the preparation, verification or certification of financial, accounting and related statements intended for publication or renders professional services or assistance in or about any and all matters of principle or detail relating to accounting procedure and systems, or the recording, presentation or certification and the interpretation of such service through statements and reports.

(b) Practice of Law. — Nothing in this Chapter shall be construed as authorizing certified public accountants, public accountants or accountants to engage in the practice of law, and such person shall not engage in the practice of law unless duly licensed so to do. (1925, c. 261, s. 1; 1929, c. 219, s. 1; 1951, c. 844, s. 1; 1979, c. 750, s. 3.)

Effect of Amendments. — The 1979 amendment deleted "public" preceding "practice" in subdivision (a)(3).

CASE NOTES

Applied in Scott v. Gillis, 197 N.C. 223, 148 S.E. 315 (1929).

Quoted in Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 25 N.C. App. 131, 212 S.E.2d 657 (1975); Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978).

§ 93-2. Qualifications.

Any citizen of the United States, or person who has duly declared his intention of becoming such citizen, over 18 years of age and of good moral character, and who shall have received from the State Board of Accountancy a certificate of qualification admitting him to practice as a certified public accountant as hereinafter provided, or who is the holder of a valid and unrevoked certificate issued under the provisions of Chapter 157 of the Public Laws of 1913, shall be licensed to practice and be styled and known as a certified public accountant. (1925, c. 261, s. 2; 1979, c. 750, s. 4.)

Effect of Amendments. — The 1979 amendment substituted "18" for "21."

§ 93-3. Unlawful use of title "certified public accountant" by individual.

It shall be unlawful for any person who has not received a certificate of qualification admitting him to practice as a certified public accountant to assume or use such a title, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the person using same has been admitted to practice as a certified public accountant. (1925, c. 261, s. 3.)

Legal Periodicals. — This section was reviewed in 3 N.C.L. Rev. 149.

§ 93-4. Use of title by firm.

It shall be unlawful for any firm, copartnership, or association to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that the members of such firm, copartnership or association have been admitted to practice as certified public accountants, unless each of the members of such firm, copartnership or association first shall have received a certificate of qualification from the State Board of Accountancy admitting him to practice as a certified public accountant; provided, however, that the Board may exempt those persons who do not actually practice in or reside in the State of North Carolina from registering and receiving a certificate of qualifications under this section. (1925, c. 261, s. 4; 1979, c. 750, s. 5.)

Effect of Amendments. — The 1979 amendment added the proviso at the end of the section.

§ 93-5. Use of title by corporation.

It shall be unlawful for any corporation to assume or use the title of certified public accountant, or to use any words, letters, abbreviations, symbols or other means of identification to indicate that such corporation has received a certificate of qualification from the State Board of Accountancy admitting it to practice as a certified public accountant. (1925, c. 261, s. 5.)

§ 93-6. Practice as accountants permitted; use of misleading titles prohibited.

It shall be unlawful for any person to engage in the public practice of accountancy in this State who is not a holder of a certificate as a certified public accountant issued by the Board, or is not registered as a public accountant under the provisions of this Chapter, unless such person uses the term "accountant" and only the term "accountant" in connection with his name on all reports, letters of transmittal, or advice, and on all stationery and documents used in connection with his services as an accountant, and refrains from the use in any manner of any other title or designation in such practice. (1925, c. 261, ss. 6, 8; 1951, c. 844, s. 2.)

§ 93-7. Registration of accountants already practicing.

Any person, firm, copartnership, association or corporation who shall on March 10, 1925, be engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, may, within six months thereafter, apply to the State Board of Accountancy for registration as a public accountant, and the State Board of Accountancy, upon the production of satisfactory evidence that such applicant was engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina on March 10, 1925, shall register such person, firm, copartnership, association or corporation. Such registration shall be conclusive evidence of the right of such person, firm, copartnership, association or corporation to engage in the practice of public accounting in the State of North Carolina, but such registration shall not be construed in any way as indicating that the State of North Carolina or the State Board of Accountancy has approved the educational and professional experience and qualifications of the registrant. (1925, c. 261, s. 7.)

§ 93-8. Public practice of accounting by corporations prohibited.

Except as provided for in Chapter 55B of the General Statutes of North Carolina, it shall be unlawful for any corporation to engage in the public practice of accountancy in this State. (1925, c. 261, s. 6; 1951, c. 844, s. 3; 1969, c. 718, s. 17.)

§ 93-9. Assistants need not be certified.

Nothing contained in this Chapter shall be construed to prohibit the employment by a certified public accountant or by any person, firm, copartnership, association, or corporation permitted to engage in the practice of public accounting in the State of North Carolina, of persons who have not received certificates of qualification admitting them to practice as certified public accountants, as assistant accountants or clerks: Provided, that such employees work under the control and supervision of certified public accountants or public

accountants, and do not certify to anyone the accuracy or verification of audits or statements; and provided further, that such employees do not hold themselves out as engaged in the practice of public accounting. (1925, c. 261, s. 9.)

§ 93-10. Persons certified in other states.

A public accountant who holds a valid and unrevoked certificate as a certified public accountant, or its equivalent, issued under authority of any state, or the District of Columbia, and who resides without the State of North Carolina, may perform work within the State: Provided, that he register with the State Board of Accountancy and comply with its rules regarding such registration. (1925, c. 261, s. 10.)

§ 93-11. Not applicable to officers of State, county or municipality.

Nothing herein contained shall be construed to restrict or limit the power or authority of any State, county or municipal officer or appointee engaged in or upon the examination of the accounts of any public officer, his employees or appointees. (1925, c. 261, s. 12.)

§ 93-12. Board of Certified Public Accountant Examiners.

The name of the State Board of Accountancy is hereby changed to State Board of Certified Public Accountant Examiners and said name State Board of Certified Public Accountant Examiners is hereby substituted for the name State Board of Accountancy wherever the latter name appears or is used in Chapter 93 of the General Statutes. Said Board is created as an agency of the State of North Carolina and shall consist of seven members to be appointed by the Governor, five persons to be holders of valid and unrevoked certificates as certified public accountants issued under the provisions of this Chapter and two persons who are not certified public accountants who shall represent the interest of the public at large. Members of the Board shall hold office for the term of three years and until their successors are appointed. Appointments to the Board shall be made under the provisions of this Chapter as and when the terms of the members of the present State Board of Accountancy expire; provided, that all future appointments to said Board shall be made for a term of three years expiring on the thirtieth day of June. All Board members serving on June 30, 1980, shall be eligible to complete their respective terms. No member appointed to a term on or after July 1, 1980, shall serve more than two complete consecutive terms. The powers and duties of the Board shall be as follows:

(1) To elect from its members a president, vice-president and secretary-treasurer. The members of the Board shall be paid, for the time actually expended in pursuance of the duties imposed upon them by this Chapter, an amount not exceeding ten dollars ($10.00) per day, and they shall be entitled to necessary traveling expenses.

(2) To employ legal counsel, clerical and technical assistance and to fix the compensation therefor, and to incur such other expenses as may be deemed necessary in the performance of its duties and the enforcement of the provisions of this Chapter. Upon request the Attorney General of North Carolina will advise the Board with respect to the performance of its duties and will assign a member of his staff, or approve the employment of counsel, to represent the Board in any hearing or litigation arising under this Chapter. The Board may, in the exercise of its discretion, cooperate with similar boards of other

states, territories and the District of Columbia in activities designed to bring about uniformity in standards of admission to the public practice of accountancy by certified public accountants, and may employ a uniform system of preparation of examinations to be given to candidates for certificates as certified public accountants, including the services and facilities of the American Institute of Certified Public Accountants, or of any other persons or organizations of recognized skill in the field of accountancy, in the preparation of examinations and assistance in establishing and maintaining a uniform system of grading of examination papers, provided however, that all examinations given by said Board shall be adopted and approved by the Board and that the grade or grades given to all persons taking said examinations shall be determined and approved by the Board.

(3) To formulate rules for the government of the Board and for the examination of applicants for certificates of qualification admitting such applicants to practice as certified public accountants.

(4) To hold written or oral examinations of applicants for certificates of qualification at least once a year, or oftener, as may be deemed necessary by the Board.

(5) To issue certificates of qualification admitting to practice as certified public accountants, each applicant who, having the qualifications herein specified, shall have passed an examination to the satisfaction of the Board, in "accounting theory," "accounting practice," "auditing," "business law," and other related subjects.

From and after July 1, 1961, any person shall be eligible to take the examination given by the Board who is a citizen of the United States or has declared his intention of becoming such a citizen or is a resident alien, and has resided for at least four months within the State of North Carolina, is 18 years of age or over, and is of good moral character, and submits evidence satisfactory to the Board that:

a. He holds a bachelor's degree from a college or university accredited by one of the regional accrediting associations or from a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution, and

b. His degree studies included a concentration in accounting as defined by the Board or that he supplemented his degree studies with courses that the Board determines to be substantially equivalent to a concentration in accounting, and

c. Satisfactory evidence of the completion of two years in an accredited college or university or its equivalent with a concentration in accounting as defined by the Board and two years experience in the practice of public accountancy under the direct supervision of a certified public accountant, in addition to other experience requirements in this section, may be substituted for a bachelor's degree.

Provided, however, the Board may, in its discretion, waive the education requirement of any candidate if the Board is satisfied from the result of a special written examination given the candidate by the Board to test his educational qualifications that he is as well equipped, educationally, as if he met the education requirements specified above. The Board may provide by regulation for the general scope of such examinations and may obtain such advice and assistance as it deems appropriate to assist it in preparing, administering and grading such special examinations.

Such applicant, in addition to passing satisfactorily the examination given by the Board, shall have the endorsement of three certified public accountants as to his eligibility, and shall have had either:

a. Two years experience in the field of accounting under the direct supervision of a certified public accountant; or

b. Five years experience teaching accounting in a four-year college or university accredited by one of the regional accrediting associations or in a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution; or

c. Five years experience in the field of accounting; or five years experience teaching college transfer accounting courses at a community college or technical institute accredited by one of the regional accrediting associations; or

d. Any combination of such experience determined by the Board to be substantially equivalent to the foregoing.

A Master's or more advanced degree in accounting, tax law, economics or business administration from an accredited college or university may be substituted for one year of experience. The Board may permit persons otherwise eligible to take its examinations and withhold certificates until such person shall have had the required experience.

(6) In its discretion to grant certificates of qualification admitting to practice as certified public accountants such applicants who shall be the holders of valid and unrevoked certificates as certified public accountants, or the equivalent, issued by or under the authority of any state, or territory of the United States or the District of Columbia; or who shall hold valid and unrevoked certificates or degrees as certified public accountants, or the equivalent, issued under authority granted by a foreign nation; when in the judgment of the Board the requirements for the issuing or granting of such certificates or degrees are substantially equivalent to the requirements established by this Chapter: Provided, however, that such applicant has been a bona fide resident of this State for not less than four months or, if a nonresident, he has maintained or has been a member of a firm that has maintained for not less than four months a bona fide office within this State for the public practice of accounting and, provided further, that the state or political subdivision of the United States upon whose certificate the reciprocal action is based grants the same privileges to holders of certificates as certified public accountants issued pursuant to the provisions of this Chapter. The Board, by general rule, may grant temporary permits to applicants under this subsection pending their qualification for reciprocal certificates.

(7) To charge for each examination and certificate provided for in this Chapter a fee not exceeding seventy-five dollars ($75.00). This fee shall be payable to the secretary-treasurer of the Board by the applicant at the time of filing application. In no case shall the examination fee be refunded, unless in the discretion of the Board the applicant shall be deemed ineligible for examination.

(8a) To require the registration of certified public accountant firms which have offices both within and outside of North Carolina, and the payment by such firms of an annual registration fee based on the total number of partners in each such firm, but not to exceed two thousand five hundred dollars ($2,500) per firm per year.

(8b) To formulate rules and regulations for the continuing professional education of all persons holding the certificate of certified public accountant, subject to the following provisions:

a. After January 1, 1983, any person desiring to obtain or renew a certificate as a certified public accountant must offer evidence satisfactory to the Board that such person has complied with the

continuing professional education requirement approved by the Board. The Board may grant a conditional license for not more than 12 months for persons who are being licensed for the first time, or moving into North Carolina, or for other good cause, in order that such person may comply with the continuing professional education requirement.

b. The Board shall promulgate rules and regulations for the administration of the continuing professional education requirement with a minimum number of hours of 20 and a maximum number of hours of 40 per year, and the Board may exempt persons who are retired or inactive from said continuing professional education requirement. The Board may also permit any certified public accountant to accumulate hours of continuing professional education in any calendar year of as much as two additional years annual requirement in advance of or subsequent to the required calendar year.

c. Any applicant who offers satisfactory evidence on forms promulgated by the Board that he has participated in a continuing professional education program of the type required by the Board shall be deemed to have complied with this section.

(9) Adoption of Rules of Professional Conduct; Disciplinary Action. — The Board shall have the power to adopt rules of professional ethics and conduct to be observed by certified public accountants and public accountants engaged in the public practice of accountancy in this State. The rules so adopted shall be publicized and filed in the office of the Attorney General as provided by Chapter 150A. The Board shall have the power to revoke, either permanently or for a specified period, any certificate issued under the provisions of this Chapter to a certified public accountant or public accountant or to censure the holder of any such certificate for any one or combination of the following causes:

a. Conviction of a felony under the laws of the United States or of any state of the United States.

b. Conviction of any crime, an essential element of which is dishonesty, deceit or fraud.

c. Fraud or deceit in obtaining a certificate as a certified public accountant.

d. Dishonesty, fraud or gross negligence in the public practice of accountancy.

e. Violation of any rule of professional ethics and professional conduct adopted by the Board.

Any disciplinary action taken shall be in accordance with the provisions of Chapter 150A of the General Statutes.

(10) Within 60 days after March 10, 1925, the Board shall formulate rules for the registration of those persons, firms, copartnerships, associations or corporations who, not being holders of valid and unrevoked certificates as certified public accountants issued under the provisions of Chapter 157 of the Public Laws of 1913, and who, having on March 10, 1925, been engaged in the practice of public accounting and maintaining an office as a public accountant in the State of North Carolina, shall, under the provisions of G.S. 93-7 apply to the Board for registration as public accountants. The Board shall maintain a register of all persons, firms, copartnerships, associations or corporations who have made application for such registration and have complied with the rules of registration adopted by the Board.

(11) Within 60 days after March 10, 1925, the Board shall formulate rules for registration of these public accountants who are qualified to prac-

tice under this Chapter and who under the provisions of G.S. 93-10 are permitted to engage in work within the State of North Carolina. The Board shall have the power to deny or withdraw the privilege herein referred to for good and sufficient reasons.

(12) To submit annually on or before the first day of May to the Secretary of Revenue the names of all persons who have qualified under this Chapter as certified public accountants or public accountants. Privilege license issued under G.S. 105-41 shall designate whether such license is issued to a certified public accountant, a public accountant, or an accountant.

(13) The Board shall keep a complete record of all its proceedings and shall annually submit a full report to the Governor.

(14) All fees collected on behalf of the Board and all receipts of every kind and nature, as well as the compensation paid the members of the Board and the necessary expenses incurred by them in the performance of the duties imposed upon them, shall be reported annually to the State Treasurer. All fees and other moneys received by the Board pursuant to the provisions of the General Statutes shall be kept in a separate fund by the treasurer of the Board, to be held and expended only for such purposes as are proper and necessary to the discharge of the duties of the Board and to enforce the provisions of this Chapter. No expense incurred by the Board shall be charged against the State.

(15) Any certificate of qualification issued under the provisions of this Chapter, or issued under the provisions of Chapter 157 of the Public Laws of 1913, shall be forfeited for the failure of the holder to renew same and to pay the renewal fee therefor to the State Board of Accountancy within 30 days after demand for such renewal fee shall have been made by the State Board of Accountancy. (1925, c. 261, s. 11; 1939, c. 218, s. 1; 1951, c. 844, ss. 4-9; 1953, c. 1041, s. 20; 1959, c. 1188; 1961, c. 1010; 1971, c. 738, ss. 1-3; 1973, c. 476, s. 193; c. 1331, s. 3; 1975, c. 107; 1952, 2nd Sess., c. 983, c. 804, ss. 1, 2; 1979, c. 750, ss. 6-10; 1979, 2nd Sess., c. 1087, ss. 1, 2.)

Cross References. — As to privilege tax, see § 105-41.

Effect of Amendments. — The 1979 amendment rewrote subdivision (5), substituted "four months" for "one year" in both places in the first proviso in the first sentence of subdivision (6), substituted "seventy-five dollars ($75.00)" for "fifty dollars ($50.00)" in the first sentence of subdivision (7), and added subdivisions (8a) and (8b).

The 1979, 2nd Sess., amendment substituted "seven" for "five", "five" for "four" and "two persons" for "one person" in the second sentence of the introductory paragraph and added the fourth sentence of the introductory paragraph.

Legal Periodicals. — For note on equal protection and residence requirements, see 49 N.C.L. Rev. 753 (1971).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Members of Board Are State Officials. — Under the former act creating and incorporating the State Board of Accountancy, its members are to be regarded as State officials to the extent of their duties specified in the statute. State ex rel. Attorney-General v. Scott, 182 N.C. 865, 109 S.E. 789 (1921), decided under former statute.

Exercise of Police Power. — The former statute creating the State Board of Accountancy, with authority to pass upon applications and issue licenses to those qualified as public accountants, was within the exercise of the police powers of the State. State ex rel. Attorney-General v. Scott, 182 N.C. 865, 109 S.E. 789 (1921), decided under former statute.

When License Not Required. — Former § 7023 of the Consolidated Statutes did not embrace within its terms an isolated instance of

the employment of a firm of certified public accountants licensed in another state, who sent their representative to this State to acquire information from the books of a corporation for a statement of its condition to be made out in the state in which the auditing concern was authorized to do business. Respess v. Rex Spinning Co., 191 N.C. 809, 133 S.E. 391 (1926), decided under former statute.

The exercise of the powers of the Board is coextensive with the State boundaries, and may not be exercised beyond them. State ex rel. Attorney-General v. Scott, 182 N.C. 865, 109 S.E. 789 (1921), decided under former statute.

Classification in subdivision (5) is not essentially arbitrary and without any reasonable basis. The rule has been uniformly applied. It has been uniformly observed by the Board. No discrimination has been shown. Thus, its application does not deny the equal protection of the laws guaranteed by the State and federal Constitutions. Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 25 N.C. App. 131, 212 S.E.2d 657 (1975), aff'd, 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

The requirement in subdivision (5) that an applicant for certification have two years' experience under the tutelage of an accountant engaged in the public practice of accountancy is rationally related to the legislative purpose of ensuring that only an applicant qualified and prepared to enter the public practice by himself be certified. Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

To achieve the statutory purpose that only competent and experienced applicants be certified, subdivision (5) must be interpreted as requiring that an applicant's experience not only be received under the supervision of an accountant but that it be in the public field of accountancy. Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

Subdivision (5) requires that an applicant for certification who relies upon two years' experience must have worked under a C.P.A. in public practice. Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

Experience with an attorney-C.P.A. is not sufficient for certification unless the attorney-C.P.A. is in the "public practice of accountancy" as that phrase is used in § 93-1(5). Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 25 N.C. App. 131, 212 S.E.2d 657 (1975), aff'd, 294 N.C. 120, 240 S.E.2d 406 (1978), decided under section as it stood prior to 1977 revision of subdivision.

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969).

§ 93-12.1. Effect of new requirements.

Any person who applies to the Board of Certified Public Accountant Examiners before July 1, 1983, to take the examination, who meets the educational requirement as it existed prior to June 4, 1979, and complies with any of the experience requirements of this Chapter shall be deemed to have met the prerequisites to taking such examination. (1979, c. 750, s. 11.)

§ 93-13. Violation of Chapter; penalty.

Any violation of the provisions of this Chapter shall be deemed a misdemeanor, and upon conviction thereof the guilty party shall be fined not less than fifty dollars ($50.00) and not exceeding two hundred dollars ($200.00) for each offense. (1925, c. 261, s. 11.)

Chapter 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salesmen.

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Article 3.

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93A-32. Definitions.
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93A-34. License required; application for license; fees; requirements for issuance of license.
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93A-38. Suspension, revocation or denial of license.

Article 1.

Real Estate Brokers and Salesmen.

§ 93A-1. License required of real estate brokers and real estate salesmen.

From and after July 1, 1957, it shall be unlawful for any person, partnership, association or corporation in this State to act as a real estate broker or real estate salesman, or directly or indirectly to engage or assume to engage in the business of real estate broker or real estate salesman or to advertise or hold himself or themselves out as engaging in or conducting such business without first obtaining a license issued by the North Carolina Real Estate Licensing Board (hereinafter referred to as the Board), under the provisions of this Chapter. (1957, c. 744, s. 1; 1969, c. 191, s. 1.)

Legal Periodicals. — For comment on this Chapter, see 36 N.C.L. Rev. 44 (1957).

CASE NOTES

Constitutionality. — The real estate business affects a substantial public interest and may be regulated for the purpose of protecting and promoting the general welfare of the people. State v. Warren, 252 N.C. 690, 114 S.E.2d 660 (1960).

This Chapter was declared constitutional in State v. Warren, 252 N.C. 690, 114 S.E.2d 660 (1960). McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

The purpose of this Chapter is to protect sellers, purchasers, lessors and lessees of real property from fraudulent or incompetent brokers and salesmen. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965); North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Chapter Must Be Strictly Construed. — Because this is a statute restricting to a special class of persons the right to engage in a lawful occupation, this Chapter must be strictly construed so as not to extend it to activities and transactions not intended by the legislature to be included. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

This Chapter must be construed with a regard to the evil which it is intended to suppress. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965); North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Any violation of its provisions is declared to be a criminal offense. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

Stated in Carver v. Lykes, 262 N.C. 345, 137 S.E.2d 139 (1964).

Cited in In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962).

§ 93A-2. Definitions and exceptions.

(a) A real estate broker within the meaning of this Chapter is any person, partnership, association, or corporation who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others. A broker shall also be deemed to include a person, partnership, association, or corporation who for a fee sells or offers to sell the name or names of persons, partnerships, associations, or corporations who have real estate for rental, lease, or sale.

(b) The term real estate salesman within the meaning of this Chapter shall mean and include any person who under the supervision of a real estate broker, for a compensation or valuable consideration is associated with or engaged by or on behalf of a licensed real estate broker to do, perform or deal in any act, acts or transactions set out or comprehended by the foregoing definition of real estate broker.

(c) The provisions of this Chapter shall not apply to and shall not include any person, partnership, association or corporation, who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned or leased by them, where such acts are performed in the regular course of or as an incident to the management of such property and the investment therein; nor shall the provisions of this Chapter apply to persons acting as attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation of performance of any contract for the sale, lease or exchange of real estate, nor shall this Chapter be construed to include in any way the acts or services rendered by an attorney-at-law; nor shall it be held to include, while acting as such, a receiver, trustee in bankruptcy, guardian, administrator or executor or any such person acting under order of any court, nor to include a trustee acting under a trust agreement, deed of trust or will, or the regular salaried employees thereof, and nothing in this Chapter shall be so construed

as to require a license for the owner, personally, to sell or lease his own property. (1957, c. 744, s. 2; 1967, c. 281, s. 1; 1969, c. 191, s. 2; 1975, c. 108.)

Cross References. — See note to § 93A-6.

Legal Periodicals. — For article on rules, ethics and reform in connection with transferring North Carolina real estate, see 49 N.C.L. Rev. 593 (1971).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For a note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

CASE NOTES

Constitutionality of Amendment. — The amendment to subsection (a) by Session Laws 1975, c. 108 is unconstitutional as repugnant to N.C. Const., Art. I, §§ 1, 19. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

This Chapter does not apply to a sale by an owner of his own note secured by a deed of trust upon his property. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

Person Who Purchases or Leases Land for His Own Account. — Although this Chapter does not expressly exempt from its provisions one who purchases or leases land for his own account, it defines "real estate broker" as a person who does these specified acts "for others." McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

The legislature did not intend for this Chapter to apply to a person, partnership or association who purchases land for his or its own account, even though such purchase is for resale. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

This Chapter does not forbid a licensed real estate broker to embark with an unlicensed person upon a joint venture in which all of the unlicensed party's activities will be such as are not within the contemplation of this Chapter nor does this Chapter forbid them to agree that they will share all of the receipts from the activities of both of them. Such a contract, when enforced as made, does not violate the policy declared by the legislature in this Chapter. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

A contract by one who is not a licensed real estate broker or salesman with another person to buy land, or an option thereon, for their own account and, thereafter to resell such land, or option, and divide the profits would not be a contract to do an act prohibited by this Chapter. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

Applied in Raab & Co. v. Independence Corp., 9 N.C. App. 674, 177 S.E.2d 337 (1970).

§ 93A-3. Licensing Board created; compensation; organization.

(a) There is hereby created the North Carolina Real Estate Licensing Board for issuing licenses to real estate brokers and real estate salesmen, hereinafter called the Board. The Board shall consist of seven members to be appointed by the Governor; provided, that at least two members of the Board shall be licensed real estate brokers, real estate salesmen, or otherwise directly engaged in the real estate business; and at least two members of the Board must be persons who are not involved directly or indirectly in the real estate business. Members of the Board shall serve three-year terms, so staggered that the terms of two members expire in one year, the terms of two members expire in the next year, and the terms of three members expire in the third year of each three-year period. The members of the Board shall elect one of their members to serve as chairman of the Board for a term of one year. The Governor may remove any member of the Board for misconduct, incompetency, or willful nelgect of duty. The Governor shall have the power to fill all vacancies occurring on the Board.

(b) Members of the Board shall each receive as full compensation for each day accordingly spent on work for the Board, the sum of fifteen dollars ($15.00)

per day plus ten dollars ($10.00) per day for subsistence plus travel expense. The total expense of the administration of this Chapter shall not exceed the total income therefrom; and none of the expenses of said Board or the compensation or expenses of any office thereof or any employee shall ever be paid or payable out of the treasury of the State of North Carolina; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt or other financial obligation binding upon the State of North Carolina. After all expenses of operation, the Board may set aside an expense reserve each year not to exceed ten percent (10%) of the previous year's gross income; then any surplus shall go to the general fund of the State of North Carolina.

(c) The Board shall have power to make such reasonable bylaws, rules and regulations that are not inconsistent with the provisions of this Chapter and the General Statutes of North Carolina, and such rules and regulations may relate to the activity of licensees with regard to supervision of salesmen by brokers, advertising, delivery of instruments, handling and accounting of funds in real estate transactions, records relative to real estate transactions and their retention, and inactive licensee status; provided, however, the Board shall not make rules or regulations regulating commissions, salaries, or fees to be charged by licensees under this Chapter. The Board shall adopt a seal for its use, which shall bear thereon the words "North Carolina Real Estate Licensing Board." Copies of all records and papers in the office of the Board duly certified and authenticated by the seal of the Board shall be received in evidence in all courts and with like effect as the originals.

(d) The Board may employ a secretary-treasurer and such clerical assistance as may be necessary to carry out the provisions of this Chapter and to put into effect such rules and regulations as the Board may promulgate. The Board shall fix salaries and shall require employees to make good and sufficient surety bond for the faithful performance of their duties.

(e) The Board shall be entitled to the services of the Attorney General of North Carolina, in connection with the affairs of the Board or may on approval of the Attorney General, employ an attorney to assist or represent it in the enforcement of this Chapter, as to specific matters, but the fee paid for such service shall be approved by the Attorney General. The Board may prefer a complaint for violation of this Chapter before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal offices of the State to enforce the provisions of this Chapter and collect the penalties provided therein.

(f) The Board is authorized to expend expense reserve funds as defined in G.S. 93A-3(b) for the purpose of conducting education and information programs relating to the real estate brokerage business for the information, education, guidance and protection of the general public, licensees, and applicants for license. The education and information programs may include preparation, printing and distribution of publications and articles and the conduct of conferences, seminars, and lectures. (1957, c. 744, s. 3; 1967, c. 281, s. 2; c. 853, s. 1; 1971, c. 86, s. 1; 1979, c. 616, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment rewrote subsection (a) and the first sentence of subsection (c).

Session Laws 1979, c. 616, s. 8, provides: "Members of the North Carolina Real Estate Licensing Board who are serving in that capacity on the effective date of this act [May 21, 1979] shall continue to serve until their terms expire. The two additional members authorized by this act shall be appointed for initial terms expiring on July 31, 1982; thereafter all appointments shall be for terms of three years."

§ 93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

(a) Any person, partnership, association, or corporation hereafter desiring to enter into business of and obtain a license as a real estate broker or real estate salesman shall make written application for such license to the Board on such forms as are prescribed by the Board. Each applicant for a license as a real estate broker or real estate salesman shall be at least 18 years of age. Each applicant for a license as a real estate broker shall have been actively engaged as a licensed real estate saleman in this State for at least 24 months on a full-time basis prior to making application for a license as a real estate broker, or shall furnish evidence satisfactory to the Board of experience in real estate transactions which the Board shall find equivalent to such 24 months' experience as a licensed real estate salesman, or shall furnish evidence satisfactory to the Board of completion of at least 90 hours of classroom instruction which shall include the study of: real estate broker responsibilities, mortgages, easements, leases, liens, taxation, zoning, real property insurance, real estate appraising, agency contracts, land contracts, government regulation of land transfers and such other topics as the Board determines, at a school approved by the Board. Each applicant for a license as a real estate salesman shall furnish evidence satisfactory to the Board of completion of 30 classroom hours of such courses of education in real estate subjects at a school approved by the Board as the Board shall by regulation prescribe or shall furnish evidence satisfactory to the Board of experience in real estate transactions which the Board shall find equivalent to such real estate education. Each application for license as a real estate broker shall be accompanied by a fee, fixed by the Board but not to exceed thirty dollars ($30.00). Each application for license as a real estate salesman shall be accompanied by a fee, fixed by the Board but not to exceed twenty dollars ($20.00) and shall state the name and address of the real estate broker with whom the applicant is to be associated.

(b) Any person who files such application to the Board in proper manner for a license as real estate broker or a license as real estate salesman shall be required to take an oral or written examination to determine his qualifications with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant.

The Board may make such investigation as it deems necessary into the ethical background of the applicant. If the results of the examination and investigation shall be satisfactory to the Board, then the Board shall issue to such a person a license, authorizing such person to act as a real estate broker or real estate salesman in the State of North Carolina, upon the payment of privilege taxes now required by law or that may hereafter be required by law. Anyone failing to pass an examination may be reexamined without payment of additional fee, under such rules as the Board may adopt in such cases.

Provided, however, that any person who, at the time of the passage or at the effective date of this Chapter, has a license to engage in, and is engaged in business as a real estate broker or real estate salesman and who shall file a sworn application with the Board setting forth his qualifications, including a statement that such applicant has not within five years preceding the filing of the application been convicted of any felony or any misdemeanor involving moral turpitude, shall not be required to take or pass such examination, but all such persons shall be entitled to receive such license from the Board under the provisions of this Chapter on proper application therefor and payment of a fee of ten dollars ($10.00).

(c) All licenses granted and issued by the Board under the provisions of this Chapter shall expire on the thirtieth day of June following issuance thereof, and shall become invalid after such date unless reinstated. Renewal of such license may be effected at any time during the month of June preceding the date of expiration of such license upon proper application to the Board accompanied by the payment of a renewal fee fixed by the Board but not to exceed fifteen dollars ($15.00) to the secretary-treasurer of the Board, provided, the Board may by regulation require the renewal of such licenses for periods not exceeding three years upon payment of a renewal fee fixed by the Board but not to exceed fifteen dollars ($15.00) for each 12-month period; provided further, that in the event of the licensee's death, removal to another state or upon voluntary surrender of the renewed license the Board shall, upon written application by the licensee or his estate, (administrator, executor, or personal representative) refund the amount of the renewal fee prepaid for the unexpired license year or years other than the current year and the renewal receipt or pocket card shall contain notice of this refund provision. All licenses reinstated after the expiration date thereof shall be subject to a late filing fee of five dollars ($5.00) in addition to the required renewal fee. In the event a licensee fails to obtain a reinstatement of such license within 12 months after the expiration date thereof, the Board may, in its discretion, consider such person as not having been previously licensed, and thereby subject to the provisions of this Chapter relating to the issuance of an original license, including the examination requirements set forth herein. Duplicate licenses may be issued by the Board upon payment of a fee of one dollar ($1.00) by the licensee.

(d) The Board is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this Chapter. The Board is further authorized to adopt rules and regulations necessary for the approval of real estate schools and such rules and regulations may, in accordance with G.S. 93A-4(a), prescribe specific requirements pertaining to the teaching of mechanics and law governing real estate transactions at such schools.

(e) Nothing contained in this Chapter shall be construed as giving any authority to the Board nor any licensee of the Board as authorizing any licensee whether by examination or under the grandfather clause or by comity to engage in the practice of law or to render any legal service as specifically set out in G.S. 84-2.1 or any other legal service not specifically referred to in said section. (1957, c. 744, s. 4; 1967, c. 281, s. 3; c. 853, s. 2; 1969, c. 191, s. 3; 1973, c. 1390; 1975, c. 112; 1979, c. 614, ss. 2, 3, 6; c. 616, ss. 2-5.)

Effect of Amendments. — Session Laws 1979, c. 614, ss. 2 and 3, substituted "or real estate salesmen" for "shall be a citizen of the United States and" and substituted "18" for "21" in the second sentence of subsection (a), rewrote the third sentence of subsection (a) and added the second sentence of subsection (d). Session Laws 1979, c. 614, s. 6 substituted "90" for "60" preceding "hours of classroom instruction" in the third sentence of subsection (a).

Session Laws 1979, c. 616, substituted "license as a" for "a license as" and "a fee, fixed by the Board but not to exceed thirty dollars ($30.00)" for "twenty-five dollars ($25.00)," in the fifth sentence, and "a fee, fixed by the Board but not to exceed twenty dollars ($20.00)" for "fifteen dollars ($15.00)" in the sixth sentence, of subsection (a). In subsection (b) the second amendment added the first sentence of the second paragraph, designated the second and third sentences of the former first paragraph as the second and third sentences of the present second paragraph, and in the second sentence of the present second paragraph inserted "and investigation." In subsection (c) the second amendment substituted "fixed by the Board but not to exceed fifteen dollars ($15.00)" for "of ten dollars ($10.00)" in two places in the second sentence.

Legal Periodicals. — For a note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

OPINIONS OF ATTORNEY GENERAL

Board May Not Establish Specific Number of Hours for Course of Study in Real Estate Transactions. — See opinion of Attorney General to Mr. Joseph P. Schweidler, N.C. Real Estate Licensing Board, 42 N.C.A.G. 288 (1973), decided prior to the 1973 amendment to this section.

§ 93A-5. Register of applicants; roster of brokers and salesmen; financial report to Secretary of State.

(a) The secretary-treasurer of the Board shall keep a register of all applicants for license, showing for each the date of application, name, place of business, place of residence, and whether the license was granted or refused. Said register shall be prima facie evidence of all matters recorded therein.

(b) The secretary-treasurer of the Board shall also keep a current roster showing the names and places of business of all licensed real estate brokers and real estate salesmen, which roster shall be kept on file in the office of the Board and be open to public inspection.

(c) On or before the first day of September of each year, the Board shall file with the Secretary of State a copy of the roster of real estate brokers and real estate salesmen holding certificates of license, and at the same time shall also file with the Secretary of State a report containing a complete statement of receipts and disbursements of the Board for the preceding fiscal year ending June 30 attested by the affidavit of the secretary-treasurer of the Board. (1957, c. 744, s. 5; 1969, c. 191, s. 4.)

CASE NOTES

Cited in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969.)

§ 93A-6. Revocation or suspension of licenses by Board.

(a) The Board shall have power to revoke or suspend licenses as herein provided. The Board may upon its own motion, and shall upon the verified complaint in writing of any persons, provided such complaint with the evidence, documentary or otherwise, presented in connection therewith, shall make out a prima facie case, hold a hearing as hereinafter provided and investigate the actions of any real estate broker or real estate salesman, or any person who shall assume to act in either such capacity, and shall have power to suspend or revoke any license issued under the provisions of this Chapter at any time where the licensee has by false or fraudulent representations obtained a license or has been convicted or has entered a plea of nolo contendere upon which a finding of guilty and final judgment has been entered in a court of competent jurisdiction in this State or in any other state of the criminal offense of embezzlement, obtaining money under false pretenses, forgery, conspiracy to defraud or any similar offense or offenses involving moral turpitude or where the licensee in performing or attempting to perform any of the acts mentioned herein is deemed to be guilty of:

(1) Making any substantial and willful misrepresentations, or

(2) Making any false promises of a character likely to influence, persuade, or induce, or

(3) Pursuing a course of misrepresentation or making of false promises through agents or salesmen or advertising or otherwise, or

(4) Acting for more than one party in a transaction without the knowledge of all parties for whom he acts, or

(5) Accepting a commission or valuable consideration as a real estate salesman for the performances of any of the acts specified in this Chapter, from any person, except the licensed broker by whom he is employed, or

(6) Representing or attempting to represent a real estate broker other than the broker by whom he is engaged or associated, without the express knowledge and consent of the broker with whom he is associated, or

(7) Failing, within a reasonable time, to account for or to remit any moneys coming into his possession which belong to others, or

(8) Being unworthy or incompetent to act as a real estate broker or salesman in such manner as to safeguard the interests of the public, or

(9) Paying a commission or valuable consideration to any person for acts or services performed in violation of this Chapter, or

(10) Any other conduct whether of the same or a different character from that hereinbefore specified which constitutes improper, fraudulent or dishonest dealing.

(11) For performing or undertaking to perform any legal service as set forth in G.S. 84-2.1 or any other such acts not specifically set forth in said section.

(12) Commingling the money or other property of his principals with his own or failure to maintain and deposit in a trust or escrow account in an insured bank or savings and loan association in North Carolina all money received by a real estate broker acting in said capacity, or as escrow agent, or the temporary custodian of the funds of others, in a real estate transaction; provided, such accounts shall not bear interest unless the principals authorize in writing the deposit be made in an interest-bearing account and also provide for the disbursement of the interest thereon.

(13) Failure to deliver, within a reasonable time, a completed copy of any purchase agreement or offer to buy and sell real estate to the buyer and to the seller.

(14) Failure by a broker to deliver to the seller in every real estate transaction wherein he acts as a real estate broker, at the time such transaction is consummated, a complete detailed closing statement showing all of the receipts and disbursements handled by such broker for the seller; also failure to deliver to the buyer a complete statement showing all money received in the transaction from such buyer and how and for what the same were disbursed.

(15) Violating any rule or regulation duly promulgated by the Board.

(a1) Anything in this Chapter to the contrary notwithstanding, the Board shall have the power to suspend or revoke the license of a real estate broker or real estate salesman:

(1) Who violates any of the provisions of G.S. 93A-6(a) when selling or leasing his own property; or

(2) Who is convicted or who enters a plea of no contest upon which a finding of guilty and final judgment is entered by a court of competent jurisdiction, or an offense involving moral turpitude which is outside the scope of the real estate business, but would reasonably affect the licensee's performance in such business.

(a2) The Board may appear in its own name in the superior courts in actions for injunctive relief to prevent violation by any person of the provisions of this Chapter or regulations promulgated hereunder, and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecu-

tion has been or may be instituted as a result of such violations, or regardless of whether the person is a licensee of the Board.

(b) Each broker shall maintain complete records showing the deposit, maintenance, and withdrawal of money or other property owned by his principals or held in escrow or trust for his principals. The Board may inspect these records of each broker periodically without prior notice and may also inspect the records whenever the Board determines that the records are pertinent to the conduct of the investigation of any specific complaint against a licensee.

(c) Records relative to the deposit, maintenance, and withdrawal of the money or other property of his principals shall be properly maintained by a broker and made available to the Board or its authorized representative when the Board determines such records are pertinent to the conduct of the investigation of any specific complaint against a licensee. (1957, c. 744, s. 6; 1967, c. 281, s. 4; c. 853, s. 3; 1969, c. 191, s. 5; 1971, c. 86, s. 2; 1973, c. 1112; c. 1331, s. 3; 1975, c. 28; 1979, c. 616, ss. 6, 7.)

Effect of Amendments. — The 1979 amendment added subsections (a1) and (a2), and rewrote subsection (b), which formerly read: "In all proceedings under this section for the revocation or suspension of licenses, the provisions of Chapter 150A of the General Statutes shall be applicable."

CASE NOTES

Strict Construction. — This section is penal in nature, is in derogation of the common law and must be strictly construed. North Carolina Real Estate Licensing Bd. v. Woodard, 27 N.C. App. 398, 219 S.E.2d 271, cert. denied, 288 N.C. 731, 220 S.E.2d 621 (1975).

Section Is Penal. — The portion of this section which empowers the Board to revoke the license of a real estate broker or salesman is penal in its nature and should not be construed to include anything as a ground for revocation which is not embraced within its terms. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962); Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Adequate procedure for judicial review is provided by this section. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962), decided prior to the 1967 amendment of this section.

Licensee on Appeal Is Entitled to Trial de Novo. — See In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962), decided prior to the 1967 amendment of this section.

Insufficient Notice of Charges. — Notice to the respondent that he was charged with violating subdivisions (a)(1), (4), and (10) of this section did not adequately apprise the respondent of the charges against him so as to enable him to prepare his defense, where he was subsequently found guilty of violating subdivision (a)(8) of this section. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

The words of subsection (a) "any of the acts mentioned herein" must mean the acts of a real estate broker or real estate salesman for which a license is required in § 93A-1. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962).

This Chapter is not concerned with a licensed broker's sharing of his commissions with an unlicensed associate, unless the reason for such sharing is the performance by the unlicensed associate of acts which violate the Chapter. McArver v. Gerukos, 265 N.C. 413, 144 S.E.2d 277 (1965).

Filing a false and fraudulent income tax return, either individually or jointly, is not an offense similar to conspiracy to defraud, in which latter offense the unlawful agreement is the gist of the offense, nor is it similar to embezzlement, obtaining money under false pretenses, or forgery within the meaning of this section. North Carolina Real Estate Licensing Bd. v. Coe, 19 N.C. App. 84, 198 S.E.2d 19 (1973).

Incompetence to Act as Broker or Salesman. — Subdivision (a)(8) of this section requires findings on issues that are not included in the other subdivisions. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Subsection (a)(8) Applies Only to Misconduct Connected with Licensed Privilege. — The general language of subsection (a)(8) of this section must be construed as applying exclusively to activities in which the licensee has actually engaged in the pursuit of his licensed privilege as a real estate broker or salesman and not to some outside activity not connected in any way with the pursuit of his licensed privilege. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962).

Subdivision (a)(8) as Lesser Included Offense. — Subdivisions (a)(1) and (a)(10) of this section do not raise any issues of respondent's worthiness or competency to act as a real estate agent or broker, or his ability to safeguard the interests of the public. Therefore, the contention that subdivision (a)(8) of this section is a lesser included offense of subdivisions (a)(1) and (10) of this section is without merit. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Finding Inadequate to Suspend License. — Finding by the Real Estate Licensing Board that "there is substantial evidence" that a real estate agent acted in violation of subdivision (8) of subsection (a) in certain respects is insufficient to support a suspension of the agent's license since it is necessary for the Board to find that the agent "is deemed guilty of" a violation of the statute before his license can be suspended. North Carolina Real Estate Licensing Bd. v. Woodard, 27 N.C. App. 398, 219 S.E.2d 271, cert. denied, 288 N.C. 731, 220 S.E.2d 621 (1975).

The finding that respondent on a single occasion failed to obtain an earnest money deposit is insufficient to support the conclusion that he was unworthy and incompetent in violation of subdivision (a)(8) of this section. Parrish v. North Carolina Real Estate Licensing Bd., 41 N.C. App. 102, 254 S.E.2d 268 (1979).

Sale of Broker's Own Notes Secured by Deeds of Trust. — A real estate broker, in selling his own notes secured by deeds of trust, did not act as a real estate broker as defined in § 93A-2, and any misconduct in performing such acts does not warrant the Board or the court on appeal to revoke his license on such ground. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962).

Keeping Disorderly House. — Evidence offered by the Board to the effect that a real estate broker had pleaded guilty to a charge of operating a disorderly house shows acts of a vile and decadent character committed by him, but such acts are not connected in any way with the pursuit of his licensed privilege as a real estate broker, and are not a ground for revocation of his license, and such evidence was correctly excluded as irrelevant and immaterial. In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962).

A real estate broker may maintain an action for malicious prosecution against a person who maliciously and without probable cause institutes proceedings before the Real Estate Licensing Board terminated in favor of the broker, charging conduct constituting ground for revocation or suspension of the broker's license. Carver v. Lykes, 262 N.C. 345, 137 S.E.2d 139 (1964).

§ 93A-7. Power of courts to revoke.

Whenever any person, partnership, association or corporation claiming to have been injured or damaged by the gross negligence, incompetency, fraud, dishonesty or misconduct on the part of any licensee following the calling or engaging in the business herein described and shall file suit upon such claim against such licensee in any court of record in this State and shall recover judgment thereon, such court may as part of its judgment or decree in such case, if it deem it a proper case in which so to do, order a written copy of the transcript of record in said case to be forwarded by the clerk of court to the chairman of the said Board with a recommendation that the licensee's certificate of license be revoked. (1957, c. 744, s. 7.)

§ 93A-8. Penalty for violation of Chapter.

Any person violating the provisions of this Chapter shall upon conviction thereof be deemed guilty of a misdemeanor and shall be punished by a fine or imprisonment, or by both fine and imprisonment, in the discretion of the court. (1957, c. 744, s. 8.)

CASE NOTES

Violation Precludes Recovery of Commissions by Foreign Real Estate Firms. — A foreign real estate firm that has not secured a North Carolina real estate license and a certificate of authority to transact business in this State cannot maintain an action to recover commissions on the lease of real estate in this State. Raab & Co. v. Independence Corp., 9 N.C. App. 674, 177 S.E.2d 337 (1970).

§ 93A-9. Licensing nonresidents.

An applicant from another state, which offers licensing privileges to residents of North Carolina, may be licensed by conforming to all the provisions of this Chapter and, in the discretion of the Board, such other terms and conditions as are required of North Carolina residents applying for license in such other state; provided that the Board may exempt from the examination prescribed in G.S. 93A-4 a broker or salesman duly licensed in another state if a similar exemption is extended to licensed brokers and salesmen from North Carolina. (1957, c. 744, s. 9; 1967, c. 281, s. 5; 1969, c. 191, s. 6; 1971, c. 86, s. 3.)

§ 93A-10. Nonresident licensees; filing of consent as to service of process and pleadings.

Every nonresident applicant shall file an irrevocable consent that suits and actions may be commenced against such applicant in any of the courts of record of this State, by the service of any process or pleading authorized by the laws of this State in any county in which the plaintiff may reside, by serving the same on the secretary of the commission, said consent stipulating and agreeing that such service of such process or pleadings on said secretary shall be taken and held in all courts to be valid and binding as if due service had been made personally upon the applicant in this State. This consent shall be duly acknowledged, and, if made by a corporation, shall be authenticated by its seal. An application from a corporation shall be accompanied by a duly certified copy of the resolution of the board of directors, authorizing the proper officers to execute it. In all cases where process or pleadings shall be served, under the provisions of this Chapter, upon the secretary of the commission, such process or pleadings shall be served in duplicate, one of which shall be filed in the office of the commission and the other shall be forwarded immediately by the secretary of the commission, by registered mail, to the last known business address of the nonresident licensee against which such process or pleadings are directed. (1957, c. 744, s. 10.)

§§ 93A-11 to 93A-15: Reserved for future codification purposes.

Article 2.

Real Estate Recovery Fund.

§ 93A-16. Real Estate Recovery Fund created; payment to fund; management.

(a) There is hereby created a special fund to be known as the "Real Estate Recovery Fund" which shall be set aside and maintained by the North Carolina Real Estate Licensing Board. Said fund shall be used in the manner provided under this Article for the payment of unsatisfied judgments where the aggrieved person has suffered a direct monetary loss by reason of certain acts committed by any person licensed under this Chapter.

(b) On September 1, 1979, the Board shall transfer the sum of one hundred thousand dollars ($100,000) from its expense reserve fund to the Real Estate Recovery Fund. Thereafter, if on December 31 of any year the amount remaining in the Real Estate Recovery Fund is less than fifty thousand dollars ($50,000) the Board may at its option replenish the fund from whatever funds it has or may determine that each licensee under this Chapter, when renewing

his license, shall pay in addition to his license renewal fee, a fee not to exceed ten dollars ($10.00) per broker and five dollars ($5.00) per salesman as shall be determined by the Board for the purpose of replenishing the fund.

(c) The Board shall invest and reinvest the moneys in the Real Estate Recovery Fund in the same manner as provided by law for the investment of funds by the clerk of superior court. The proceeds from such investments shall be deposited to the credit of the fund. (1979, c. 614, s. 1.)

§ 93A-17. Application for payment out of fund; grounds.

(a) When any aggrieved person obtains final judgment in any court of competent jurisdiction against any real estate broker or salesman licensed under this Chapter on grounds of conversion of trust funds arising directly out of any transaction which occurred when such broker or salesman was licensed and acted in a capacity for which a license is required under this Chapter and which transaction occurred on or after September 1, 1979, such person may, upon termination of all proceedings including appeals, file a verified application in the court in which judgment was entered for an order directing payment out of the Real Estate Recovery Fund of the amount remaining unpaid upon the judgment which represents an actual and direct loss sustained by reason of said conversion of trust funds.

In case of a judgment rendered by a magistrate in a small claims action, the aggrieved person shall file such verified application in the district court. The district court judge may then make a determination as to whether such judgment rendered by a magistrate was based on facts constituting grounds for recovery under this Article and may enter an order directing payment of such judgment out of the Real Estate Recovery Fund.

A copy of the verified application shall be served upon the Board and the judgment debtor and a certificate or affidavit of such service filed with the court. Jurisdiction of the court against the fund or the Board shall not attach under this Article until after judgment is obtained against a licensee and execution is returned unsatisfied.

(b) For purposes of this Chapter, the term "trust funds" shall include all down payments, earnest money deposits, advance listing fees and other moneys received on behalf of his principal or any other person by a real estate broker or salesman licensed under this Chapter, under the terms of an express or implied agreement that the broker or salesman is not entitled to retain all or a portion of such moneys until the occurrence of some future event. (1979, c. 614, s. 1.)

§ 93A-18. Hearing; required showing.

Upon such application by an aggrieved person, the court shall conduct a hearing and the aggrieved person shall be required to show:

(1) He is not a spouse of the judgment debtor or a person representing such spouse; and

(2) He is making application not more than one year after termination of all proceedings, including appeals, in connection with the judgment;

(3) He has complied with all requirements of this Article;

(4) He has obtained a judgment as described in G.S. 93A-17, stating the amount owing thereon at the date of application;

(5) He has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets liable to be sold or applied in satisfaction of the judgment;

(6) That by such search he has discovered no real or personal property or other assets liable to be sold or applied, or that he has discovered

certain of them, describing them, but that the amount so realized was insufficient to satisfy the judgment, stating the amount realized and the balance remaining due on the judgment after application of the amount realized; and

(7) He has diligently pursued his remedies including attempted execution on the judgment against all the judgment debtors which execution has been returned unsatisfied. In addition to that, he knows of no assets of the judgment debtor and that he has attempted collection from all other persons who may be liable to him in the transaction for which he seeks payment from the Real Estate Recovery Fund if there be any such other persons. (1979, c. 614, s. 1.)

§ 93A-19. Answer and defense by Board; proof of conversion.

(a) Whenever the court proceeds upon an application as set forth in this Article the Board may defend such action on behalf of the fund and shall have recourse to all appropriate means of defense and review, including examination of witnesses. The judgment debtor may defend such action on his own behalf and shall have recourse to all appropriate means of defense and review, including examination of witnesses. At any time it appears there are no triable issues of fact and the application for an order directing payment from the fund is without merit, the court shall dismiss the application. Motion to dismiss may be supported by affidavit of any person or persons having knowledge of the facts and may be made on the basis that the application and the judgment referred to therein do not form the basis for a meritorious recovery within the purview of G.S. 93A-17 or that the applicant has not complied with the provisions of G.S. 93A-18; provided, however, notice of such motion shall be given at least 10 days prior to the time fixed for hearing.

(b) Whenever the judgment obtained by an applicant is by default, stipulation, or consent, or whenever the action against the licensee was defended by a trustee in bankruptcy, the applicant, for purposes of this Article, shall have the burden of proving his cause of action for conversion of trust funds. Otherwise, the judgment shall create a rebuttable presumption of the conversion of trust funds. This presumption is a presumption affecting the burden of producing evidence. (1979, c. 614, s. 1.)

§ 93A-20. Order directing payment out of fund; compromise of claims.

If the court finds after said hearing that the claim should be levied against the fund, the court shall enter an order directed to the Board requiring payment from the fund of whatever sum the court shall find to be payable upon the claim in accordance with the limitations contained in this Article. The Board may, subject to court approval, compromise a claim based upon the application of an aggrieved party; however, the Board shall not be bound in any way by any prior compromise or stipulation of the judgment debtor. (1979, c. 614, s. 1.)

§ 93A-21. Maximum liability; pro rata distribution; attorney fees.

(a) Payments from the Real Estate Recovery Fund shall be subject to the following limitations:

(1) The right to recovery under this Article shall be forever barred unless application is made within one year after termination of all proceedings including appeals, in connection with the judgment;

(2) The fund shall not be liable for more than five thousand dollars ($5,000) per transaction regardless of the number of persons aggrieved or parcels of real estate involved in such transaction; and

(3) The liability of the fund shall not exceed in the aggregate ten thousand dollars ($10,000) for any one licensee within a single calendar year, and in no event shall it exceed in the aggregrate twenty thousand dollars ($20,000) for any one licensee.

(b) If the maximum liability of the fund is insufficient to pay in full the valid claims of all aggrieved persons whose claims relate to the same transaction or to the same licensee, the amount for which the fund is liable shall be distributed among the claimants in a ratio that their respective claims bear to the total of such valid claims or in such manner as the court deems equitable. Upon petition of the Board, the court may require all claimants and prospective claimants to be joined in one action to the end that the respective rights of all such claimants to the Real Estate Recovery Fund may be equitably adjudicated and settled.

(c) In the event an aggrieved person is entitled to payment from the fund in an amount of one thousand dollars ($1,000) or less, the court may allow such person to recover from the fund reasonable attorney's fees incurred in effecting such recovery. Reimbursement for attorney's fees shall be limited to those fees incurred in effecting recovery from the fund and shall not include any fee incurred in obtaining judgment against the licensee. (1979, c. 614, s. 1.)

§ 93A-22. Repayment to fund; automatic suspension of license.

Should the Board pay from the Real Estate Recovery Fund any amount in settlement of a claim or toward satisfaction of a judgment against a licensed real estate broker or salesman, the license of the broker or salesman shall be automatically suspended upon the effective date of an order by the court authorizing payment from the fund. No such broker or salesman shall be granted a reinstatement until he has repaid in full, plus interest at the legal rate as provided for in G.S. 24-1, the amount paid from the Real Estate Recovery Fund. (1979, c. 614, s. 1.)

§ 93A-23. Subrogation of rights.

When, upon order of the court, the Board has paid from the Real Estate Recovery Fund any sum to the judgment creditor, the Board shall be subrogated to all of the rights of the judgment creditor to the extent of the amount so paid and the judgment creditor shall assign all his right, title, and interest in the judgment to the extent of the amount so paid to the Board and any amount and interest so recovered by the Board on the judgment shall be deposited in the Real Estate Recovery Fund. (1979, c. 614, s. 1.)

§ 93A-24. Waiver of rights.

The failure of an aggrieved person to comply with this Article shall constitute a waiver of any rights hereunder. (1979, c. 614, s. 1.)

§ 93A-25. Persons ineligible to recover from fund.

No real estate broker or real estate salesman who suffers the loss of any commission from any transaction in which he was acting in the capacity of a real estate broker or real estate salesman shall be entitled to make application for payment from the Real Estate Recovery Fund for such loss. (1979, c. 614, s. 1.)

§ 93A-26. Disciplinary action against licensee.

Nothing contained in this Article shall limit the authority of the Board to take disciplinary action against any licensee under this Chapter, nor shall the repayment in full of all obligations to the fund by any licensee nullify or modify the effect of any other disciplinary proceeding brought under this Chapter. (1979, c. 614, s. 1.)

§§ 93A-27 to 93A-31: Reserved for future codification purposes.

Article 3.

Private Real Estate Schools.

§ 93A-32. Definitions.

As used in this Article:

(1) "Board" means the North Carolina Real Estate Licensing Board.

(2) "Private real estate school" means any real estate educational institution or organization which is privately owned and operated for profit by an individual, partnership, corporation or association, and which is devoted exclusively to the teaching of real estate courses for which tuition is charged, and wherein the purpose of any of such courses is to qualify applicants under G.S. 93A-4(a) to sit for the licensing examinations for real estate brokers or salesmen. (1979, 2nd Sess., c. 1193, s. 1.)

Editor's Notes. — Session Laws 1979, 2nd Sess., c. 1193, s. 3, makes the act effective October 1, 1980.

Session Laws 1979, 2nd Sess., c. 1193, s. 2, reads as follows: "The North Carolina State Board of Education is directed to transfer all records in its possession relating to the licensing of private real estate schools to North Carolina Real Estate Licensing Board, such transfer to be accomplished not later than September 30, 1980."

§ 93A-33. Real Estate Licensing Board to administer Article; authority of Board to conduct investigations, issue licenses, and promulgate regulations.

The Board shall have authority to administer and enforce this Article and to issue licenses to private real estate schools as defined herein which have complied with the requirements of this Article and regulations promulgated by the Board. Through licensing applications, periodic reports required of licensed schools, periodic investigations and inspections of schools, and appropriate regulations, the Board shall exercise general supervisory authority over private real estate schools, the object of such supervision being to protect the

public interest and to assure the conduct of quality real estate education programs. To this end the Board is authorized and directed to promulgate such regulations as it deems necessary which are not inconsistent with the provisions of this Article and which relate to the subject areas set out in G.S. 93A-34(c). (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-34. License required; application for license; fees; requirements for issuance of license.

(a) No person, partnership, corporation or association shall operate or maintain or offer to operate in this State a private real estate school as defined herein unless a license is first obtained from the Board in accordance with the provisions of this Article and the rules and regulations promulgated by the Board under this Article. For licensing purposes, each branch location where a school conducts courses shall be considered a separate school requiring a separate license.

(b) Application for a license shall be filed in the manner and upon the forms prescribed by the Board for that purpose. Such application shall be accompanied by a nonrefundable application fee of two hundred fifty dollars ($250.00) in the form of a certified check or money order payable to the North Carolina Real Estate Licensing Board, shall be signed by the applicant, and shall contain the following:

(1) Name and address of the applicant and the school;
(2) Names, biographical data, and qualifications of director, administrators and instructors;
(3) Description of school facilities and equipment;
(4) Description of course(s) to be offered and instructional materials to be utilized;
(5) Information on financial resources available to equip and operate the school;
(6) Information on school policies and procedures regarding administration, record keeping, entrance requirements, registration, tuition and fees, grades, student progress, attendance, and student conduct;
(7) Copies of bulletins, catalogues and other official publications;
(8) Copy of bond required by G.S. 93A-36;
(9) Such additional information as the Board may deem necessary to enable it to determine the adequacy of the instructional program and the ability of the applicant to operate a school in such a manner as would best serve the public interest.

(c) After due investigation and consideration by the Board, a license shall be issued to the applicant when it is shown to the satisfaction of the Board that the applicant and school are in compliance with the following standards, as well as the requirements of any supplemental regulations of the Board regarding these standards:

(1) The program of instruction is adequate in terms of quality, content and duration.
(2) The director, administrators and instructors are adequately qualified by reason of education and experience.
(3) There are adequate facilities, equipment, instructional materials and instructor personnel to provide instruction of good quality.
(4) The school has adopted adequate policies and procedures regarding administration, instruction, record keeping, entrance requirements, registration, tuition and fees, grades, student progress, attendance, and student conduct.
(5) The school publishes and provides to all students upon enrollment a bulletin, catalogue or similar official publication which is certified as

being true and correct in content and policy by an authorized school official, and which contains the following information:

a. Identifying data and publication date;
b. Name(s) of school and its full-time officials and faculty;
c. School's policies and procedures relating to entrance requirements, registration, grades, student progress, attendance, student conduct and refund of tuition and fees;
d. Detailed schedule of tuition and fees;
e. Detailed course outline of all courses offered.

(6) Adequate records as prescribed by the Board are maintained in regard to grades, attendance, registration and financial operations.
(7) Institutional standards relating to grades, attendance and progress are enforced in a satisfactory manner.
(8) The applicant is financially sound and capable of fulfilling educational commitments made to students.
(9) The school's owner(s), director, administrators and instructors are of good reputation and character.
(10) The school complies with all applicable local, State and federal laws and regulations regarding safety and sanitation of facilities.
(11) The school does not utilize advertising of any type which is false or misleading, either by actual statement, omission or intimation.
(12) Such additional standards as may be deemed necessary by the Board to assure the conduct of adequate instructional programs and the operation of schools in a manner which will best serve the public interest. (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-35. Duration and renewal of licenses; transfer of school ownership.

(a) All licenses issued shall expire on June 30 following the date of issuance.

(b) Licenses shall be renewable annually on July 1, provided a renewal application accompanied by a certified check or money order for the renewal fee in the amount of one hundred dollars ($100.00) payable to the North Carolina Real Estate Licensing Board has been filed in the form and manner prescribed by the Board; and provided further that the applicant and school are found to be in compliance with the standards established for issuance of an original license.

(c) In the event a school is sold or ownership is otherwise transferred, the license issued to the original owner is not transferable to the new owner. Such new owner must make application for an original license as prescribed by this Article and Board regulations. (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-36. Execution of bond required; applicablility to branch schools; actions upon bond.

(a) Before the Board shall issue a license the applicant shall execute a bond in the sum of five thousand dollars ($5,000), payable to the State of North Carolina, signed by a solvent guaranty company authorized to do business in the State of North Carolina, and conditioned that the principal in said bond will carry out and comply with each and every contract or agreement, written or verbal, made and entered into by the applicant's school acting by and through its officers and agents with any student who desires to enter such school and to take any courses offered therein and that said principal will refund to such students all amounts collected in tuition and fees in case of failure on the part of the party obtaining a license from the Board to open and operate a private real estate school or to provide the instruction agreed to or

contracted for. Such bond shall be required for each school or branch thereof for which a license is required and shall be first approved by the Board and then filed with the clerk of superior court of the county in which the school is located, to be recorded by such clerk in a book provided for that purpose.

(b) In any and all cases where the party licensed by the Board fails to fullfill its obligations under any contract or agreement, written or verbal, made and entered into with any student, then the State of North Carolina, upon the relation of the student(s) entering into said contract or agreement, shall have a cause of action against the principal and surety on the bond herein required for the full amount of payments made to such party, plus court costs and six percent (6%) interest from the date of payment of said amount. Such suits shall be brought in Wake County Superior Court within one year of the alleged default. (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-37. Contracts with unlicensed schools and evidences of indebtedness made null and void.

All contracts or agreements entered into on or after October 1, 1980, by private real estate schools, as defined in this Article, with students or prospective students, and all promissory notes or other evidence of indebtedness taken on or after October 1, 1980, in lieu of cash payments by such schools, shall be null and void unless such schools are duly licensed as required by this Article on the date of such contract or agreement or taking of any promissory note or other evidence of indebtedness. (1979, 2nd Sess., c. 1193, s. 1.)

§ 93A-38. Suspension, revocation or denial of license.

The board shall have the power to suspend, revoke, deny issuance, or deny renewal of license to operate a private real estate school. In all proceedings to suspend, revoke or deny a license, the provisions of Chapter 150A of the General Statutes shall be applicable. The Board may suspend, revoke, or deny such license when it finds:

(1) That the applicant for or holder of such license has refused or failed to comply with any of the provisions of this Article or the rules or regulations promulgated thereunder;

(2) That the applicant for or holder of such license has knowingly presented to the Board false or misleading information relating to matters within the purview of the Board under this Article;

(3) That the applicant for or holder of such license has presented to its students or prospective students false or misleading information relating to its instructional program, to the instructional programs of other institutions or to employment opportunities;

(4) That the applicant for or holder of such license has failed to comply with the provisions of any contract or agreement entered into with a student;

(5) That the applicant for or holder of such license has at any time refused to permit authorized representatives of the Board to inspect the school, or failed to make available to them upon request full information relating to matters within the purview of the Board under the provisions of this Article or the rules or regulations promulgated thereunder; or

(6) That the applicant for or holder of such license or any officer of a corporate licensee or corporation applying for a license, or any partner of a partnership licensee or partnership applying for a license, has pleaded guilty, entered a plea of nolo contendere or been found guilty of a crime involving moral turpitude in any state or federal court. (1979, 2nd Sess., c. 1193, s. 1.)

Chapter 93B.

Occupational Licensing Boards.

Sec.
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93B-10. Expiration of term of appointment of board member.

§ 93B-1. Definitions.

As used in this Chapter:

"License" means any license (other than a privilege license), certificate, or other evidence of qualification which an individual is required to obtain before he may engage in or represent himself to be a member of a particular profession or occupation.

"Occupational licensing board" means any board, committee, commission, or other agency in North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within, a particular profession or occupation, and which is authorized to issue licenses; "occupational licensing board" does not include State agencies, staffed by full-time State employees, which as a part of their regular functions may issue licenses. (1957, c. 1377, s. 1.)

§ 93B-2. Annual reports required; contents; open to inspection.

Each occupational licensing board shall file with the Secretary of State and with the Attorney General an annual financial report, and an annual report containing the following information:

(1) The address of the board, and the names of its members and officers;
(2) The number of persons who applied to the board for examination;
(3) The number who were refused examination;
(4) The number who took the examination;
(5) The number to whom initial licenses were issued;
(6) The number who applied for license by reciprocity or comity;
(7) The number who were granted licenses by reciprocity or comity;
(8) The number of licenses suspended or revoked; and
(9) The number of licenses terminated for any reason other than failure to pay the required renewal fee.

The reports required by this section shall be open to public inspection. (1957, c. 1377, s. 2; 1969, c. 42.)

§ 93B-3. Register of persons licensed; information as to licensed status of individuals.

Each occupational licensing board shall prepare a register of all persons currently licensed by the board and shall supplement said register annually by listing the changes made in it by reason of new licenses issued, licenses revoked or suspended, death, or any other cause. The board shall, upon request of any

citizen of the State, inform the requesting person as to the licensed status of any individual. (1957, c. 1377, s. 3.)

§ 93B-4. Annual audit of books and records; payment of cost; report of financial operations.

The books and records of each occupational licensing board shall be audited annually by the State Auditor. The cost of all audits shall be paid out of the funds of the occupational licensing boards. One copy of the audit report of each of the boards shall be submitted by the State Auditor to the Legislative Services Office.

The State Auditor shall issue annually a report containing a summary of the financial operations of each board. The State Auditor shall submit copies of the annual summary of the occupational licensing boards to the Governor, the Lieutenant Governor, the President pro tem of the Senate, the Speaker of the House of Representatives and the Legislative Services Office. (1957, c. 1377, s. 4; 1965, c. 661; 1973, c. 1301.)

§ 93B-5. Compensation and employment of board members.

(a) Board members shall receive as compensation for their services per diem not to exceed thirty-five dollars ($35.00) for each day during which they are engaged in the official business of the board.

(b) Board members shall be reimbursed for all necessary travel expenses in an amount not to exceed that authorized under G.S. 138-6(a)(1), (2), and (3) for officers and employees of State departments.

(c) Board members shall be reimbursed for convention registration fees not to exceed twenty-five dollars ($25.00) per convention.

(d) Except as provided herein board members shall not be paid a salary or receive any additional compensation for services rendered as members of the board.

(e) Board members shall not be permanent, salaried employees of said board.

(f) Repealed by Session Laws 1975, c. 765, s. 1, effective July 1, 1975. (1957, c. 1377, s. 5; 1973, c. 1303, s. 1; c. 1342, s. 1; 1975, c. 765, s. 1.)

§ 93B-6. Use of funds for lobbying prohibited.

Occupational licensing boards shall not use any funds to promote or oppose in any manner the passage by the General Assembly of any legislation. (1973, c. 1302.)

§ 93B-7. Rental of state-owned office space.

Any occupational licensing board, which financially operates on the licensing fees charged and also occupies state-owned office space, shall pay rent, in a reasonable amount to be determined by the Governor, to the State for the occupancy of such space. (1973, c. 1300.)

§ 93B-8. Examination procedures.

(a) Each applicant for an examination given by any occupational licensing board shall be informed in writing or print of the required grade for passing the examination prior to the taking of such examination.

(b) Each applicant for an examination given by any occupational licensing board shall be identified, for purposes of the examination, only by number rather than by name.

(c) Each applicant who takes an examination given by any occupational licensing board, and does not pass such examination, shall have the privilege to review his examination in the presence of the board or a representative of the board.

(d) Notwithstanding the provisions of this section, under no circumstances shall an occupational licensing board be required to disclose to an applicant questions or answers to tests provided by recognized testing organizations pursuant to contracts which prohibit such disclosures. (1973, c. 1334, s. 1.)

§ 93B-9. Age requirements.

Any other provision notwithstanding, no occupational licensing board may require that an individual be more than 18 years of age as a requirement for receiving a license. (1973, c. 1356.)

§ 93B-10. Expiration of term of appointment of board member.

A board member serving on an occupational and professional licensing board whose term of appointment has expired shall continue to serve until a successor is appointed and qualified. (1973, c. 1373, s. 1.)

Chapter 93C.

Watchmakers.

§§ 93C-1 to 93C-18: Repealed by Session Laws 1977, c. 712, s. 2, effective July 1, 1979.

Editor's Note. — This Chapter is repealed, effective July 1, 1979, by the "Sunset Law," Session Laws 1977, c. 712, s. 2, codified as § 143-34.11. Session Laws 1977, c. 712, s. 5, codified as § 143-34.14, provides: "Upon termination, each program or function shall continue in operational existence until July 1 of the next succeeding year as a winding-up period. During the winding-up period, termination shall not reduce or otherwise limit the powers or authority of the responsible agencies. Upon the expiration of the one-year period after termination, each such program or function shall cease operation entirely."

Chapter 93D.

North Carolina State Hearing Aid Dealers and Fitters Board.

Sec.
93D-1. Definitions.
93D-2. Fitting and selling without license unlawful.
93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.
93D-4. Board may enjoin illegal practices.
93D-5. Requirements for registration; examinations; apprentice licenses.
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93D-12. License to be displayed at office.
93D-13. Discipline, suspension, revocation of licenses and apprentice licenses.
93D-14. Persons not affected.
93D-15. Violation of Chapter.
93D-16. Severability.

Repeal of Chapter. — This Chapter is repealed, effective July 1, 1983, by Session Laws 1977, c. 712, s. 4. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 93D-1. Definitions.

For the purposes of this Chapter:

(1) "Board" shall mean the North Carolina State Hearing Aid Dealers and Fitters Board.

(2) "Fitting and selling hearing aids" shall mean the evaluation or measurement of the powers or range of human hearing by means of an audiometer or by other means and the consequent selection or adaptation or sale or rental of hearing aids intended to compensate for hearing loss including the making of an impression of the ear.

(3) "Hearing aid" shall mean any instrument or device designed for or represented as aiding, improving or compensating for defective human hearing and any parts, attachments or accessories of such an instrument or device. (1969, c. 999.)

§ 93D-2. Fitting and selling without license unlawful.

It shall be unlawful for any person to fit or sell hearing aids unless he has first obtained a license or apprentice license from the North Carolina State Hearing Aid Dealers and Fitters Board. (1969, c. 999.)

§ 93D-3. North Carolina State Hearing Aid Dealers and Fitters Board; composition, organization, duties and compensation.

(a) There is hereby created a board whose duty it shall be to carry out the purposes and enforce the provisions of this Chapter, and which shall be known as the "North Carolina State Hearing Aid Dealers and Fitters Board." The Board shall be composed of seven members. Four members who have been actively engaged in the fitting and selling of hearing aids for three years shall be appointed by the Governor. These initial appointments are for the following terms: one for one year, one for two years, one for three years and one for four years. All subsequent appointments shall be for terms of four years.

Two members shall be appointed by the Governor who shall be physicians practicing in North Carolina, preferably specializing in the field of otolaryngology. All appointments shall be for terms of four years.

One member shall be appointed by the Governor from a list of two audiologists residing in North Carolina, which list shall be compiled by the North Carolina Speech and Hearing Association. This initial appointment shall be for a term of three years. All subsequent appointments shall be for a term of two years.

Vacancies on the Board shall be filled by appointment of the Governor. Appointees shall serve the unexpired term of their predecessor in office and must be appointed from the same category, physician, or hearing aid dealer or audiologist, as their predecessor in office. The members of the Board, before entering their duties, shall respectively take all oaths taken and prescribed for other State officers, in the manner provided by law, which oaths shall be filed in the office of the Secretary of State, and the Board shall have a common seal.

(b) The Board shall choose, at the first regular meeting and annually thereafter, one of its members to serve as president and one as secretary and treasurer. A majority of the Board shall constitute a quorum. The Board shall meet at least once a year, the time and place of the annual meeting and any special meetings to be designated by the president. The secretary and treasurer of the Board shall keep a full record of its proceedings, including a current list of all licensees, which shall at all reasonable times be open to public inspection.

(c) The Board shall:

(1) Authorize all disbursements necessary to carry out the provisions of this Chapter;

(2) Supervise and administer qualifying examinations to test and determine the knowledge and proficiency of applicants for licenses;

(3) Issue licenses to qualified persons who apply to the Board;

(4) Obtain audiometric equipment and facilities necessary to carry out the examination of applicants for licenses;

(5) Suspend or revoke licenses and apprentice licenses pursuant to this Chapter;

(6) Make and publish rules and regulations (including a code of ethics) which are necessary and proper to regulate the fitting and selling of hearing aids and to carry out the provisions of this Chapter;

(7) Exercise jurisdiction over the hearing of complaints, charges of malpractice including corrupt or unprofessional conduct, and allegations of violations of the Board's rules or regulations, which are made against any fitter and seller of hearing aids in North Carolina;

(8) Require the periodic inspection and calibration of audiometric testing equipment of persons who are fitting and selling hearing aids;

(9) In connection with any matter within the jurisdiction of the Board, summon and subpoena and examine witnesses under oath and to

compel their attendance and the production of books, papers, or other documents or writings deemed by the Board to be necessary or material to the inquiry. Each summons or subpoena shall be issued under the hand of the secretary and treasurer or the president of the Board and shall have the force and effect of a summons or subpoena issued by a court of record. Any witness who shall refuse or neglect to appear in obedience thereto or to testify or produce books, papers, or other documents or writings required shall be liable to contempt charges in the manner set forth in Chapter 150A of the General Statutes. The Board shall pay to any witness subpoenaed before it the fees and per diem as paid witnesses in civil actions in the superior court of the county where such hearing is held;

(10) Inform the Attorney General of any information or knowledge it acquires regarding any "price-fixing" activity whatsoever in connection with the sales and service of hearing aids;

(11) Establish and enforce regulations which will guarantee that a full refund will be made by the seller of a hearing aid to the purchaser when presented with a written medical opinion of an otolaryngologist that the purchaser's hearing cannot be improved by the use of a hearing aid;

(12) Fund, establish, conduct, approve and sponsor instructional programs for persons who hold an apprentice license and a license as well as for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to the extent that the Board deems such instructional programs to be beneficial or necessary.

(d) Out of the funds coming into the possession of said Board, each member thereof may receive as reimbursement for each day he is actually engaged in the assigned duties of his office, the sum of eight cents (8¢) per mile for travel plus the actual costs of meals and public lodging while away from home, which costs of meals and lodging may not exceed twenty dollars ($20.00) per day. Such expenses shall be paid from the fees and assessments received by the Board under the provisions of this Chapter. No part of these expenses or any other expenses of the Board, in any manner whatsoever, shall be paid out of the State treasury. All moneys received in excess of expense allowance and mileage, as above provided, shall be held by the secretary-treasurer as a special fund for meeting other expenses of the Board and carrying out the provisions of this Chapter.

The secretary-treasurer shall give a bond to the Board to be approved by the Board, in the sum of five thousand dollars ($5,000) conditioned upon the faithful performance of the duties of his office.

The Board shall make an annual report of its proceedings to the Governor on the first Monday in June of each year, which report shall contain an account of all moneys received and disbursed by the Board and a complete listing of names and addresses of all licensees. Copies of the report and list of licensees shall be filed in the office of the State Auditor, the Secretary of State, and Attorney General. (1969, c. 999; 1973, c. 1331, s. 3; c. 1345, ss. 1, 2; 1975, c. 550, s. 1.)

§ 93D-4. Board may enjoin illegal practices.

The Board may, if it finds that any person is violating any of the provisions of this Chapter, apply to superior court for a temporary or permanent restraining order or injunction to restrain such persons from continuing such illegal practices. If upon application, it appears to the court that such person has violated or is violating the provisions of this Chapter, the court shall issue an order restraining the sale or fitting of hearing aids or other conduct in violation of this Chapter. All such actions by the Board for injunctive relief

shall be governed by the Rules of Civil Procedure and Article 37, Chapter 1 of the General Statutes; provided, that injunctive relief may be granted regardless of whether criminal prosecution has been or may be instituted under the provisions of this Chapter. (1969, c. 999.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

§ 93D-5. Requirements for registration; examinations; apprentice licenses.

(a) No person shall begin the fitting and selling of hearing aids in this State after the effective date of this Chapter until he is issued a license or apprentice license by the Board. Except as hereinafter provided, each applicant for a license shall pay a fee of fifty dollars ($50.00) and shall show to the satisfaction of the Board that he:

(1) Is a person of good moral character,

(2) Is 21 years of age or older, provided that, a person who has reached the age of 19 years or more may be awarded an apprentice license,

(3) Has an education equivalent to a four-year course in an accredited high school,

(4) Is free of contagious or infectious disease.

(b) Except as hereinafter provided, no license shall be issued to a person until he has successfully passed a qualifying examination administered by the Board.

(c) No license shall be issued to any person until he has first held an apprentice license as set forth in G.S. 93D-9 for a period of at least one year; provided, that this subsection shall not apply to those persons qualified under G.S. 93D-6. (1969, c. 999; 1975, c. 550, s. 2.)

§ 93D-6. Persons selling in other jurisdictions.

Whenever the Board determines that another state or jurisdiction has requirements at least equivalent to those in effect pursuant to this Chapter for the fitting and selling of hearing aids, and that such state or jurisdiction has a program at least equivalent to the program for determining whether applicants pursuant to this Article [Chapter] are qualified to sell and fit hearing aids, the Board may issue, but is not compelled to issue, licenses to applicants therefor who hold current, unsuspended and unrevoked certificates or licenses to fit and sell hearing aids in such other state or jurisdiction. No such applicant shall be required to submit to any examination or other procedure required by G.S. 93D-5, except that he shall pay a fee of fifty dollars ($50.00) to the Board upon application. Such applicant must have one full year of experience satisfactory to the Board before issuance of the license. (1969, c. 999; 1971, c. 1093, s. 2.)

§ 93D-7. Statements of sale.

Every person fitting and selling a hearing aid, be it new or used, in the State of North Carolina, at the time of delivery of the hearing aid shall render to the user and/or purchaser a statement of sale to include the following:

(1) Date of delivery

(2) Condition of hearing aid; new, used, reconditioned

(3) Hearing aid identification number

(4) Name of manufacturer

(5) Price of hearing aid
(6) Charge for fitting and service
(7) Name of dealer and/or fitter
(8) Signature of customer. (1969, c. 999; 1973, c. 1345, s. 3.)

§ 93D-8. Examination of applicants; issue of license certificate.

(a) Every applicant for a license who is notified by the Board that he has fulfilled the requirements of G.S. 93D-5(a) excepting those making application pursuant to G.S. 93D-6 and 93D-7, shall appear at a time, place and before such persons as the Board may designate, to be examined by written and practical tests in order to demonstrate that he is qualified for the fitting and selling of hearing aids. The Board shall give one examination of the type prescribed herein each year at a duly prescribed time and place, which shall be publicized for at least 90 days in advance. Additional examinations may be given at the discretion of the Board. The examination provided in this section shall not include questions requiring a medical or surgical education but shall consist of:

(1) Tests of knowledge in the following areas as they pertain to the fitting of hearing aids:
   a. The basic physics of sound,
   b. The human hearing mechanism, including the science of hearing and the cause and rehabilitation of abnormal hearing and hearing disorders, and
   c. The structure and function of hearing aids.
(2) Tests of proficiency in the following techniques as they pertain to the fitting of hearing aids:
   a. Pure tone audiometry, including air conduction testing and bone conduction testing,
   b. Live voice and recorded voice speech audiometry, including speech reception threshold testing and speech discrimination testing,
   c. Effective masking,
   d. Recording and evaluation of audiograms and speech audiometry to determine hearing aid candidacy,
   e. Selection and adaption of hearing aids and testing of hearing aids,
   f. Taking earmold impressions, and
   g. Such other skills as may be required for the fitting of hearing aids in the opinion of the Board.

(b) Upon payment of five dollars ($5.00) the Board shall issue a license certificate to each applicant who successfully passes the examination. (1969, c. 999.)

§ 93D-9. Apprenticeship licenses.

(a) Any applicant who has fulfilled the requirements of G.S. 93D-5(a) may apply to the Board for an apprenticeship license.

(b) Upon receiving an application as provided under G.S. 93D-5(a) accompanied by a fee of five dollars ($5.00), the Board may issue an apprenticeship license which shall entitle the applicant to fit and sell hearing aids under the supervision of a holder of a regular license.

(c) No apprenticeship license shall be issued by the Board under this section unless the applicant shows to the satisfaction of the Board that he is or will be supervised and trained by a hearing aid fitter and seller who holds a license.

(d) If a person 21 years of age or older who holds an apprenticeship license issued under this section does not take the next succeeding examination given after a minimum of one full year of apprenticeship, his apprenticeship license

shall not be renewed, except for good cause shown to the satisfaction of the Board.

(e) If a person who holds an apprenticeship license takes and fails to pass the next succeeding examination given after one full year of apprenticeship, the Board may renew the apprenticeship license for a period of time to end 30 days after the results of the examination given next after the date of renewal of said apprenticeship license. The fee for apprenticeship license renewal shall be twenty-five dollars ($25.00).

(f) The apprenticeship license may be revoked for cause as determined by the Board in its discretion. (1969, c. 999; 1973, c. 1345, s. 4.)

§ 93D-10. Registration and notice.

The Board shall register each person to whom it grants a license or apprentice license. The secretary-treasurer of the Board shall keep a record of the place of business of all licensees and apprentice licensees. Any notice required to be given by the Board to a person holding a license or apprentice license may be given by mailing to him at the last address received by the Board from him. (1969, c. 999.)

§ 93D-11. Annual fees; failure to pay; expiration of license; occupational instruction courses.

Every person who engages in the fitting and selling of hearing aids shall pay to the Board an annual license renewal fee of fifty dollars ($50.00). Such payment shall be made prior to the first day of April in each year. In case of default in payment the license shall expire 30 days after notice by the secretary-treasurer to the last known address of the licensee by registered mail. The Board may reinstate an expired license upon the showing of good cause for late payment of fees, upon payment of said fees within 60 days after expiration of the license, and upon the further payment of a late penalty of ten dollars ($10.00). After 60 days after the expiration date, the Board may reinstate the license for good cause shown upon application for reinstatement and payment of the late penalty of ten dollars ($10.00) and renewal fee. The Board may require all licensees to successfully attend and complete a course or courses of occupational instruction funded, conducted or approved or sponsored by the Board on an annual basis as a condition to any license renewal and evidence of satisfactory attendance and completion of any such course or courses shall be provided the Board by the licensee. (1969, c. 999; 1975, c. 550, s. 3; 1979, c. 848.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, substituted "fifty dollars ($50.00)" for "twenty-five dollars ($25.00)" in the first sentence.

§ 93D-12. License to be displayed at office.

Every person to whom a license or apprentice license is granted shall display the same in a conspicuous part of his office wherein the fitting and selling of hearing aids is conducted, or shall have a copy of such license or apprentice license on his person and exhibit the same upon request when fitting or selling hearing aids outside of his office. (1969, c. 999.)

§ 93D-13. Discipline, suspension, revocation of licenses and apprentice licenses.

(a) The Board may in its discretion administer the punishment of private reprimand, suspension of license or apprentice license for a fixed period or revocation of license or apprentice license as the case may warrant in their judgment for any violation of the rules and regulations of the Board or for any of the following causes:

(1) Habitual drunkenness
(2) Gross incompetence
(3) Knowingly fitting and selling hearing aids while suffering with a contagious or infectious disease
(4) Commission of a criminal offense indicating professional unfitness
(5) The use of a false name or alias in his business
(6) Conduct involving willful deceit
(7) Conduct involving fraud or any other business conduct involving moral turpitude
(8) Advertising of a character or nature tending to deceive or mislead the public
(9) Advertising declared to be unethical by the Board or prohibited by the code of ethics established by the Board
(10) Permitting another person to use his license or apprentice license, and
(11) For violating any of the provisions of this Chapter.

(b) Board action in revoking or suspending a license shall be in accordance with the provisions of Chapter 150A of the General Statutes. Any person whose license has been suspended for any of the grounds or reasons herein set forth, may, after the expiration of 90 days but within two years, apply to the Board to have the same reissued; upon a showing satisfactory to the Board that such reissuance will not endanger the public health and welfare, the Board may reissue a license to such person for a fee of fifty dollars ($50.00) plus five dollars ($5.00) for a certificate of license. If application is made subsequent to two years from date of suspension, reissuance shall be in accordance with the provisions of G.S. 93D-8. (1969, c. 999; 1973, c. 1331, s. 3.)

CASE NOTES

Gross Incompetence. — The term "gross incompetence" was intended by the legislature to mean a failure on the part of the individual hearing aid dealer to possess the minimum degree of technical expertise or ability required to adequately fit and service hearing aids. Faulkner v. North Carolina State Hearing Aid Dealers & Fitters Bd., 38 N.C. App. 222, 247 S.E.2d 668 (1978).

A hearing aid salesman's failure to make promised refunds, while reprehensible, failed to demonstrate any lack of competence on his part in selling and fitting hearing aids. Faulkner v. North Carolina State Hearing Aid Dealers & Fitters Bd., 38 N.C. App. 222, 247 S.E.2d 668 (1978).

§ 93D-14. Persons not affected.

This Chapter shall not prevent any person from engaging in the measuring of human hearing for the purpose of selection of hearing aids, provided such person or organization employing such person does not sell hearing aids or accessories thereto, nor shall this Chapter apply to any physician licensed to practice medicine or surgery in the State of North Carolina. Nothing in this Chapter shall permit a licensee hereunder to perform any practices or services set forth in Article 17 of Chapter 90 of the General Statutes of North Carolina. (1969, c. 999.)

§ 93D-15. Violation of Chapter.

Any person who violates any of the provisions of this Chapter and any person who holds himself out to the public as a fitter and seller of hearing aids without having first obtained a license or apprentice license as provided for herein shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars ($1,000) nor less than five hundred dollars ($500.00) or imprisonment for not more than six months, or both, in the discretion of the court. (1969, c. 999.)

§ 93D-16. Severability.

If any provision of the Chapter shall be declared unconstitutional or invalid, such invalidity shall not affect other provisions or the application of the Chapter which can be given effect without the invalid provisions. To this end, the provisions of this Chapter are declared to be severable. (1969, c. 999.)

Chapter 94.

Apprenticeship.

Sec.
94-1. Purpose.
94-2. Apprenticeship Council.
94-3. Director of Apprenticeship.
94-4. Powers and duties of Director of Apprenticeship.
94-5. Apprenticeship committees and program sponsors.
94-6. Definition of an apprentice.
94-7. Contents of agreement.
94-8. Approval of apprentice agreements; signatures.
94-9. Rotation of employment.
94-10. [Repealed.]
94-11. Limitation.

§ 94-1. Purpose.

The purposes of this Chapter are: to open to young people the opportunity to obtain training that will equip them for profitable employment and citizenship; to set up, as a means to this end, a program of voluntary apprenticeship under approved apprentice agreements providing facilities for their training and guidance in the arts and crafts of industry and trade, with parallel instruction in related and supplementary education; to promote employment opportunities for young people under conditions providing adequate training and reasonable earnings; to relate the supply of skilled workers to employment demands; to establish standards for apprentice training; to establish an Apprenticeship Council and apprenticeship committees and sponsors to assist in effectuating the purposes of this Chapter; to provide for a Director of Apprenticeship within the Department of Labor; to provide for reports to the legislature and to the public regarding the status of apprentice training in the State; to establish a procedure for the determination of apprentice agreement controversies; and to accomplish related ends. (1939, c. 229, s. 1; 1979, c. 673, s. 1.)

Effect of Amendments. — The 1979 amendment substituted "apprenticeship committees and sponsors" for "local and State joint apprenticeship committees."

Legal Periodicals. — For comment on this Chapter, see 17 N.C.L. Rev. 327.

§ 94-2. Apprenticeship Council.

The Commissioner of Labor shall appoint an Apprenticeship Council composed of four representatives each from employer and employee organizations respectively and three representatives from the public at large. One State official designated by the Department of Public Instruction and one State official designated by the Department of Community Colleges shall be a member ex officio of said council, without vote. The terms of office of the members of the Apprenticeship Council first appointed by the Commissioner of Labor shall expire as designated by the Commissioner at the time of making the appointment: two representatives each of employers and employees, being appointed for one year and one representative of the public at large being appointed for two years; and one representative each of employers, employees, and the public at large being appointed for a term of three years. Any member appointed to fill a vacancy occurring prior to the expiration of the term of his predecessor shall be appointed for the remainder of said term. Each member of the Council not otherwise compensated by public moneys, shall be reimbursed for transportation and shall receive such per diem compensation as is provided generally for boards and commissions under the biennial maintenance appropriation acts for each day spent in attendance at meetings of the Apprenticeship Council. The Commissioner of Labor shall annually appoint one member of the Council to act as its chairman.

The Apprenticeship Council shall meet at the call of the Commissioner of Labor and shall aid him in formulating policies for the effective administration of this Chapter. Subject to the approval of the Commissioner, the Apprenticeship Council shall establish standards for apprentice agreement which in no case shall be lower than those prescribed by this Chapter, shall issue such rules and regulations as may be necessary to carry out the intent and purposes of said Chapter, and shall perform such other functions as the Commissioner may direct. Not less than once a year the Apprenticeship Council shall make a report through the Commissioner of Labor of its activities and findings to the legislature and to the public. (1939, c. 229, s. 2; 1973, c. 476, s. 138; 1977, c. 896.)

§ 94-3. Director of Apprenticeship.

The Commissioner of Labor is hereby directed to appoint a Director of Apprenticeship which appointment shall be subject to the confirmation of the State Apprenticeship Council by a majority vote. The Commissioner of Labor is further authorized to appoint and employ such clerical, technical, and professional help as shall be necessary to effectuate the purposes of this Chapter. (1939, c. 229, s. 3.)

§ 94-4. Powers and duties of Director of Apprenticeship.

The Director, under the supervision of the Commissioner of Labor and with the advice and guidance of the Apprenticeship Council is authorized to administer the provisions of this Chapter; in cooperation with the Apprenticeship Council and apprenticeship committees and sponsors, to set up conditions and training standards for apprentice agreements, which conditions or standards shall in no case be lower than those prescribed by this Chapter; to act as secretary of the Apprenticeship Council; to approve for the Council if in his opinion approval is for the best interest of the apprenticeship any apprentice agreement which meets the standards established under this Chapter; to terminate or cancel any apprentice agreement in accordance with the provisions of such agreement; to keep a record of apprentice agreements and their disposition; to issue certificates of completion of apprenticeship; and to perform such other duties as are necessary to carry out the intent of this Chapter, including other on-job training necessary for emergency and critical civilian production: Provided, that the administration and supervision of related and supplemental instruction for apprentices, coordination of instruction with job experiences, and the selection and training of teachers and coordinators for such instruction shall be the responsibility of State and local boards responsible for vocational education. (1939, c. 229, s. 4; 1951, c. 1031, s. 1; 1979, c. 673, s. 2.)

Effect of Amendments. — The 1979 amendment substituted "apprenticeship committees and sponsors" for "local and State joint apprenticeship committees," and deleted "and of each State joint apprenticeship committee" preceding "to approve."

§ 94-5. Apprenticeship committees and program sponsors.

(a) As used in this Chapter:

(1) "Apprenticeship program" means a plan containing all terms and conditions for the qualification, recruitment, selection, employment, and training of apprentices, including such matters as the requirement for a written apprenticeship agreement.

(2) "Apprenticeship agreement" means a written agreement between an apprentice and either his employer or an apprenticeship committee or sponsor acting as agent for employer(s), which agreement satisfies the requirements of G.S. 94-7.

(3) "Sponsor" means any person, firm, corporation, organization, association or committee operating an apprenticeship program and in whose name the apprenticeship program is approved.

(4) "Employer" means any person, firm, corporation or organization employing an apprentice whether or not such person, firm, corporation or organization is a party to an apprenticeship agreement with the apprentice.

(5) "Apprenticeship committee" means those persons designated by the sponsor, and approved by the Apprenticeship Council, to act for it in the administration of the apprenticeship program. A committee may be "joint," i.e., it is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s) and has been established to conduct, operate or administer an apprenticeship program and enter into apprenticeship agreements with apprentices. A committee may be "unilateral" or "nonjoint" which shall mean a program sponsor in which employees or a bona fide collective bargaining agent is not a party.

(b) An apprenticeship committee may be appointed by the Apprenticeship Council in any trade or group of trades in a city or trade area, whenever the apprentice training needs of such trade or group of trades justifies such establishment.

(c) The function of the apprenticeship committee, or sponsor when there is no apprenticeship committee, shall be: to cooperate with school authorities in regard to the education of apprentices; in accordance with the standards set up by the apprenticeship committee for the same trade or group of trades, where such committee has been appointed, to work in an advisory capacity with employers and employees in matters regarding schedule of operations, application of wage rates, and working conditions for apprentices and to specify the number of apprentices which shall be employed locally in the trade under the apprenticeship agreements under this Chapter; and to adjust apprenticeship disputes, subject to the approval of the director; to ascertain the prevailing rate for journeymen in the city or trade area and specify the graduated scale of wages applicable to apprentices in such trade in such area; to ascertain employment needs in such trade or group of trades and specify the appropriate current ratio of apprentices to journeymen; and to make recommendations for the general good of apprentices engaged in the trade or trades represented by the committee. An apprenticeship committee may appoint a representative and delegate to such representative the authority for implementation and performance of any standards adopted by the committee pursuant to any of the aforementioned functions. (1939, c. 229, s. 5; 1979, c. 673, s. 3.)

Effect of Amendments. — The 1979 amendment, effective May 29, 1979, rewrote this section.

§ 94-6. Definition of an apprentice.

The term "apprentice," as used herein, shall mean a person at least 16 years of age who is covered by a written apprenticeship agreement approved by the Apprenticeship Council, which apprenticeship agreement provides for not less than 2,000 hours of reasonably continuous employment for such person for his

participation in an approved schedule of work experience and for organized, related supplemental instruction in technical subjects related to the trade. A minimum of 144 hours of related supplemental instruction for each year of apprenticeship is recommended. The required hours for apprenticeship agreements and the recommended hours for related supplemental instruction may be decreased or increased in accordance with standards adopted by the apprenticeship committee or sponsor, subject to approval of the Commissioner of Labor. (1939, c. 229, s. 6; 1979, c. 479, ss. 1, 2; c. 673, s. 4.)

Effect of Amendments. — The first 1979 amendment, effective April 30, 1979, substituted "2,000" for "4,000" in the first sentence and rewrote the last sentence to read as follows: "The required hours for apprenticeship agreements and related supplemental instruction may be decreased or increased in accordance with standards adopted by local or statewide apprenticeship sponsors, subject to approval of the Commissioner of Labor."

The second 1979 amendment rewrote the section to read as set out above.

§ 94-7. Contents of agreement.

Every apprentice agreement entered into under this Chapter shall contain:

(1) The names of the contracting parties.

(2) The date of birth of the apprentice.

(3) A statement of the trade, craft, or business which the apprentice is to be taught, and the time at which the apprenticeship will begin and end.

(4) A statement showing (i) the number of hours to be spent by the apprentice in work on the job, and (ii) the number of hours to be spent in related and supplemental instruction, which is recommended to be not less than 144 hours per year: Provided, that in no case shall the combined weekly hours of work and of required related and supplemental instruction of the apprentice exceed the maximum number of hours of work prescribed by law for a person of the age of the apprentice.

(5) A statement setting forth a schedule of the processes in the trade or industry division in which the apprentice is to be taught and the approximate time to be spent at each process.

(6) A statement of the graduated scale of wages to be paid the apprentice and whether the required school time shall be compensated.

(7) A statement providing for a period of probation of not more than 500 hours of employment and instruction extending over not more than four months, during which time the apprentice agreement shall be terminated by the Director at the request in writing of either party, and providing that after such probationary period the apprentice agreement may be terminated by the Director by mutual agreement of all parties thereto, or canceled by the Director for good and sufficient reason. The Council at the request of a joint apprentice committee may lengthen the period of probation.

(8) A provision that all controversies or differences concerning the apprentice agreement which cannot be adjusted locally in accordance with G.S. 94-5 shall be submitted to the Director for determination.

(9) A provision that an employer who is unable to fulfill his obligation under the apprentice agreement may with the approval of the Director transfer such contract to any other employer: Provided, that the apprentice consents and that such other employer agrees to assume the obligations of said apprentice agreement.

(10) Such additional terms and conditions as may be prescribed or approved by the Director not inconsistent with the provisions of this

Chapter. (1939, c. 229, s. 7; 1945, c. 729, s. 1; 1977, c. 500, s. 1; 1979, c. 673, s. 5.)

Effect of Amendments. — The 1979 amendment inserted "(i)," "on the job," and "(ii)" and substituted "is recommended to" for "instruction shall" in the part of subdivision (4) preceding the proviso. The amending clause in the 1979 amendatory act provides that subdivision (4) "is hereby amended by rewriting the first sentence thereof to read as follows," and sets out the subdivision as amended without the proviso. It appears, however, that there was no intention to eliminate the proviso, and it has been retained in subdivision (4) as set out above.

§ 94-8. Approval of apprentice agreements; signatures.

No apprentice agreement under this Chapter shall be effective until approved by the Director. Every apprentice agreement shall be signed by the employer, or by an association of employers or an organization of employees as provided in G.S. 94-9, and by the apprentice, and if the apprentice is a minor, by either of the minor's lawful parents, or by any person, agency, organization or institution standing in loco parentis. Where a minor enters into an apprentice agreement under this Chapter for a period of training extending into his majority, the apprentice agreement shall likewise be binding for such a period as may be covered during the apprentice's majority. (1939, c. 229, s. 8; 1977, c. 550, s. 2.)

§ 94-9. Rotation of employment.

For the purpose of providing greater diversity of training or continuity of employment, any apprentice agreement made under this Chapter may in the discretion of the Director of Apprenticeship be signed by an association of employers or an organization of employees instead of by an individual employer. In such a case, the apprentice agreement shall expressly provide that the association of employers or organization of employees does not assume the obligation of an employer but agrees to use its best endeavors to procure employment and training for such apprentice with one or more employers who will accept full responsibility, as herein provided, for all the terms and conditions of employment and training set forth in said agreement between the apprentice and employer association or employee organization during the period of each such employment. The apprentice agreement in such a case shall also expressly provide for the transfer of the apprentice, subject to the approval of the Director, to such employer or employers who shall sign in written agreement with the apprentice, and if the apprentice is a minor with his parent or guardian, as specified in G.S. 94-8, contracting to employ said apprentice for the whole or a definite part of the total period of apprenticeship under the terms and conditions of employment and training set forth in the said agreement entered into between the apprentice and employer association or employee organization. (1939, c. 229, s. 9.)

§ 94-10: Repealed by Session Laws 1945, c. 729, s. 2.

§ 94-11. Limitation.

Nothing in this Chapter or in any apprentice agreement approved under this Chapter shall operate to invalidate any apprenticeship provision in any collective agreement between employers and employees, setting up higher apprenticeship standards; provided, that none of the terms or provisions of this Chapter shall apply to any person, firm, corporation or crafts unless, until, and

only so long as such person, firm, corporation or crafts voluntarily elects that the terms and provisions of this Chapter shall apply. Any person, firm, corporation or crafts terminating an apprenticeship agreement shall notify the Director of Apprenticeship. (1939, c. 229, s. 11; 1945, c. 729, s. 3.)

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Article 1.

Department of Labor.

§ 95-1. Department of Labor established.

A Department of Labor is hereby created and established. The duties of said Department shall be exercised and discharged under the supervision and direction of a commissioner, to be known as the Commissioner of Labor. (Rev., s. 3909; 1919, c. 314, s. 4; C. S., s. 7309; 1931, c. 312, s. 1.)

Legal Periodicals. — For comment on the 1931 act, see 9 N.C.L. Rev. 413.

§ 95-2. Election of Commissioner; term; salary; vacancy.

The Commissioner of Labor shall be elected by the people in the same manner as is provided for the election of the Secretary of State. The term of office of the Commissioner of Labor shall be four years, and the salary of the Commissioner of Labor shall be the same as for superior court judges as set by the General Assembly in the Budget Appropriation Act. Any vacancy in the office shall be filled by the Governor, until the next general election. The office of the Department of Labor shall be kept in the City of Raleigh and shall be provided for as are other public offices of the State. (Rev., ss. 3909, 3910; 1919, c. 314, s. 4; C. S., s. 7310; 1931, c. 312, s. 2; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 349; 1943, c. 499, s. 2; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 5; 1967, c. 1130; c. 1237, s. 5; 1969, c. 1214, s. 5; 1971, c. 912, s. 5; 1973, c. 778, s. 5; 1975, 2nd Sess., c. 983, s. 20; 1977, c. 802, s. 42.11.)

§ 95-3. Divisions of Department; Commissioner; administrative officers.

The Department of Labor shall consist of the following officers, divisions and sections:

A Commissioner of Labor.

A Division of Standards and Inspections.
A Division of Statistics.

Each division shall be in the charge of a chief administrative officer and shall be organized under such rules and regulations as the Commissioner of Labor and the head of the division concerned, with the approval of the Governor, shall prescribe and promulgate. The Commissioner of Labor, with the approval of the Governor, may make provision for one person to act as chief administrative officer of two or more divisions, when such is deemed advisable. The chief administrative officers of the several divisions shall be appointed by the Commissioner of Labor with the approval of the Governor. The Commissioner of Labor, with the approval of the Governor may combine or consolidate the activities of two or more of the divisions of the Department, or provide for the setting up of other divisions when such action shall be deemed advisable for the more efficient and economical administration of the work and duties of the Department. (1931, c. 277; c. 312, s. 4; 1933, c. 46; 1963, c. 313, s. 2.)

Editor's Note. — Pursuant to § 95-25.17, the Division of Standards is renamed the Wage and Hour Division.

§ 95-4. Authority, powers and duties of Commissioner.

The Commissioner of Labor shall be the executive and administrative head of the Department of Labor. In addition to the other powers and duties conferred upon the Commissioner of Labor by this Article, the said Commissioner shall have authority and be charged with the duty:

(1) To appoint and assign to duty such clerks, stenographers, and other employees in the various divisions of the Department, with approval of said director of division, as may be necessary to perform the work of the Department, and fix their compensation, subject to the approval of the Department of Administration. The Commissioner of Labor may assign or transfer stenographers, or clerks, from one division to another, or inspectors from one division to another, or combine the clerical force of two or more divisions, or require from one division assistance in the work of another division, as he may consider necessary and advisable: Provided, however, the provisions of this subdivision shall not apply to the Industrial Commission, or the Division of Workmen's Compensation.

(2) To make such rules and regulations with reference to the work of the Department and of the several divisions thereof as shall be necessary to properly carry out the duties imposed upon the said Commissioner and the work of the Department; such rules and regulations to be made subject to the approval of the Governor.

(3) To take and preserve testimony, examine witnesses, administer oaths, and under proper restriction enter any public institution of the State, any factory, store, workshop, laundry, public eating house or mine, and interrogate any person employed therein or connected therewith, or the proper officer of a corporation, or file a written or printed list of interrogatories and require full and complete answers to the same, to be returned under oath within 30 days of the receipt of said list of questions.

(4) To secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State. To aid him in the work, he shall have power to appoint factory inspectors and other assistants. The duties of such inspectors and other assistants shall be prescribed by the Commissioner of Labor.

(5) To visit and inspect, personally or through his assistants and factory inspectors, at reasonable hours, as often as practicable, the factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State, where goods, wares, or merchandise are manufactured, purchased, or sold, at wholesale or retail.

(6) To enforce the provisions of this section and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating houses, and commercial institutions in this State before any court of competent jurisdiction. It shall be the duty of the district attorney of the proper district upon the request of the Commissioner of Labor, or any of his assistants or deputies, to prosecute any violation of a law, which it is made the duty of the said Commissioner of Labor to enforce. (1925, c. 288; 1931, c. 277; c. 312, ss. 5, 6; 1933, cc. 46, 244; 1945, c. 723, s. 2; 1957, c. 269, s. 1; 1973, c. 47, s. 2; c. 108, s. 41.)

Editor's Note. — Pursuant to § 97-1.1, "Division of Workmen's Compensation" is deemed to refer to "Division of Worker's Compensation."

§ 95-5. Annual report to Governor; recommendation as to legislation needed.

The Commissioner of Labor shall annually, on or before the first day of January, file with the Governor a report covering the activities of the Department, and the report so made on or before January 1 of the years in which the General Assembly shall be in session shall be accompanied by recommendations of the Commissioner with reference to such changes in the law applying to or affecting industrial and labor conditions as the Commissioner may deem advisable. The report of the Commissioner of Labor shall be printed and distributed in such manner and form as the Director of the Budget shall authorize. (1931, c. 312, s. 7.)

§ 95-6. Statistical report to Governor; publication of information given by employers.

It shall be the duty of the Commissioner of Labor to collect in the manner herein provided for, and to assort, systematize, and present to the Governor as a part of the report provided for in G.S. 95-5, statistical details relating to all divisions of labor in the State, and particularly concerning the following: the extent of unemployment, the hours of labor, the number of employees and sex thereof, and the daily wages earned; the conditions with respect to labor in all manufacturing establishments, hotels, stores, and workshops; and the industrial, social, educational, moral, and sanitary conditions of the labor classes, in the productive industries of the State. Such statistical details shall include the names of firms, companies, or corporations, where the same are located, the kind of goods produced or manufactured, the period of operation of each year, the number of employees, male or female, the number engaged in clerical work and the number engaged in manual labor, with the classification of the number of each sex engaged in such occupation and the average daily wage paid each: Provided, that the Commissioner shall not, nor shall anyone connected with his office, publish or give or permit to be published or given to any person the individual statistics obtained from any employer, and all such statistics, when published, shall be published in connection with other similar statistics and be set forth in aggregates and averages. (1931, c. 312, s. 8.)

§ 95-7. Power of Commissioner to compel the giving of such information; refusal as contempt.

The Commissioner of Labor, or his authorized representative, for the purpose of securing the statistical details referred to in G.S. 95-6, shall have power to examine witnesses on oath, to compel the attendance of witnesses and the giving of such testimony and production of such papers as shall be necessary to enable him to gain the necessary information. Upon the refusal of any witness to comply with the requirements of the Commissioner of Labor or his representative in this respect, it shall be the duty of any judge of the superior court, upon the application of the Commissioner of Labor, or his representative, to order the witness to show cause why he should not comply with the requirements of the said Commissioner, or his representative, if in the discretion of the judge such requirement is reasonable and proper. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 9.)

§ 95-8. Employers required to make statistical report to Commissioner; refusal as contempt.

It shall be the duty of every owner, operator, or manager of every factory, workshop, mill, mine, or other establishment, where labor is employed, to make to the Department, upon blanks furnished by said Department, such reports and returns as the said Department may require, for the purpose of compiling such labor statistics as are authorized by this Article, and the owner or business manager shall make such reports and returns within the time prescribed therefor by said Commissioner, and shall certify to the correctness of the same. Upon the refusal of any person, firm, or corporation to comply with the provisions of this section, it shall be the duty of any judge of the superior court, upon application by the Commissioner or by any representative of the Department authorized by him, to order the person, firm, or corporation to show cause why he or it should not comply with the provisions of this section. Refusal to comply with the order of the judge of the superior court shall be dealt with as for contempt of court. (1931, c. 312, s. 10.)

§ 95-9. Employers to post notice of laws.

It shall be the duty of every employer to keep posted in a conspicuous place in every room where five or more persons are employed a printed notice stating the provisions of the law relative to the employment of adult persons and children and the regulation of hours and working conditions. The Commissioner of Labor shall furnish the printed form of such notice upon request. (1933, c. 244, s. 6.)

§ 95-10: Repealed by Session Laws 1963, c. 313, s. 1.

§ 95-11. Division of Standards and Inspection.

(a) The chief administrative officer of the Division of Standards and Inspection shall be known as the Director of the Division. It shall be his duty, under the direction and supervision of the Commissioner of Labor, and under rules and regulations to be adopted by the Department as herein provided, to make or cause to be made all necessary inspections to see that all laws, rules and regulations concerning the safety and well-being of labor are promptly and effectively carried out.

(b) The Division shall make studies and investigations of special problems connected with the labor of women and children, and create the necessary organization, and appoint an adequate number of investigators, with the consent of the Commissioner of Labor and the approval of the Governor; and the Director of said Division, under the supervision and direction of the Commissioner of Labor and under such rules and regulations as shall be prescribed by said Commissioner, with the approval of the Governor, shall perform all duties devolving upon the Department of Labor, or the Commissioner of Labor with relation to the enforcement of laws, rules, and regulations governing the employment of women and children.

(c) The Director shall report annually to the Commissioner of Labor the activities of the Division, with such recommendations as may be considered advisable for the improvement of the working conditions for women and children.

(d) The Division shall collect and collate information and statistics concerning the location, estimated and actual horsepower and condition of valuable water powers, developed and undeveloped, in this State; also concerning farm lands and farming, the kinds, character, and quantity of the annual farm products in this State; also of timber lands and timbers, truck gardening, dairying, and such other information and statistics concerning the agricultural and industrial welfare of the citizens of this State as may be deemed to be of interest and benefit to the public. The Director shall also perform the duties of mine inspector as prescribed in the Chapter on Mines and Quarries.

(e) The Division shall conduct such research and carry out such studies as will contribute to the health, safety, and general well-being of the working classes of the State. The finding of such investigations, with the approval of the Commissioner of Labor and the Governor and the cooperation of the chief administrative officer of the Division or Divisions directly concerned, shall be promulgated as rules and regulations governing work places and working conditions. All recommendations and suggestions pertaining to health, safety, and well-being of employees shall be transmitted to the Commissioner of Labor in an annual report which shall cover the work of the Division of Standards and Inspection.

(f) The Division shall make, promulgate and enforce rules and regulations for the protection of employees from accident and from occupational disease; and shall upon request, and after such investigation as it deems proper, issue certificates of compliance to such employers as are found by it to be in compliance with the rules and regulations made and promulgated in accordance with the provisions of this paragraph. (1931, c. 312, s. 12; c. 426; 1935, c. 131.)

Editor's Note. — Pursuant to § 95-25.17, the Division of Standards is renamed the Wage and Hour Division.

CASE NOTES

Section Does Not Create Criterion for Negligence. — Neither the legislature, when it authorized the Division of Standards and Inspection of the Department of Labor to promulgate rules and regulations to protect the health, safety and general well-being of the working classes of the State, nor the Division when it wrote the rules, intended to create a criterion for negligence in civil damages suits; hence, violation of those rules cannot be asserted as contributory negligence. Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963).

§ 95-12. Division of Statistics.

The Division of Statistics shall be in charge of a Chief Statistician. It shall be his duty, under the direction and supervision of the Commissioner of Labor, to collect, assort, systematize, and print all statistical details relating to all divisions of labor in this State as is provided in G.S. 95-6. (1931, c. 312, s. 13.)

§ 95-13. Enforcement of rules and regulations.

In the event any person, firm or corporation shall, after notice by the Commissioner of Labor, violate any of the rules or regulations promulgated under the authority of this Article or any laws amendatory hereof relating to safety devices, or measures, the Attorney General of the State, upon the request of the Commissioner of Labor, may take appropriate action in the civil courts of the State to enforce such rules and regulations. Upon request of the Attorney General, any district attorney of the State of North Carolina in whose district such rule or regulation is violated may perform the duties hereinabove required of the Attorney General. (1939, c. 398; 1973, c. 47, s. 2.)

CASE NOTES

Stated in Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963).

§ 95-14. Agreements with certain federal agencies for enforcement of Fair Labor Standards Act.

The North Carolina State Department of Labor may and it is hereby authorized to enter into agreements with the Wage and Hour Division, and the Children's Bureau, United States Department of Labor, for assistance and cooperation in the enforcement within this State of the act of Congress known as the Fair Labor Standards Act of 1938, approved June 25, 1938, and is further authorized to accept payment and/or reimbursement for its services as provided by said act of Congress. Any such agreement may be subject to the regulations of the administrator of the Wage and Hour Division, or the chief of the Children's Bureau of the United States Department of Labor, as the case may be, and shall be subject to the approval of the Director of the State Budget. Nothing in this section shall be construed as authorizing the State Department of Labor to spend in excess of its appropriation from State funds, except to the extent that such excess may be paid and/or reimbursed to it by the United States Department of Labor. All payments received by the State Department of Labor under this section shall be deposited in the State treasury and are hereby appropriated to the State Department of Labor to enable it to carry out the agreements entered into under this section. (1939, c. 245.)

ARTICLE 2.

Maximum Working Hours.

§§ 95-15 to 95-25: Recodified as §§ 95-25.1 to 95-25.25.

Editor's Note. — This Article was rewritten by Session Laws 1979, c. 839, s. 1, and has been recodified as §§ 95-25.1 to 95-25.25.

ARTICLE 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

(a) This Article shall be known and may be cited as the "Wage and Hour Act."

(b) The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry. The General Assembly declares that the general welfare of the State requires the enactment of this law under the police power of the State. (1937, c. 409, s. 2; 1979, c. 839, s. 1.)

Editor's Note. — This Article is Article 2, §§ 95-15 to 95-25 of this Chapter, as rewritten by Session Laws 1979, c. 839, s. 1, and recodified. The 1979 act also repealed Article 11, §§ 95-85 to 95-96, and Article 17, §§ 95-161 to 95-172, of this Chapter, and Article 1, §§ 110-1 to 110-20, of Chapter 110, and incorporated the subject matter of those Articles in Article 2A of this Chapter as rewritten. Where appropriate, the historical citations to sections from the rewritten and repealed Articles have been added to corresponding sections in the Article as recodified.

Session Laws 1979, c. 839, s. 4, makes this Article effective July 1, 1979, except that §§ 95-25.6 through 95-25.13 and the last sentence of § 95-25.2, subdivision (16), are effective Jan. 1, 1980.

§ 95-25.2. Definitions.

In this Article, unless the context otherwise requires:

(1) "Agriculture" includes farming in all its branches performed by a farmer or on a farm as an incident to or in conjunction with farming operations.

(2) "Commissioner" means the Commissioner of Labor.

(3) "Employ" means to suffer or permit to work.

(4) "Employee" includes any individual employed by an employer.

(5) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee.

(6) "Establishment" means a physical location where business is conducted.

(7) "The Fair Labor Standards Act" means the Fair Labor Standards Act of 1938, as amended and as the same may be amended from time to time by the United States Congress.

(8) "Hours worked" includes all time an employee is employed.

(9) "Payday" means that day designated for payment of wages due by virtue of the employment relationship.

(10) "Pay period" means a period of seven or 14 calendar days, or a calendar month.

(11) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons. For the purposes of G.S. 95-25.3 it also means the State of North Carolina, a city, town, county, or other municipality or agency or instrumentality of government.

(12) "Seasonal food service establishment" means a restaurant, food and drink stand or other establishment generally recognized as a commercial food service establishment, preparing and serving food to the public but operating 180 days or less per year.

(13) "Seasonal religious assembly or a seasonal amusement or recreational establishment" means an establishment which does not operate for more than seven months in any calendar year, or during the preceding calendar year had average receipts for any six months of such year of not more than thirty-three and one-third percent ($33^1/_3\%$) of its average receipts for the other six months of that year.

(14) "Tipped employee" means any employee who customarily receives more than twenty dollars ($20.00) a month in tips.

(15) "Tip" shall mean any money or part thereof over and above the actual amount due a business for goods, food, drink, services or articles sold which is paid in cash or by credit card, or is given to or left for an employee by a patron or patrons of the business where the employee is employed.

(16) "Wage" paid to an employee means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation, and the reasonable cost as determined by the Commissioner of furnishing employees with board, lodging, or other facilities. For the purposes of G.S. 95-25.6 through G.S. 95-25.12, "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.

(17) "Workweek" means any period of 168 consecutive hours. (1959, c. 475; 1961, c. 652; 1969, c. 34, s. 2; c. 218; 1971, c. 1231, s. 1; 1975, c. 413, s. 1; c. 605; 1977, c. 653; c. 672, s. 1; c. 826, s. 1; 1979, c. 839, s. 1.)

Editor's Note. — The last sentence of subdivision (16) of this section is effective Jan. 1, 1980. See the Editor's note under § 95-25.1.

§ 95-25.3. Minimum wage.

(a) Every employer shall pay to each employee who in any workweek performs any work, wages of at least two dollars and seventy-five cents ($2.75) per hour effective July 1, 1979, and two dollars and ninety cents ($2.90) per hour effective July 1, 1980, except as authorized below.

(b) In order to prevent curtailment of opportunities for employment, the wage rate for full-time students, learners, apprentices, and messengers, as defined under the Fair Labor Standards Act, shall be two dollars and forty-five cents ($2.45) per hour, except that the Commissioner may vary the amount after publishing notice, holding a public hearing, and following the other requirements of Chapter 150A (Administrative Procedure Act).

(c) The Commissioner, in order to prevent curtailment of opportunities for employment, may, by regulation, establish a wage rate less than the wage rate in effect under section (a) which may apply to persons whose earning or productive capacity is impaired by age or physical or mental deficiency or injury, as such persons are defined under the Fair Labor Standards Act.

(d) The Commissioner, in order to prevent curtailment of opportunities for employment of the economically disadvantaged and the unemployed, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to all persons (i) who have been unemployed for at least 15 weeks and who are economically disadvantaged, or (ii) who are, or whose families are, receiving aid to families with dependent children provided under Part A of Title IV of the Social Security Act, or who are receiving supplemental security benefits under Title XVI of the Social Security Act.

Pursuant to regulations issued by the Commissioner, certificates establishing eligibility for such subminimum wage shall be issued by the Employment Security Commission.

The regulation issued by the Commissioner shall not permit employment at the subminimum rate for a period in excess of 52 weeks.

(e) The Commissioner, in order to prevent curtailment of opportunities for employment, and to not adversely affect the viability of seasonal establishments, may, by regulation, establish a wage rate not less than eighty-five percent (85%) of the otherwise applicable wage rate in effect under subsection (a) which shall apply to any employee employed by an establishment which is a seasonal religious assembly, a seasonal amusement or recreational establishment, or a seasonal food service establishment.

(f) Tips earned by a tipped employee may be counted as wages only up to fifty percent (50%) of the applicable minimum wage for each hour worked if the tipped employee is notified in advance, is permitted to retain all tips and the employer maintains accurate and complete records of tips received by each employee as such tips are certified by the employee monthly or for each pay period. Tip pooling shall also be permissible among employees who customarily and regularly receive tips; however, no employee's tips may be reduced by more than fifteen percent (15%) under a tip pooling arrangement. (1959, c. 475; 1963, c. 816; 1965, c. 229; 1969, c. 34, s. 1; 1971, c. 138; 1973, c. 802; 1975, c. 256, s. 1; 1977, c. 519; 1979, c. 839, s. 1.)

Cross References. — As to exemptions from the provisions of this section, see § 95-25.14.

§ 95-25.4. Overtime.

(a) Every employer shall pay each employee who works longer than 45 hours in any workweek at a rate of not less than time and one half of the regular rate of pay of the employee for those hours in excess of 45 per week.

(b) Hospital and nursing home employers may elect to pay overtime after eight hours per day or 80 hours in a 14-day work period, if the employee is notified in advance and is paid not less than one and one-half times the regular rate of pay of the employee for those hours in excess of eight per day or 80 in such 14-day work period. (1973, c. 685, s. 1; 1979, c. 839, s. 1.)

Cross References. — As to exemptions from the provisions of this section, see § 95-25.14.

§ 95-25.5. Youth employment.

(a) The Commissioner shall require employment certificates for all workers under 18 years of age and shall prescribe regulations for the issuance and revocation of certificates. Such regulations shall prescribe that certificates be issued by county or city directors of social services.

(b) An employer shall not employ minors under age 18 in hazardous occupations, as defined under the Fair Labor Standards Act.

(c) An employer may employ minors 14 and 15 years old:

(1) No more than three hours on a day when school is in session for the minor, except that the minor may work up to six hours on the last day of the school week;

(2) No more than eight hours on a day when school is not in session for the minor;

(3) Only between 7 A.M. and 7 P.M., except to 9 P.M. when there is no school for the minor the next day; and

(4) No more hours per week than the following:

Days school in session for the minor	Weekly hours
5	18
4	26
3	34
2 or less	40

(d) An employer may employ minors 12 and 13 years of age outside school hours in the distribution of newspapers to the consumer but not more than three hours per day. An employment certificate shall not be required for any person under 18 years of age engaged in the distribution of newspapers to the consumer outside of school hours.

(e) No minor under 16 years of age shall be employed for more than five consecutive hours without an interval of at least 30 minutes for rest. No period of less than 30 minutes shall be deemed to interrupt a continuous period of work.

(f) The Commissioner may waive for any minor over 12 years of age any provision of this section and authorize the issuance of an employment certificate when:

(1) He receives a letter from a social worker, court, probation officer, county department of social services, or school official stating those factors which create a hardship situation when the best interests of a minor 12 years of age or older are served by allowing him to work; and

(2) He determines that the health or safety of the minor would not be adversely affected; and

(3) The parent, guardian, or other person standing in loco parentis consents in writing to the proposed employment. (1937, c. 317, ss. 1-3, 6, 9, 18; 1943, c. 670; 1951, c. 1187, s. 1; 1967, cc. 173, 764; 1969, c. 962; 1973, c. 649, s. 1; c. 758, s. 1; 1977, c. 551, ss. 1-4; 1979, c. 839, s. 1.)

Cross References. — As to exemptions from the provisions of this section, see § 95-25.14.

§ 95-25.6. Wage payment.

Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance. (1975, c. 413, s. 3; 1977, c. 826, s. 3; 1979, c. 839, s. 1.)

§ 95-25.7. Payment to separated employees.

Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday. (1975, c. 413, s. 4; 1979, c. 839, s. 1.)

§ 95-25.8. Withholding of wages.

An employer may withhold or divert any portion of an employee's wages when:

(1) The employer is required or empowered to do so by State or federal law, or

(2) The employer has a written authorization from the employee which is signed on or before the payday for the pay period from which the deduction is to be made. (1975, c. 413, s. 6; 1979, c. 839, s. 1.)

§ 95-25.9. Certain claims not to be deducted from paycheck covering period when claim arises.

Except as otherwise provided in this Article, cash shortages, inventory shortages, or damage to an employer's property may not be deducted from an employee's wages due on the payday immediately following the occurrence of the shortage or damage. (1979, c. 839, s. 1.)

§ 95-25.10. Combined amounts of certain deductions limited to fifteen percent of gross pay.

Pursuant to G.S. 95-25.8(2) and subject to G.S. 95-25.9, the following items may be deducted from any paycheck, but their combined amount shall not be in excess of fifteen percent (15%) of gross wages:

(1) Cash shortages,

(2) Inventory shortages,

(3) Damage to an employer's property,

(4) Deposits made by the employee for the use of the employer's property. (1979, c. 839, s. 1.)

§ 95-25.11. Portion of final paycheck not subject to fifteen percent limitation; employer's remedy.

The fifteen percent (15%) limitation imposed by G.S. 95-25.10 above only applies to that portion of a separated employee's final paycheck which is equal to the minimum wage required by G.S. 95-25.3. Any amounts in excess of the minimum wage required by G.S. 95-25.3 and any other amounts due the employee may be deducted in their entirety.

Nothing in this Article shall preclude an employer from bringing an action in the General Court of Justice to collect any amounts due the employer from the employee. (1979, c. 839, s. 1.)

§ 95-25.12. Vacation pay.

An employer is not required to provide vacations for employees. If the employer provides vacations to employees, the employer shall pay all vacation pay or payment in lieu of time off as required by company policy or past practice.

An accrual policy is not required. If there is an accrual policy, all vacation pay in lieu of time off is due at termination unless the policy or past practice

indicates that an employee quitting without notice forfeits accrued time and payment, and the employee fails to notify or is discharged for cause.

For purposes of this section the term "discharged for cause" shall mean a discharge for willful or habitual tardiness or absence from work or being disorderly or intoxicated while at work, or destructive of employer's property or shall mean that an employee is discharged for violating specific written company policy of which the employee has been previously warned and for which a discharge is the stated remedy for such violation. An accrual policy containing a forfeiture clause based upon any factor other than failure to notify or discharge for cause is null and void. (1979, c. 839, s. 1.)

§ 95-25.13. Notification, posting, and records.

Every employer shall:

(1) Notify his employees, orally or in writing at the time of hiring, of the rate of pay, policies on vacation time and pay, sick leave and comparable matters, and the day, and place for payment of wages;

(2) Make available to his employees, in writing or through a posted notice maintained in a place accessible to his employees, employment practices and policies with regard to vacation pay, sick leave, and comparable matters;

(3) Notify his employees, in writing or through a posted notice maintained in a place accessible to his employees, of any changes in the arrangements specified in (b) above prior to the time of such changes except that wages and benefits may be retroactively increased without the prior notice required by this subsection; and

(4) Furnish each employee with an itemized statement of deductions made from his wages under G.S. 95-25.8 for each pay period such deductions are made. (1975, c. 413, s. 7; 1979, c. 839, s. 1.)

§ 95-25.14. Exemptions.

(a) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), G.S. 95-25.5 (Youth Employment), and G.S. 95-25.15(b) (Record Keeping) as it relates to these exemptions, do not apply to:

(1) Any person covered by the Fair Labor Standards Act, except for the issuance of employment certificates pursuant to G.S. 95-25.5;

(2) Any person employed in agriculture;

(3) Any person employed as a baby sitter;

(4) Any person employed as a page in the North Carolina General Assembly or in the Governor's office;

(5) The spouse, child or parent of the employer, or any other person qualifying as a dependent of the employer under the income tax laws of North Carolina;

(6) Any person employed in an establishment that does not have four or more persons employed in any workweek;

(7) Any employee employed in a bona fide executive, administrative, professional, or outside sales capacity, as defined under the Fair Labor Standards Act.

(b) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), and G.S. 95-25.15(b) (Record Keeping) as it relates to these exemptions, do not apply to:

(1) Bona fide volunteers in medical, educational, religious, or nonprofit organizations where an employer-employee relationship does not exist;

(2) Persons confined in any penal, correctional, or mental institution of the State or local government;

(3) Any employee of a boys' or girls' summer camp;
(4) Any person employed in the catching, processing, or first sale of seafood.

(c) The provisions of G.S. 95-25.4 (Overtime), and G.S. 95-25.15(b) (Record Keeping) as it relates to this exemption, do not apply to:
(1) Drivers, drivers' helpers, loaders, and mechanics, as defined under the Fair Labor Standards Act;
(2) Taxicab drivers;
(3) Seamen, employees of railroads, and employees of air carriers, as defined under the Fair Labor Standards Act;
(4) Salespersons and mechanics employed by automotive, truck, and farm implement dealers, as defined under the Fair Labor Standards Act;
(5) Salespersons employed by trailer, boat and aircraft dealers, as defined under the Fair Labor Standards Act;
(6) Child care workers or other live-in employees in homes for dependent children.

(d) The provisions of G.S. 95-25.3 (Minimum Wage) do not apply to any person employed in a seasonal recreation program by a city, town, county, or other municipality or agency or instrumentality of local government.

(e) The provisions of this Article with the exception of G.S. 95-25.3 and provisions of G.S. 95-25.2 necessary to interpret the application of G.S. 95-25.3 do not apply to the State of North Carolina, a city, town, county, or other municipality or agency or instrumentality of government. (1937, c. 406; c. 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59; 1947, c. 825; 1949, c. 1057; 1959, cc. 475, 629; 1961, cc. 602, 1070; 1963, c. 1123; 1965, c. 724; 1967, c. 998; 1973, c. 600, s. 1; 1975, c. 19, s. 26; c. 413, s. 2; 1977, c. 146; 1979, c. 839, s. 1.)

CASE NOTES

Cited in Thornton v. Thornton, 45 N.C. App. 25, 262 S.E.2d 326 (1980).

§ 95-25.15. Investigations and inspection of records; notice of law.

(a) The Commissioner or his designated representative shall have the power and authority to enter any place of employment and gather such facts as are essential to determine whether or not the employer is covered by any provision of this Article.

With respect to any provision of this Article under which the employer is covered, the Commissioner or his designated representative may inspect such places and such records, make transcriptions of any and all such records, question employees and investigate such facts, conditions, practices, or matters as are necessary to determine whether the employer has violated said provision of this Article.

With respect to the provisions of G.S. 95-25.6 through 95-25.12 (Wage Payment) as those provisions apply to persons covered by the Fair Labor Standards Act, the Commissioner or his designated representative shall have no authority under this subsection unless the Commissioner or his designated representative has received a complaint from an employee of the covered establishment, and then shall investigate that specific complaint only.

(b) Except as otherwise provided in this Article, every employer subject to any provision of this Article shall make, keep, and preserve such records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment which are essential to the enforcement of

this Article and are prescribed by regulation of the Commissioner, except that the Commissioner shall have no authority to prescribe records for the State of North Carolina, a city, town, county or other municipality or agency or instrumentality of government.

(c) A poster summarizing the major provisions of this Article shall be displayed in every establishment subject to this Article. (1937, c. 317, ss. 5, 19; 1959, c. 475; 1971, c. 1231, s. 2; 1973, c. 649, s. 4; 1975, c. 413, ss. 7, 9; 1979, c. 839, s. 1.)

Cross References. — As to exemptions from subsection (b) of this section, see § 95-25.14.

§ 95-25.16. Enforcement.

(a) The Commissioner shall enforce and administer the provisions of this Article, and the Commissioner or his authorized representative is empowered to hold hearings and to institute criminal and civil proceedings hereunder.

(b) The Commissioner or his authorized representative shall have power to administer oaths and examine witnesses, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and take depositions and affidavits in any proceeding hereunder. (1937, c. 317, s. 19; c. 409, s. 7; 1971, c. 1231, s. 2; 1973, c. 649, s. 4; 1975, c. 473, s. 9; c. 475; 1979, c. 839, s. 1.)

§ 95-25.17. Wage and Hour Division established.

The State Employment Standards Division within the North Carolina Department of Labor is renamed the Wage and Hour Division. The Commissioner shall reappoint the Director of the State Employment Standards Division as the Director of the Wage and Hour Division and shall reappoint such other employees as he deems necessary to assist him in administering the provisions of this Article. The Commissioner shall continue to prescribe the powers, duties, and responsibilities of the Director and employees engaged in the administration of this Article. (1979, c. 839, s. 1.)

§ 95-25.18. Legal representation.

It shall be the duty of the Attorney General of North Carolina, when requested, to represent the Department of Labor in actions or proceedings in connection with this Article. (1979, c. 839, s. 1.)

§ 95-25.19. Rules and regulations.

Subject to the requirements of Article 2 of Chapter 150A, the Commissioner is authorized to issue such rules and regulations as are necessary for the purpose of carrying out the provisions of this Article. (1937, c. 317, s. 18; 1975, c. 413, s. 12; 1979, c. 839, s. 1.)

§ 95-25.20. Complainants protected.

No employer shall discharge or in any manner discriminate against any employee because the employee files a complaint or participates in any investigation or proceeding under this Article. Any employee who believes that he has been discharged or otherwise discriminated against in violation of this section may, within 30 days after such violation occurs, file a complaint with the Commissioner alleging such discrimination. If the Commissioner deter-

mines that the provisions of this section have been violated, he shall bring an action against the employer in the superior court division of the General Court of Justice in the county wherein the discharge or discrimination occurred. In any such action, the superior court shall have jurisdiction, for cause shown, to restrain violations of this section and order all appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay. (1979, c. 839, s. 1.)

§ 95-25.21. Illegal acts.

(a) It shall be unlawful for any person to interfere unduly with, hinder, or delay the Commissioner or any authorized representative in the performance of official duties or refuse to give the Commissioner or his authorized representative any information required for the enforcement of this Article.

(b) It shall be unlawful for any person to make any statement or report, or keep or file any record pursuant to this Article or regulations issued thereunder, knowing such statement, report, or record to be false in a material respect.

(c) Any person who violates this section shall be guilty of a misdemeanor, subject to a fine of not more than two hundred fifty dollars ($250.00) or imprisonment for not more than six months, or both. (1937, c. 409, ss. 6, 8; 1979, c. 839, s. 1.)

§ 95-25.22. Recovery of unpaid wages.

(a) Any employer who violates the provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), or G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, their unpaid overtime compensation, or their unpaid amounts due under G.S. 95-25.6 through 95-25.12, as the case may be. In its discretion, the court may award exemplary damages in an amount not in excess of the amount found to be due as provided above.

(b) Action to recover such liability may be maintained in the General Court of Justice by any one or more employees.

(c) Action to recover such liability may also be maintained in the General Court of Justice by the Commissioner at the request of the employees affected. Any sums thus recovered by the Commissioner on behalf of an employee shall be held in a special deposit account and shall be paid directly to the employee or employees affected.

(d) The court, in any action brought under this section may, in addition to any judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to be paid by the defendant.

The court may order costs and fees of the action and reasonable attorneys' fees to be paid by the plaintiff if the court determines that the action was frivolous.

(e) The Commissioner is authorized to determine and supervise the payment of the amounts due under this section, and the agreement to accept such amounts by the employee shall constitute a waiver of the employee's right to bring an action under subsection (b) of this section.

(f) Actions under this section must be brought within two years pursuant to G.S. 1-53.

(g) Prior to initiating any action under this section, the Commissioner shall exhaust all administrative remedies, including giving the employer the opportunity to be heard on the matters at issue and giving the employer notice of the pending action. (1959, c. 475; 1975, c. 413, s. 11; 1979, c. 839, s. 1.)

§ 95-25.23. Violation of youth employment; civil penalty.

(a) Any employer who violates the provisions of G.S. 95-25.5 (Youth Employment) or any regulation issued thereunder, shall be subject to a civil penalty not to exceed two hundred fifty dollars ($250.00) for each violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The determination by the Commissioner shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination, in which event final determination of the penalty shall be made in an administrative proceeding pursuant to Article 3 of Chapter 150A and in a judicial proceeding pursuant to Article 4 of Chapter 150A.

(b) The amount of such penalty when finally determined may be recovered in a civil action brought by the Commissioner in the General Court of Justice.

(c) Sums collected under this section by the Commissioner shall be paid into the General Fund of the State Treasury. (1979, c. 839, s. 1.)

§ 95-25.24. Restraint of violations.

The General Court of Justice has jurisdiction and authority upon application of the Commissioner to enjoin or restrain violations of this Article. (1979, c. 839, s. 1.)

§ 95-25.25. Construction of Article and severability.

This Article shall receive a liberal construction to the end that the welfare of adult and minor workers may be protected. If any provisions of this Article or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect the provisions or application of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (1979, c. 839, s. 1.)

Article 3.

Various Regulations.

§ 95-26: Repealed by Session Laws 1971, c. 56.

§ 95-27: Repealed by Session Laws 1973, c. 660, s. 3.

§ 95-28. Working hours of employees in State institutions.

It shall be unlawful for any person or official or foreman or other person in authority in Dorothea Dix Hospital, Broughton Hospital, Cherry Hospital, or any penal or correctional institution of the State of North Carolina, excepting the State prison and institutions under the control of the Board of Transportation, to require any employee to work for a greater number of hours than 12 during any 24-hour period, or not more than 72 hours during any one week, or permit the same, during which period the said employee shall be permitted to take one continuous hour off duty; except in case of an emergency as determined by the superintendent, in which case the limitation of 12 hours in any consecutive 24 hours shall not apply. Nothing in this section shall be construed to affect the hours of doctors and superintendents in these hospitals. Any violation of this section shall be a misdemeanor, punishable within the discre-

tion of the court. (1935, c. 136; 1959, c. 1028, ss. 1-3; 1973, c. 507, s. 5; c. 549.)

§ 95-28.1. Discrimination against any person possessing sickle cell trait or hemoglobin C trait prohibited.

No person, firm, corporation, unincorporated association, State agency, unit of local government or any public or private entity shall deny or refuse employment to any person or discharge any person from employment on account of the fact such person possesses sickle cell trait or hemoglobin C trait. The term "sickle cell trait" is defined as the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin S (sickle hemoglobin) as defined by standard chemical and physical analytic techniques, including electrophoresis; and the proportion of hemoglobin A is greater than the proportion of hemoglobin S or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in the normal proportions by standard chemical and physical analytic tests. The term "hemoglobin C trait" is defined as the condition wherein the major natural hemoglobin components present in the blood of the individual are hemoglobin A (normal) and hemoglobin C as defined by standard chemical and physical analytic techniques, including electrophoresis; and the proportion of hemoglobin A is greater than the proportion of hemoglobin C or one natural parent of the individual is shown to have only normal hemoglobin components (hemoglobin A, hemoglobin A2, hemoglobin F) in the normal proportions by standard chemical and physical analytic tests, provided, however, that this section shall not be construed to give employment, promotion, or layoff preference to persons who possess the above traits, or to prevent such persons being discharged for cause. (1975, c. 463, s. 1.)

§ 95-29: Repealed by Session Laws 1973, c. 660, s. 4.

§ 95-30: Repealed by Session Laws 1971, c. 240.

§ 95-31. Acceptance by employer of assignment of wages.

No employer of labor shall be responsible for any assignment of wages to be earned in the future, executed by an employee, unless and until such assignment of wages is accepted by the employer in a written agreement to pay same. (1935, c. 410; 1937, c. 90.)

CASE NOTES

Section Is Constitutional. — The provisions of this section, rendering an assignment invalid unless accepted in writing by the employer, do not deprive the assignee of due process of law or the equal protection of the laws. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

When applied to contracts executed after its effective date this section cannot be held unconstitutional as impairing the obligations of contracts. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

This section is a regulation of contracts growing out of the relationship of employer and employee imposed for the general welfare and is a valid exercise of the police power of the State. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

The fact that this section permits an employer, at his election to accept an assignment of unearned wages executed by his employee does not in itself constitute an unconstitutional discrimination, since in the absence of legislative restraint, one engaged in

private business may exercise his own pleasure as to the parties with whom he will deal. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

Purpose. — The end in view was not only to relieve the employer of unnecessary responsibility, but also to restrain the activities of those who were engaged in the business of buying at a discount the unearned wages of employees. Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115, 137 A.L.R. 733 (1941).

Section Applies Only to Wages to Be Earned. — An assignment by an employee of wages earned and due him from the employer is valid without acceptance by the employer, and the assignee may sue the employer thereon, the provision of this section being applicable only to wages to be earned in the future. Rickman v. Holshouser, 217 N.C. 377, 8 S.E.2d 199 (1940).

Article 4.

Conciliation Service and Mediation of Labor Disputes.

§ 95-32. Declaration of policy.

It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the conciliation and voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the State. To carry out such policy, the necessity for the enactment of the provisions of this Article is hereby declared as a matter of legislative determination. (1941, c. 362, s. 1.)

Cross References. — For subsequent statute affecting this Article, see §§ 95-36.1 to 95-36.9.

§ 95-33. Scope of Article.

The provisions of this Article shall apply to all labor disputes in North Carolina. (1941, c. 362, s. 2.)

§ 95-34. Administration of Article.

The administration of this Article shall be under the general supervision of the Commissioner of Labor of North Carolina. (1941, c. 362, s. 3.)

§ 95-35. Conciliation service established; personnel; removal; compensation.

There is hereby established in the Department of Labor a conciliation service. The Commissioner of Labor may appoint such employees as may be required for the consummation of the work under this Article, prescribe their duties and fix their compensation, subject to existing laws applicable to the appointment and compensation of employees of the State of North Carolina. Any member of or employee in the conciliation service may be removed from office by the Commissioner of Labor, acting in his discretion. (1941, c. 362, s. 4.)

§ 95-36. Powers and duties of Commissioner and conciliator.

Upon his own motion in an existent or imminent labor dispute, the Commissioner of Labor may, and, upon the direction of the Governor, must order a conciliator to take such steps as seem expedient to effect a voluntary, amicable and expeditious adjustment and settlement of the differences and issues between employer and employees which have precipitated or culminated in or threaten to precipitate or culminate in such labor dispute.

The conciliator shall promptly put himself in communication with the parties to such controversy, and shall use his best efforts, by mediation, to bring them to agreement.

The Commissioner of Labor, any conciliator or conciliators and all other employees of the Commissioner of Labor engaged in the enforcement and duties prescribed by this Article, shall not be compelled to disclose to any administrative or judicial tribunal any information relating to, or acquired in the course of their official activities under the provisions of this Article, nor shall any reports, minutes, written communications, or other documents or copies of documents of the Commissioner of Labor and the above employees pertaining to such information be subject to subpoena: Provided, that the Commissioner of Labor, any conciliator or conciliators and all other employees of the Commissioner of Labor engaged in the enforcement of this Article, may be required to testify fully in any examination, trial, or other proceeding in which the commission of a crime is the subject of inquiry. (1941, c. 362, s. 5; 1949, c. 673.)

Legal Periodicals. — For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 465.

Article 4A.

Voluntary Arbitration of Labor Disputes.

§ 95-36.1. Declaration of policy.

It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties to such disputes, should always be considered, respected and protected; and, where efforts at amicable settlement have been unsuccessful, that the voluntary arbitration of such disputes will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the State. To carry out such policies, the necessity for the enactment of the provisions of this Article is hereby declared as a matter of legislative determination. (1945, c. 1045, s. 1; 1951, c. 1103, s. 1.)

Cross References. — As to arbitration and award generally, see §§ 1-567.1 through 1-567.20. As to the State's conciliation service, see §§ 95-32 through 95-36.

State Government Reorganization. — The administration of this Article was transferred to the Department of Labor by § 143A-72, enacted by Session Laws 1971, c. 864.

Legal Periodicals. — For note on labor arbitration in North Carolina, see 29 N.C.L. Rev. 460.

CASE NOTES

Remedy Provided by Article Is Cumulative. — The statutory methods of arbitration provide cumulative and concurrent rather than exclusive procedural remedies. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

Effect on Employee's Right to Sue for Wages and Benefits Due under Labor Contract. — The fact that disputed provisions of a collective labor contract have been arbitrated under the procedure outlined in the contract does not make the question of an accounting for an employee's wages and other benefits under the terms of the contract one of arbitration and award under the Uniform Arbitration Act, former § 1-544 et seq. (now § 1-567.1 et seq.). Nor does the statutory procedure for the voluntary arbitration of labor disputes as contained in this Article preclude maintenance of an action by the employee for such accounting. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

§ 95-36.2. Scope of Article.

The provisions of this Article shall apply only to voluntary agreements to arbitrate labor disputes including, but not restricted to, all controversies between employers, employees and their respective bargaining representatives, or any of them, relating to wages, hours, and other conditions of employment. (1945, c. 1045, s. 2; 1951, c. 1103, s. 1.)

§ 95-36.3. Administration of Article.

(a) The administration of this Article shall be under the general supervision of the Commissioner of Labor of North Carolina.

(b) There is hereby established in the Department of Labor an arbitration service. The Commissioner of Labor may appoint such employees as may be required for the consummation of the work under this Article, prescribe their duties and fix their compensation, subject to existing laws applicable to the appointment and compensation of employees of the State of North Carolina. Any member of or employee in the arbitration service may be removed from office by the Commissioner of Labor, acting in his discretion.

(c) The Commissioner of Labor, with the written approval of the Attorney General as to legality, shall have power to adopt, alter, amend or repeal appropriate rules of procedure for selection of the arbitrator or panel and for conduct of the arbitration proceedings in accordance with this Article: Provided, however, that such rules shall be inapplicable to the extent that they are inconsistent with the arbitration agreement of the parties. (1945, c. 1045, s. 3; 1951, c. 1103, s. 1.)

§ 95-36.4. Voluntary arbitrators.

(a) It shall be the duty of the Commissioner of Labor to maintain a list of qualified and public-spirited citizens who will serve as arbitrators. All appointments of a single arbitrator or member of an arbitration panel by the Commissioner of Labor shall be made from the list of qualified arbitrators maintained by him.

(b) No person named by the Commissioner of Labor to act as an arbitrator in a dispute shall be qualified to serve as such arbitrator if such person has any financial or other interest in the company or labor organization involved in the dispute. (1945, c. 1045, s. 4; 1951, c. 1103, s. 1.)

§ 95-36.5. Fees and expenses.

(a) All the costs of any arbitration proceeding under this Article, including the fees and expenses of the arbitrator or arbitration panel, shall be paid by the parties to the proceeding in accordance with any agreement between them. In the absence of such an agreement, the award in the proceeding shall normally require the payment of such fees, expenses and other proper costs by one or more of the parties: Provided, that if the Commissioner of Labor deems that the public interest so requires, he may provide for the payment to any arbitrator appointed by him of per diem compensation at the rate established by the Commissioner, and actual travel and other necessary expenses incurred while performing duties arising under this Article.

(b) In cases where an arbitrator has been appointed by the Commissioner, the Department of Labor may furnish necessary stenographic, clerical and technical service and assistance to the arbitrator or arbitration panel.

(c) Expenditures of public funds authorized under this section shall be paid from funds appropriated for the administration of this Article. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

Legal Periodicals. — For discussion of 1947 amendment affecting this and following sections, see 25 N.C.L. Rev. 446.

§ 95-36.6. Appointment of arbitrators.

The parties may by agreement determine the method of appointment of the arbitrator or arbitration panel. If the parties have agreed upon arbitration under this Article and have not otherwise agreed upon the number of arbitrators or the method for their appointment, the controversy shall be heard and decided by a single arbitrator designated in such manner as the Commissioner of Labor shall determine. Any person or agency selected by agreement or otherwise to appoint an arbitrator or arbitrators shall send by registered mail to each of the parties to the proposed proceeding notice of the demand for arbitration. The arbitrator or arbitration panel, as the case may be, shall have such powers and duties as are conferred by the voluntary agreement of the parties, and, if there is no agreement to the contrary, shall have power to decide the arbitrability as well as the merits of the dispute. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

CASE NOTES

This section is modified by § 95-36.9(b), giving the courts and not the arbitrators power to decide whether or not a party has agreed to the arbitration of the controversy involved. Charlotte City Coach Lines v. Brotherhood of R.R. Trainmen, 254 N.C. 60, 118 S.E.2d 37 (1961).

§ 95-36.7. Arbitration procedure.

Upon the selection or appointment of an arbitrator or arbitration panel in any labor dispute, a statement of the issues or questions in dispute shall be submitted to said arbitrator or panel in writing, signed by one or more of the parties or their authorized agents. The arbitrator or panel shall appoint a time and place for the hearing, and notify the parties thereof, and may postpone or adjourn the hearing from time to time as may be necessary, subject to any time limits which are agreed upon by the parties. If any party neglects to appear

before the arbitrator or panel after reasonable notice, the arbitrator or panel may nevertheless proceed to hear and determine the controversy. Unless the parties have otherwise agreed, the findings and decision of a majority of an arbitration panel shall constitute the award of the panel and, if a majority vote of the panel cannot be obtained, then the findings and decision of the impartial chairman of the panel shall constitute such award. To be enforceable, the award shall be handed down within 60 days after the written statement of the issues or questions in dispute has been received by the arbitrator or panel, or within such further time as may be agreed to by the parties. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

§ 95-36.8. Enforcement of arbitration agreement and award.

(a) Written agreements to arbitrate labor disputes, including but not restricted to controversies relating to wages, hours and other conditions of employment, shall be valid, enforceable and irrevocable, except upon such grounds as exist in law or equity for the rescission or revocation of any contract, in either of the following cases:

(1) Where there is a provision in a collective bargaining agreement or any other contract, hereafter made or extended, for the settlement by arbitration of a controversy or controversies thereafter arising between the parties;

(2) Where there is an agreement to submit to arbitration a controversy or controversies already existing between the parties.

(b) Any arbitration award, made pursuant to an agreement of the parties described in subsection (a) of this section and in accordance with this Article, shall be final and binding upon the parties to the arbitration proceedings. (1945, c. 1045, s. 5; 1947, c. 379, ss. 1-3; 1951, c. 1103, s. 1.)

§ 95-36.9. Stay of proceedings.

(a) If any action or proceeding be brought in any court upon any issue referable to arbitration under an agreement described in subsection (a) of G.S. 95-36.8, the court where the action or proceeding is pending or a judge of the superior court having jurisdiction in any county where the dispute arose shall stay the action or proceeding, except for any temporary relief which may be appropriate pending the arbitration award, until such arbitration has been had in accordance with the terms of the agreement. The application for stay may be made by motion in writing of a party to the agreement, but such motion must be made before answer or demurrer to the pleading by which the action or proceeding was begun.

(b) Any party against whom arbitration proceedings have been initiated may, within 10 days after receiving written notice of the issue or questions to be passed upon at the arbitration hearing, apply to any judge of the superior court having jurisdiction in any county where the dispute arose for a stay of the arbitration upon the ground that he has not agreed to the arbitration of the controversy involved. Any such application shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions generally, except that it shall be entitled to priority in the interest of prompt disposition. If no such application is made within said 10-day period, a party against whom arbitration proceedings have been initiated cannot raise the issue of arbitrability except before the arbitrator and in proceedings subsequent to the award.

(c) Any party against whom an arbitration award has been issued may, within 10 days after receiving written notice of such award, apply to any judge

of the superior court having jurisdiction in any county where the dispute arose for a stay of the award upon the ground that it exceeds the authority conferred by the arbitration agreement. Any such application shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions generally, except that it shall be entitled to priority in the interest of prompt disposition. If no such application is made within said 10-day period, a party against whom arbitration proceedings have been initiated cannot raise the issue of arbitrability except before the arbitrator or arbitrators, or in proceedings to enforce the award. Any failure to abide by an award shall not constitute a breach of the contract to arbitrate, pending disposition of a timely application for stay of the award pursuant to this paragraph. (1951, c. 1103, s. 1.)

CASE NOTES

Section 95-36.6 is modified by this section, giving the courts and not the arbitrators power to decide whether or not a party has agreed to the arbitration of the controversy involved. Charlotte City Coach Lines v. Brotherhood of R.R. Trainmen, 254 N.C. 60, 118 S.E.2d 37 (1961).

Applied in Calvine Cotton Mills, Inc. v. Textile Workers Union, Local 677, 238 N.C. 719, 79 S.E.2d 181 (1953).

Article 5.

Regulation of Employment Agencies.

§§ 95-37 to 95-47: Recodified as §§ 95-47.1 to 95-47.13.

Editor's Note. — This Article was rewritten by Session Laws 1979, c. 780, s. 1, effective July 1, 1979, and has been recodified as Article 5A, §§ 95-47.1 through 95-47.13.

Article 5A.

Regulation of Private Personnel Services.

§ 95-47.1. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Accept" employment means to accept an employer's offer of employment or to begin work for an employer.

(2) "Applicant," except where it refers to an applicant for a private personnel services license, means any person who uses or attempts to use the services of a private personnel service in seeking employment.

(3) "Commissioner" means the North Carolina Commissioner of Labor or any person designated by the Commissioner as the representative of the Commissioner.

(4) "Complaint" means a communication to the Commissioner or department alleging facts that could support issuance of a warning or citation under G.S. 95-47.9.

(5) "Contract" means any agreement between a private personnel service and an applicant obligating the applicant to pay a fee or any agreement subsequent to such contract reducing the obligations of the private personnel service to the applicant under the contract.

(6) "Employee" means a person performing work or services of any kind or character for compensation.

(7) "Employer" means a person employing or seeking to employ a person for compensation, or any representative or employee of such employer.
(8) "Employment" means any service or engagement rendered or undertaken for wages, salary, commission, or other form of compensation.
(9) "Fee" means anything of value, including money or other valuable consideration or services or the promise of any of the foregoing, required or received by a private personnel service, in payment for any of its services, or act rendered or to be rendered by any private personnel service.
(10) "Interview" means a meeting between an employer and an applicant to discuss potential employment.
(11) "Job order" means an oral or written communication from an employer authorizing a private personnel service to refer applicants for a position the employer has available.
(12) "Licensee" means any person licensed by the Commissioner to operate a private personnel service.
(13) "Manager" of a private personnel service means the person who is responsible for the operation of an office of a private personnel service.
(14) "Owner" of a private personnel service means the sole proprietor of a private personnel service operated as a sole proprietorship; any partner in a partnership that owns or operates a private personnel service; any stockholder with a financial interest greater than 10 percent (10%) in a corporation that owns or operates a private personnel service.
(15) "Person" means any individual, association, partnership or corporation.
(16) "Private personnel service" means any business operated in the State of North Carolina by any person for profit which secures employment or by any form of advertising holds itself out to applicants as able to secure employment or to provide information or service of any kind purporting to promote, lead to or result in employment for the applicant with any employer other than itself, where any applicant may become liable for the payment of a fee to the private personnel service, either directly or indirectly. "Private personnel service" does not include:
    a. Any educational, religious, charitable, fraternal or benevolent organization which charges no fee for services rendered in securing employment or providing information about employment;
    b. Any employment service operated by the State of North Carolina, the Government of the United States, or any city, county, or town, or any agency thereof;
    c. Any temporary help service that at no time advertises or represents that its employee may, with the approval of the temporary help service, be employed by one of its client companies on a permanent basis;
    d. Any newspaper of general circulation or other business engaged primarily in communicating information other than information about specific positions of employment and that does not purport to adapt the information provided to the needs or desires of an individual subscriber;
    e. Employment offices that charge no fee to the applicant other than union dues or to the employer and which are used solely for the hiring of employees under a valid union contract by the employer subscribing to this contract;

(17) "Refer" an applicant means to submit resumes to an employer, arrange interviews between an applicant and an employer, or to provide an employer with the name of an applicant. (1929, c. 178, ss. 1, 10; 1979, c. 780, s. 1.)

Editor's Note. — This Article is Article 5, §§ 95-37 to 95-45, as rewritten by Session Laws 1979, c. 780, s. 1, effective July 1, 1979, and recodified. Where appropriate, the historical citations to the sections in the former Article have been added to corresponding sections in the Article as rewritten.

Session Laws 1979, c. 780, s. 4, provides:

"Sec. 4. Effective date. — This Article shall become effective on July 1, 1979, and shall apply to all employment agencies operating on or after that date. Any agency license issued by the department prior to that date shall remain in full force and effect under the terms of the license until the first anniversary date of the issuance of the license following July 1, 1979, at which time the license shall be renewed under procedures established by the department, unless the department finds that the agency has not substantially complied with the laws and regulations governing employment agencies in North Carolina and that the agency licensee is not of a character likely to abide by this Article and regulations adopted hereunder."

§ 95-47.2. Licensing procedures.

(a) No person shall open, keep, maintain, own, operate or carry on a private personnel service unless the person has first procured a license therefor as provided in this Article.

(b) An application for license shall be made to the Commissioner. If the private personnel service is owned by an individual, the application shall be made by that individual; if the service is owned by a partnership, the application shall be made by all partners; if the service is owned by a corporation, the application shall be made by all stockholders who own at least twenty percent (20%) of the issued and outstanding voting stock of the corporation, or if the service is owned by an association, society, or corporation in which no one individual owns at least twenty percent (20%) of the issued and outstanding voting stock, the application shall be made by the president, vice-president, secretary and treasurer of the owner, by whatever title designated. The application shall state the name and address of the individual who is responsible for the direction and operation of the placement activities of the private personnel service whether that individual be one of the applicants or another person; whether or not that individual has ever been employed in a private personnel service; the name and address of each of the license applicant's prior employers during the five years immediately preceding the license application; and such other information relating to the good moral character of that individual as the Commissioner may require. No change in such persons shall take place without prior notification to the Commissioner.

(c) Each application for license shall be in writing and in the form prescribed by the Commissioner, and shall state truthfully the name under which the business is to be conducted; the street and number of the building or place where the business is to be conducted.

(d) Upon the receipt of an application for a license the Commissioner:

(1) Shall publish a notice of the pending application in a newspaper of general circulation in the area of the proposed location of the employment agency and may publish the notice in a newspaper of general circulation in each area in which the applicant (or if a corporation, the president and majority shareholder) has resided during the five years preceding the time of the application. The notice shall include a statement informing individuals of their right to protest the issuance of a license by filing within 10 days written comments with the Commissioner. The protest shall be in writing and signed by the person

filing the protest or by his authorized agent or attorney, and shall state reasons why the license should not be granted. Upon the filing of a protest, the Commissioner, if he determines the protest to be of such a nature that a hearing should be conducted and that the protest is for a cause on which denial of a license may properly be based, shall appoint a time and place for a hearing on the application and shall give at least seven days' notice of that time and place to the license applicant and to the person filing the protest. The hearing shall be conducted in accordance with the provisions of the rules of the Administrative Procedure Act;

(2) Shall investigate the character, criminal record and business integrity of each applicant for agency license and shall investigate the criminal records of all persons listed as agency owners, officers, directors or managers. The applicant and all agency owners, officers, directors and managers shall assist the department in obtaining necessary information by authorizing the release of all relevant information;

(3) Upon completion of the investigation, or 30 days after the application was received, whichever is later, but in no case more than 45 days after the application was received, shall determine whether or not a license should be issued. The license shall be denied for any of the following reasons:

a. If the applicant for agency license, or the president or majority shareholder of a corporate applicant, omits or falsifies any material information asked for in the application and required by the Commissioner;

b. If any owner, officer, director or manager of the employment agency:

1. Has been convicted in any state of the criminal offense of embezzlement, obtaining money under false pretenses, forgery, conspiracy to defraud or any similar offense involving fraud or moral turpitude;

2. Was an owner, officer, director or manager of an employment agency or other business whose license was revoked or that was otherwise caused to cease operation by action of any State or federal agency or court because of violations of law or regulation relating to deceptive or unfair practices in the conduct of business;

3. As an owner or manager of an employment agency or other business or as an employment counselor was found by any State or federal agency or court to have violated any law or regulation relating to deceptive or unfair practices in the conduct of business; or

4. In any other demonstrable way engaged in deceptive or unfair practices in the conduct of business;

c. If the employment agency will be operated on the same premises as a loan agency (as defined in G.S. 105-88) or collection agency (as defined in G.S. 66-42).

(e) If it appears upon the hearing or from the inspection, examination or investigation made by the Commissioner that the owners, partners, corporation officers or the agency manager are not persons of good moral character or that the license applicant has not complied with the provisions of this Article, the application shall be denied and a license shall not be granted. The Commissioner shall find facts to substantiate his denial of the issuance of a license. Each application shall be granted or refused within 30 days from the date of its filing, or if a hearing is held, within 45 days. Any license heretofore or hereafter issued shall expire 12 months from the date of its issuance, and shall be renewed as hereinafter provided unless sooner revoked by the Commissioner.

(f) No license shall be granted to a person to operate as a private personnel service where the name of the business is similar or identical to that of any existing licensed business (except where a franchiser has licensed two or more persons to use the same name within the State) or directly or indirectly expresses or connotes any limitation, specification or discrimination contrary to current State or federal laws against discrimination in employment.

(g) Every license shall contain the name of the person licensed and shall designate the city in which the license is issued, the name of the manager and date of the license. The license shall be displayed in a conspicuous place in the area where job applicants are received by the agency.

(h) A license granted as provided in this Article shall not be valid for any person other than the person to whom it is issued or for any place other than that designated in the license and shall not be assigned or transferred without the consent of the Commissioner, whose consent must be based on the standards contained in this Article. Applications for consent to assign or transfer shall be made in the same manner as an application for a license, and all the provisions of this Article shall apply to applications for consent. The location of a private personnel service shall not be changed without notice to the Commissioner, and any change of location shall be endorsed upon the license. A person who has obtained a license in accordance with the provisions of this Article may apply for additional licenses to conduct additional private personnel services in accordance with the provisions of this Article. The manner of application, and the conditions and terms applicable to the issuance of the additional licenses shall be the same as for an original license. The same agency manager may be designated in all such licenses.

(i) Temporary license. — If ownership of a licensed private personnel service is transferred, the department shall issue a temporary license to any new owner or successor if it appears to the department that issuance of such a license would serve the public interest. A temporary license shall be effective for a period of 90 days and shall not be renewed.

(j) Each licensee shall, before the license is issued or renewed, deposit with the department a bond payable to the State of North Carolina and executed by a surety company duly authorized to transact business in the State of North Carolina in the amount of five thousand dollars ($5,000) and upon condition that the private personnel service will pay to applicants all refunds due under this Article and regulations adopted hereunder if the private personnel service terminates its business. (1929, c. 178, ss. 2, 3; 1931, c. 312, s. 3; 1979, c. 780, s. 1.)

Editor's Note. — Article 9 of Chapter 66, containing § 66-42, referred to in this section, was rewritten by Session Laws 1979, c. 835, and has been recodified. For present section defining "collection agency," see § 66-49.27.

§ 95-47.3. Fees and contracts; filing with Commissioner.

(a) Every license applicant shall file with the Commissioner a schedule of fees or charges made by the private personnel service to applicants for employment for any services rendered, stating clearly the conditions under which the private personnel service refunds or does not refund a fee, together with all rules or regulations that may in any manner affect the fees charged or to be charged for any service. Changes in the schedule may be made, but no change shall become effective until seven calendar days after the filing thereof with the Commissioner. It is unlawful for a private personnel service to charge, demand, collect or receive a greater compensation from an applicant for employment for any service performed than as specified in the schedule filed with the Commissioner.

(b) Every license applicant shall file with the Commissioner a copy of the contract which the private personnel service will require applicants for employment to execute. (1979, c. 780, s. 1.)

§ 95-47.4. Contracts; contents; approval; tying contracts forbidden.

(a) A contract between a private personnel service and an applicant shall be in writing, labeled as a contract, physically separate from any application and made in duplicate. One copy shall be given to the applicant and the other shall be kept by the private personnel service as required by G.S. 95-47.5(2).

(b) Any contract that obligates an applicant to pay a fee to the private personnel service shall include:

(1) The name, address and telephone number of the private personnel service;
(2) The name of the applicant;
(3) The date the contract was signed;
(4) A clear schedule of the fees to be charged to the applicant at various salary levels;
(5) A clear explanation of when the applicant becomes obligated to pay a fee;
(6) A clear refund policy (or no refund policy) that conforms to the requirements of G.S. 95-47.4(f) and (g);
(7) If the applicant is obligated whether or not the applicant accepts employment, a clear explanation of the services provided and a statement that the private personnel service does not guarantee that the applicant will obtain employment as a result of its services;
(8) A statement, in a type size no smaller than nine point, directly above the place for the applicant's signature, that reads as follows: "I have read and received a copy of this CONTRACT, which I understand makes me legally obligated to pay a fee under conditions outlined below." In the preceding statement the word "CONTRACT" and no others shall be in all capitals; and
(9) A statement that the private personnel service is licensed and regulated by the Commissioner and the address at which a copy of laws and regulations governing private personnel services may be obtained.

(c) A copy of each contract form to be used with applicants shall be filed with the Commissioner. Until the private personnel service receives written notification from the Commissioner that the form conforms to the requirements of this Article and regulations adopted hereunder, it shall not be used with applicants.

(d) A private personnel service shall not require an applicant to sign a contract with the private personnel service before the applicant has had an opportunity to read the contract and discuss the contract with an employee of the personnel agency who regularly arranges contacts and assists in negotiations between employers and applicants. A private personnel service shall not coerce an applicant into signing a contract by applying or using duress, undue influence, fraud or misrepresentation sufficient to invalidate the contract under North Carolina law.

(e) Any contract that obligates an applicant to pay a fee to the private personnel service when the applicant accepts employment shall be physically separate from any contract that obligates an applicant to pay a fee whether or not the applicant accepts employment. A private personnel service shall not require an applicant to sign one contract as a prerequisite to signing another contract or to pay a fee as a prerequisite to signing a contract. Express violations of this subsection are the following:

(1) Refusal to allow an applicant to contract for counseling, job information or resume writing services, if the applicant does not agree to pay an additional fee upon acceptance of employment; and

(2) Refusal to allow an applicant to contract for services which obligate the applicant only upon acceptance of employment, if the applicant does not agree to pay a registration fee or to contract for counseling, resume writing or other services.

(f) If a private personnel service has a refund policy, included on each contract that obligates an applicant upon acceptance of employment will be a statement defining:

(1) The length of the period of time covered by the refund policy;

(2) The exact manner of computing the refund so that the amount of refund due the applicant will be clear;

(3) The conditions under which a refund becomes due to the applicant. The conditions of the refund, if other than unconditional policy is used, shall contain a definition of the reasons for which a refund will not be made. A refund will not be denied except for a reason so stated in the definition of the contract;

(4) A personnel service shall abide by the refund policy stated on its contract by promptly paying to applicants any refund due under the terms of the contract.

(g) If a private personnel service has no refund policy, the private personnel service shall include on each contract that obligates an applicant upon acceptance of employment, in a type size no smaller than nine point, a statement that reads as follows:

"..... (name of private personnel service) will make NO REFUND under any circumstances of fees paid by the applicant." In the preceding statement the words NO REFUND and no others shall be in all capitals. (1979, c. 780, s. 1.)

§ 95-47.5. Records.

Every private personnel service shall maintain for a period of two years, the following records:

(1) Job orders or job specifications.

(2) Executed applicant contracts.

(3) Information on all placements made, including the employer's name and address; name and address of applicant placed; salary of the position; amount of fee charged; and refunds, where applicable. (1929, c. 178, s. 4; 1931, c. 312, s. 3; 1979, c. 780, s. 1.)

§ 95-47.6. Prohibited acts.

A private personnel service shall not engage in any of the following activities or conduct:

(1) Induce or attempt to induce any employee placed by that private personnel service to terminate his employment in order to obtain other employment through the private personnel service; or procure or attempt to procure the discharge of any person from his employment.

(2) Publish or cause to be published any false or fraudulent information, representation, promise, notice or advertisement.

(3) Advertise in newspapers or otherwise, unless the advertising contains the name of the private personnel service and the word "personnel service."

(4) Direct an applicant to visit or call upon an employer for the purpose of obtaining employment without having first obtained a job order or authorization from the employer for the interview. A private

personnel service may attempt to sell the services of an applicant to an employer from whom no job order has been received and may charge a fee if the efforts result in the applicant's being employed.

(5) Send or cause to be sent any person to any employer where the private personnel service knows that the prospective employment is or would be in violation of State or federal laws governing minimum wages or child labor, or has been notified that a labor dispute is in progress, without notifying the applicant of that fact, or knowingly arrange an interview for an employment or occupation prohibited by law.

(6) Send or cause to be sent any person to any place which the private personnel service knows is maintained for immoral or illicit purposes.

(7) Divide or share, either directly or indirectly, the fees collected by the private personnel service, with contractors, sub-contractors, employers or their agents, foremen or anyone in their employ, or if the contractors, sub-contractors or employers be a corporation, any of the officers, directors or employees of the corporation to whom applicants for employment are sent.

(8) Make, cause to be made, or use any name, sign or advertising device bearing a name which is similar to or may reasonably be confused with the name of a federal, State, city, county or other governmental unit or agency.

(9) Knowingly make any false or misleading promise or representation or give any false or misleading information to any applicant or employer in regard to any employment, work or position, its nature, location, duration, compensation or the circumstances surrounding any employment, work or position including the availability thereof.

(10) Accept a registration fee from an applicant.

(11) Impose or attempt to collect any fee from any applicant unless that applicant accepts employment with an employer to which the applicant was directly or indirectly introduced by the private personnel service.

(12) A fee may be charged for resume writing provided the private personnel service does not require the applicant to become obligated for any other services. (1979, c. 780, s. 1.)

§ 95-47.7. Private Personnel Service Advisory Council.

(a) There is hereby established the North Carolina Private Personnel Service Advisory Council. The Council shall be composed of 12 members appointed by the Commissioner. Each member of the Council shall be domiciled in this State for at least three years immediately preceding his appointment and be of good moral character. At least five members shall have occupied for at least three years immediately preceding their appointment, and shall occupy at the time of appointment, executive or managerial positions in the private personnel service industry in North Carolina; and at least three shall have occupied, for at least three years immediately preceding their appointment, executive or managerial positions as personnel officers in companies which regularly utilize the services of private personnel services in obtaining employees. Members of the Council shall serve without salary.

(b) Each member of the Council shall hold office until the appointment and qualification of his successor. The terms of the initial members of the Council shall expire as follows: four members, July 1, 1980; four members, July 1, 1981; four members, July 1, 1982. Subsequent appointments shall be made for terms of three years. Vacancies occurring in the membership of the Council for any cause shall be filled by appointment for the balance of the unexpired term. The Commissioner may remove any member of the Council for misconduct, incompetency, neglect of duty, or other good cause.

(c) The Council shall meet at least once in each calendar quarter of each year. All meetings of the Council shall be open and public and all records of the Council shall be open to inspection, except as otherwise prescribed by law. Seven members shall constitute a quorum for the transaction of business. The Council shall elect from its members, each for term of one year, a chairman and vice-chairman, and may appoint such committees as it deems necessary to carry out its duties. The Commissioner or his designee shall serve ex officio as the secretary of the Council, but shall not be a member of the Council. (1979, c. 780, s. 1.)

§ 95-47.8. Duties of Personnel Service Advisory Council.

The Advisory Council shall:

(1) Inquire into the nature of the private personnel service industry, and make such recommendations as may be deemed important and necessary for the welfare of the citizens of the State, the public health and welfare and the progress of the private personnel service industry.

(2) Confer and advise with the Commissioner in regard to how private personnel services may best serve the State, the public and the private personnel service industry.

(3) Assist the Commissioner in the formulation, adoption, amendment or repeal of any rules or regulations authorized by this Article. Both the Commissioner and a majority of a properly constituted quorum of the Advisory Council must review any such rules or regulations, or amendments or repeals thereof, before they become effective.

(4) Collect such necessary information and data as the Council deems necessary to the proper administration of this Article.

(5) Consider and make recommendations to the Commissioner with respect to all matters relating to the private personnel service industry in the State, including, but not limited to, applicants for licenses and complaints against private personnel services.

(6) Publish findings and make such recommendations as the Council may deem necessary to the Commissioner. (1979, c. 780, s. 1.)

§ 95-47.9. Enforcement of Article; rules; hearing; penalty; criminal penalties.

(a) This Article shall be enforced by the Commissioner. The Commissioner or any duly authorized agent, deputies or assistants designated by the Commissioner, may upon receipt of a complaint that a private personnel service has violated a specific section of this Article, inspect those records relevant to the complaint which this Article requires the private personnel service to retain. The Commissioner may also subpoena those records and witnesses and may conduct investigations of any employer or other person where the Commissioner has reasonable grounds for believing that the employer or person has conspired or is conspiring with a private personnel service to violate this Article.

(b) The Commissioner may make reasonable administrative rules within the standards set in this Article. Before such rules are presented to the Advisory Council, the Commissioner shall conduct a public hearing, giving due notice thereof to all interested parties and shall afford the opportunity for written comments. No rule shall become effective until 60 days after the public hearing and Advisory Council approval, and copies thereof shall be furnished to all private personnel services at least 30 days prior to the effective date of the rule.

(c) Complaints against any licensed person shall be made in writing to the Commissioner, or be sent in affidavit form without a personal appearance of the complainant. If the complaint alleges a violation of this Article, the Commissioner shall cause an investigation to be made. If, as a result of the investigation, the Commissioner has reason to believe that a material violation of this Article has been committed by a private personnel service, the Commissioner may hold a hearing. Reasonable notice thereof, not less than 10 days, shall be given in writing to the licensed person involved by serving upon him either personally, by registered or certified mail, or by leaving the same with the manager, a copy of the complaint. A hearing shall be held before the Commissioner with reasonable promptness but in no event later than 30 calendar days from the date of the filing of the complaint. The Commissioner, when investigating any matters pertaining to the granting, issuing, transferring, renewing, revoking, suspending or canceling of any license may take such testimony as he deems necessary on which to base official action. When taking such testimony he may subpoena witnesses and also direct the production before him of necessary and material books and papers. A daily calendar of all hearings shall be kept by the Commissioner and shall be posted in a conspicuous place in his public office for at least one day before the date of the hearings. The Commissioner shall render his decision within eight calendar days from the date of the completion of the hearing. The Commissioner shall keep a record of all such complaints and hearings.

(d) If at the hearing conducted pursuant to subsection (c) of this section, it has been shown that the private personnel service or any employee of that personnel service is guilty of violating the provisions of this Article, the Commissioner may issue warnings, or levy a fine against the personnel service which shall not exceed two hundred and fifty dollars ($250.00), and, for repeated willful violations, may suspend or revoke the license of the personnel service. Whenever the Commissioner suspends or revokes the license of any private personnel service, or levies a fine against a service, the determination is subject to judicial review in proceedings brought pursuant to the Administrative Procedure Act. Whenever a license is revoked, another license shall not be issued to the same person within three years from the date of the revocation. The Commissioner, Deputy Commissioner, or Director, Private Personnel Service Division may conduct hearings and act upon applications for licenses, and may revoke or suspend such licenses, or levy fines.

(e) Any person who operates as a private personnel service without first obtaining the appropriate license (i) shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not to exceed two thousand dollars ($2,000), or imprisonment for not more than one year, or both, by any court of competent jurisdiction; and (ii) be subject to a civil penalty of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00) for each day the private personnel service operates without a license, the penalty not to exceed a total of two thousand dollars ($2,000). Actions to recover civil penalties shall be initiated by the Attorney General and any such penalties collected shall be deposited to the general fund. (1929, c. 178, ss. 3-5, 7, 9; 1931, c. 312, s. 3; 1979, c. 780, s. 1.)

§ 95-47.10. Power of Commissioner to seek injunction.

The Commissioner may apply to courts having jurisdiction for injunctions to prevent violations of this Chapter or of rules issued pursuant thereto, and such courts are empowered to grant such injunctions regardless of whether criminal prosecution or other action has been or may be instituted as a result of such violation. A single act of unauthorized or illegal practice shall be sufficient, if shown, to invoke the injunctive relief of this section or criminal or civil penalties under G.S. 95-47.9(e). (1979, c. 780, s. 1.)

§ 95-47.11. Government employment agencies unaffected.

This Article shall not in any manner affect or apply to the State of North Carolina, the government of the United States, or to any city, county or town, or any agency of any of those governments. (1929, c. 178, s. 10; 1979, c. 780, s. 1.)

§ 95-47.12. License taxes placed upon agencies not affected.

This Article is not intended to conflict with or affect any license tax placed upon private personnel services by the revenue laws of North Carolina, but instead shall be construed as supplementary thereto in exercising the police powers of the State. (1929, c. 178, s. 11; 1979, c. 780, s. 1.)

§ 95-47.13. Severability.

If any provision of this Article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications, and to this end the provisions of this Article are severable. (1929, c. 178, s. 9; 1979, c. 780, s. 1.)

§§ 95-47.14 to 95-47.18: Reserved for future codification purposes.

ARTICLE 5B.

Regulation of Job Listing Services.

§ 95-47.19. Definitions.

Definitions of terms used in this Article shall be the same as in Chapter 95, Article 5A (Regulation of Private Personnel Services), with the words "job listing service" substituted, where appropriate, for the words "private personnel service." "Job listing service" means any business operated in the State of North Carolina by any person for profit which publishes, either orally or in writing, lists of specific positions of employment available with any employer other than itself or which holds itself out to applicants as able to provide information about specific positions of employment available with any employer other than itself, which charges a fee to any applicant for its services or purported services and which performs none of the activities of a private personnel service other than the publishing of job listings. "Job listing service" does not include:

(1) Any educational, religious, charitable, fraternal or benevolent organization which charges no fee for services rendered in providing information about employment;

(2) Any employment service operated by the State of North Carolina, the Government of the United States, or any city, county or town, or any agency thereof;

(3) Any temporary help service that charges no fee for services rendered in providing information about employment;

(4) Any newspaper of general circulation or other business engaged primarily in communicating information other than information about specific positions of employment and that does not purport to adapt the information provided to the needs or desires of an individual subscriber;

(5) Employment offices that charge no fee to the applicant other than union dues and which are used solely for the hiring of employees under a valid union contract by the employers subscribing to this contract. (1979, c. 780, s. 2.)

Editor's Note. — Session Laws 1979, c. 780, s. 4, provides:

"Sec. 4. Effective date. — This Article shall become effective on July 1, 1979, and shall apply to all employment agencies operating on or after that date. Any agency license issued by the department prior to that date shall remain in full force and effect under the terms of the license until the first anniversary date of the issuance of the license following July 1, 1979, at which time the license shall be renewed under procedures established by the department, unless the department finds that the agency has not substantially complied with the laws and regulations governing employment agencies in North Carolina and that the agency licensee is not of a character likely to abide by this Article and regulations adopted hereunder."

§ 95-47.20. License required.

No person shall operate a job listing service in North Carolina without first obtaining a license from the Commissioner. A job listing service shall have a separate license for each location at which it maintains an office. (1979, c. 780, s. 2.)

§ 95-47.21. Violation of this Article; criminal and civil penalty.

Any person who violates the provisions of this Article by operating a job listing service without a valid license from the Commissioner shall be subject, under current regulations adopted pursuant to this Article, to criminal and civil penalties in the same amount and under substantially the same procedure as that provided under G.S. 95-47.9(e) for a person operating a private personnel service. (1979, c. 780, s. 2.)

§ 95-47.22. Licensing procedure.

The procedure, under regulations adopted prior to this Article, for the issuance, denial and renewal of job listing service licenses and other aspects of the licensing of job listing services by the Commissioner shall be substantially the same as that provided under Article 5A of this Chapter for the licensing of private personnel services. (1979, c. 780, s. 2.)

§ 95-47.23. Enforcement.

Under regulations adopted pursuant to this Article, a job listing service may be issued a warning, citation or notice of violation, or may have its license revoked or suspended, or its licensee reprimanded, censured or placed on probation in substantially the same manner and under substantially the same procedure as that provided for a private personnel service under Article 5A of this Chapter. (1979, c. 780, s. 2.)

§ 95-47.24. Certain practices prohibited.

Under regulations adopted pursuant to this Article, a job listing service shall abide by provisions substantially the same as those provided under G.S. 95-47.6(7) (kickbacks), G.S. 95-47.6(9) (misrepresentation), G.S. 95-47.2(d)(3)c. (loan or collection agencies) and G.S. 95-47.2(j) (bond required) for a private personnel service. (1979, c. 780, s. 2.)

§ 95-47.25. Contracts; contents; approval.

A contract between a job listing service and an applicant shall be in writing, labeled as a contract, physically separate from any application form and made in duplicate, and shall include:

(1) A clear explanation of the services provided and the amount of the fee;

(2) In a type size no smaller than nine point, a statement that reads "I understand that . . . . . (name of job listing service) does not guarantee that I will obtain employment through its services. I understand that . . . . . (name of job listing service) does not refund fees for any reason," unless the job listing service agrees in the contract to refund to the applicant any fee the applicant paid to the job listing service if within three months of paying such a fee the applicant has not accepted an employment position listed in a publication of the job listing service;

(3) A statement that the job listing service is not a private personnel service or employment agency, that no additional fee will be charged to the applicant upon acceptance of employment and that the job listing service will not set up interviews or otherwise arrange direct contacts between an employer and the applicant; and

(4) A statement that the job listing service is licensed and regulated by the Commissioner and the address at which a copy of regulations governing job listing services may be obtained.

A copy of each contract form to be used with applicants shall be filed with the Commissioner. Until the job listing service receives written notification from the Commissioner that the form conforms to the requirements of this Article and regulations adopted hereunder, it shall not be used with applicants. A job listing service shall not accept a fee from any applicant before the applicant has read and received a copy of the contract. (1979, c. 780, s. 2.)

§ 95-47.26. Advertising and publication.

(a) In conducting any form of advertising, a job listing service shall identify itself by its business name and identify itself as a job listing service by using in the name or elsewhere in the advertising the term "job listing service."

(b) Prior to advertising or publishing information about an available job, a job listing service shall receive a job order and shall record the job order, the date it was received and the name of the employer representative or other business who gave the job order to the job listing service. No description or representation of an employment position shall be stated in any advertising or other publication, unless the information is included on the recorded job order for the position. Information about a single employment position shall not be used in more than one advertisement or listing in a single issue of any publication.

(c) A job listing service shall not publish or cause to be published any information which it knows or reasonably ought to know is false or deceptive or which it has no reasonable basis for believing to be true.

(d) In conducting any form of advertising, a job listing service shall not use the term "no fee" or any other term indicating that applicants will not be financially obligated to the job listing service. (1979, c. 780, s. 2.)

§ 95-47.27. Fee receipts.

A job listing service shall give every applicant from whom payment is received a receipt stating the name and address of the job listing service, the name of the applicant, the date and the amount of the payment. (1979, c. 780, s. 2.)

§ 95-47.28. Prohibited job listings.

A job listing service shall not publish information about a position of employment with an employer that the job listing service knows or has reason to know:

(1) Has included false information in the job order; or
(2) Has a strike or lockout at its business, unless the applicant is so informed in the publication; or
(3) Is engaging in unlawful or immoral activity; or
(4) Is in financial or other difficulty likely to lead to imminent cessation of operation, unless the applicant is so informed in the publication; or
(5) Is an employer in which the job listing service or any owner of the job listing service has a financial interest greater than ten percent (10%), unless the applicant is so informed in the publication. (1979, c. 780, s. 2.)

§ 95-47.29. Records of the job listing service.

Each job listing service shall maintain and make available for inspection by the Commissioner the following records of the operation of the job listing service for the 18 months immediately preceding:

(1) The job listing service's copies of all contracts executed with applicants;
(2) Copies of all fee receipts;
(3) Copies of all advertising and job lists published orally or in writing, indexed or attached to the recorded job order (including the date it was received and the name of the employer representative or other business who gave it) for each position advertised or listed, and records of the dates advertisements were run on publications issued; and
(4) Any records required by the Commissioner under regulations adopted pursuant to this Article. (1979, c. 780, s. 2.)

§ 95-47.30. Administration of this Article.

This Article shall be enforced under the general supervision of the Commissioner, who shall have the same powers and duties in the enforcement of this Article as in the enforcement of Article 5A of this Chapter. (1979, c. 780, s. 2.)

§ 95-47.31. Review of job listing services.

After the Commissioner receives written statements from two or more applicants complaining that the applicant failed to obtain employment as a result of the services of a job listing service, the Commissioner may contact other applicants who have paid a fee to the job listing service for the purpose of determining what percentage of such applicants obtain employment as a result of the services of the job listing service. After gathering information from such applicants and following the requirements of due process, the Commissioner shall place the survey results in the public records. (1979, c. 780, s. 2.)

§ 95-47.32. Severability.

If any provision of this Article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications, and to this end the provisions of this Article are severable. (1979, c. 780, s. 2.)

ARTICLE 6.

Separate Toilets for Sexes.

§ 95-48. Separate toilets required.

In the interest of public health and in compliance with G.S. 130-160 and 143-138, adequate, well-lighted and ventilated toilet facilities plainly lettered and marked, for each sex shall be provided and maintained in a sanitary condition by all persons and corporations employing both males and females. Such toilet facilities shall be separated by full and substantial walls. (1913, c. 83, s. 1; C. S., s. 6559; 1963, c. 1114, s. 1.)

§ 95-49. Intruding on toilets unlawful.

It shall be unlawful, and punishable as provided in G.S. 95-50, for any employee to willfully intrude or use any toilet not intended for his or her sex. (1913, c. 83, s. 4; C. S., s. 6560; 1963, c. 1114, s. 2.)

§ 95-50. Punishment for violation of Article.

If any person, firm, or corporation refuses to comply with the provisions of this Article, he or it shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (1913, c. 83, s. 2; 1919, c. 100, s. 12; C. S., s. 6561.)

CASE NOTES

Quoted in Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970).

§ 95-51. Police in towns to enforce Article.

The police officers of any town or city shall investigate the places of business of any person or corporation employing males and females and see that the provisions of this Article are put in force, and shall swear out a warrant before the mayor or other proper officer of any town or city and prosecute all persons, corporations, and managers of corporations violating any of the provisions of this Article. (1913, c. 83, s. 3; C. S., s. 6562.)

§ 95-52. Sheriff in county to enforce Article.

When any persons or corporations locate their manufacturing plant or other business outside of any city or town, the sheriff of the county shall investigate the condition of the toilets used by such manufacturing plant or business and see that the provisions of this Article are complied with, and shall swear out a warrant and prosecute anyone violating the provisions of this Article. (1913, c. 83, s. 5; C. S., s. 6563; 1973, c. 108, s. 42.)

Local Modification. — Cleveland, Harnett, Henderson, Johnston, Lee, Northampton, Polk, Rutherford and Sampson: C. S., § 6564.

§ 95-53. Enforcement by Department of Labor.

The Department of Labor shall investigate the places of business of any person or corporation employing males and females, and shall make such rules and regulations for enforcing and carrying out this Article as may be necessary. (1919, c. 100, s. 7; C. S., s. 6563(a); 1931, c. 312, ss. 12, 14.)

Article 7.

Board of Boiler Rules and Bureau of Boiler Inspection.

§ 95-54. Board of Boiler Rules created; members, appointment, and qualifications; terms of office; vacancies; meetings.

There is hereby created the North Carolina Board of Boiler Rules consisting of six members, of whom five shall be appointed to the Board by the Governor, one for a term of one year, one for a term of two years, one for a term of three years, one for a term of four years and one for a term of five years. At the expiration of their respective terms of office, their successors shall be appointed for terms of five years each. Upon the death or incapacity of any member, the vacancy for the remainder of the term shall be filled with a representative of the same class. Of these five appointed members, one shall be a representative of the owners and users of steam boilers within the State of North Carolina, one a representative of the boiler manufacturers or a boilermaker who has had not less than five years' practical experience as a boilermaker within the State of North Carolina, one a representative of a boiler inspection and insurance company licensed to do business within the State of North Carolina, one a representative of the operating steam engineers in the State of North Carolina, and one a licensed heating contractor. The sixth member shall be the Commissioner of Labor, who shall be chairman of the Board. The Board shall meet at least twice yearly at the State capitol or other place designated by the Board. (1935, c. 326, s. 1; 1953, c. 569.)

Cross References. — For the Uniform Boiler and Pressure Vessel Act, see § 95-69.8 et seq.

CASE NOTES

Cited in Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972).

§ 95-55. Formulation of rules and regulations.

The Board shall formulate rules and regulations for the safe and proper construction, installation, repair, use and operation of steam boilers, steam and hot water heating boilers, and hot water supply tanks and steam or hot water boilers fired or unfired in this State. The rules and regulations so formulated shall conform as nearly as possible to the boiler code of the American Society of Mechanical Engineers and amendments and interpretations thereto made and approved by the council of the Society. (1935, c. 326, s. 1; 1951, c. 1107, s. 1.)

§ 95-56. Approval of rules and regulations by Governor.

The rules and regulations formulated by the Board of Boiler Rules shall become effective upon approval by the Governor, except that rules applying to the construction of new boilers shall not become effective to prevent the installation of such new boilers until six months after approval by the Governor. Changes in the rules which would raise the standards governing the methods of construction of new boilers or the quality of material used in them shall not become effective until six months after approval by the Governor. (1935, c. 326, s. 2.)

§ 95-57. Compensation and expenses of Board.

The members of the Board of Boiler Rules, exclusive of the chairman thereof, shall serve without salary but shall be paid a subsistence and travel allowance in accordance with the general provisions of the biennial appropriations act, for not to exceed 20 days in any year while in the performance of their duties as members of the Board, to be paid in the same manner as in case of other State officers. The chairman of the Board of Boiler Rules shall countersign all vouchers for expenditures under this section. (1935, c. 326, s. 3; 1951, c. 1107, s. 11.)

§ 95-58. Effect of Article on boilers installed prior to enactment.

This Article shall not be construed as in any way preventing the use or sale of steam boilers and steam and hot water heating boilers and hot water supply tanks and boilers in this State which shall have been installed or in use in this State prior to the taking effect of this Article and which shall have been made to conform to the rules and regulations of the Board of Boiler Rules governing existing installations as provided in G.S. 95-66. (1935, c. 326, s. 4; 1951, c. 1107, s. 2.)

§ 95-59. Commissioner of Labor empowered to appoint chief inspector; qualifications; salary.

After the passage of this Article and at any time thereafter that the office may become vacant, the Commissioner of Labor shall appoint, and may remove for cause when so appointed, a citizen of this State who shall have had at the time of such appointment not less than five years' practical experience with steam boilers as a steam engineer, mechanical engineer, boilermaker or boiler inspector, or who has passed the same kind of examination as that prescribed for deputy or special inspectors in G.S. 95-63, to be chief inspector for a term of two years or until his successor shall have been appointed, at an annual salary to be fixed by the Commissioner of Labor with the approval of the Secretary of Administration. (1935, c. 326, s. 5; 1943, c. 469; 1975, c. 879, s. 46.)

§ 95-60. Certain boilers excepted.

This Article shall not apply to boilers under federal control or to stationary boilers used by railroads which are inspected regularly by competent inspectors, or to boilers used solely for propelling motor road vehicles; or to boilers of steam fire engines brought into the State for temporary use in times of emergency to check conflagrations; or to portable boilers used for agricultural purposes only or for pumping or drilling in the open field for water, gas or coal, gold, talc or other minerals and metals; or to hot water supply tanks

and boilers fired or unfired, which are located in private residences or in apartment houses of less than six families; or to steam boilers used for heating purposes carrying a pressure of not more than 15 pounds per square inch gauge, and which are located in private residences or in apartment houses of less than six families; or to hot water heating boilers carrying a pressure of not more than 30 pounds per square inch gauge, and which are located in private residences or in apartment houses of less than six families. (1935, c. 326, s. 6; 1937, c. 125, s. 1; 1951, c. 1107, s. 3.)

§ 95-61. Powers of Commissioner of Labor; creation of Bureau of Boiler Inspection.

The Commissioner of Labor is hereby charged, directed and empowered:

(1) To set up in the Division of Standards and Inspections of the Department of Labor, a Bureau of Boiler Inspection to be supervised by the chief inspector provided for in G.S. 95-59 and one or more deputy inspectors of boilers, who shall have passed the examination provided for in G.S. 95-63, at a salary not to exceed the salary of a senior factory inspector, and such office help as may be necessary.

(2) To have free access for himself and his chief boiler inspector and deputies, during reasonable hours, to any premises in the State where a steam boiler or steam or hot water heating boiler or hot water supply tank or boiler fired or unfired is built or being built or is being installed or operated, for the purpose of ascertaining whether such boiler or tank is built, installed or operated in accordance with the provisions of this Article.

(3) To prosecute all violators of the provisions of this Article.

(4) To issue, suspend and revoke inspection certificates allowing steam boilers to be operated, as provided in this Article.

(5) To enforce the laws of the State governing the use of steam boilers and steam and hot water heating boilers and hot water supply tanks and boilers fired and unfired and to enforce the rules and regulations of the Board of Boiler Rules.

(6) To keep a complete record of the type, dimensions, age, condition, pressure allowed upon, location and date of the last inspection of all steam boilers and steam and hot water heating boilers and hot water supply tanks and boilers fired and unfired to which this Article applies.

(7) To publish and distribute among boiler manufacturers and others requesting them, copies of the rules and regulations adopted by the Board of Boiler Rules. (1935, c. 326, s. 7; 1951, c. 1107, s. 4.)

Editor's Note. — Pursuant to § 95-25.17, the Division of Standards is renamed the Wage and Hour Division.

§ 95-62. Special inspectors; certificate of competency; fees.

In addition to the deputy boiler inspectors authorized by G.S. 95-61, the Commissioner of Labor shall, upon the request of any company authorized to insure against loss from explosion of boilers in this State, issue commissions as special inspectors to any qualified boiler inspectors of said company who have certificates of competency. To be entitled to a certificate of competency a boiler inspector must either—

(1) Have passed the examination for inspectors provided for by G.S. 95-63, or

(2) Have passed an examination on boiler inspection in a state having standards therefor equal to this State, or

(3) Hold a certificate from the National Board of Boiler and Pressure Vessel Inspectors.

The commission shall be in the form of a credential card for which a fee of two dollars ($2.00) must be paid. The commission remains in force until the next succeeding December 31, and must be renewed annually thereafter.

Such special inspectors shall receive no salary from, nor shall any of their expenses be paid by, the State, and the continuance of a special inspector's commission shall be conditioned upon his continuing in the employ of a boiler inspection and insurance company duly authorized as aforesaid and upon his maintenance of the standards imposed by this Article. Such special inspectors shall inspect all steam boilers insured by their respective companies, and the owners of such insured boilers shall be exempt from the payment of the fees provided for in G.S. 95-68. Each company employing such special inspectors shall, within 30 days following each annual internal inspection made by such inspectors, file a report of such inspection with the Commissioner of Labor. (1935, c. 326, s. 8; 1951, c. 544, s. 1.)

§ 95-63. Examination for inspectors; revocation of commission.

Application for examination as an inspector of boilers shall be in writing, and in duplicate, upon forms furnished by the Department of Labor, and shall be accompanied by a fee of ten dollars ($10.00).

Examination for deputy or special inspectors shall be given by the Board of Boiler Rules or by at least two examiners to be appointed by said Board and must be written or part written and part oral recorded in writing and must be confined to questions the answers to which will aid in determining the fitness and competency of the applicant for the intended service and must be of uniform grade throughout the State. In case an applicant for an inspector's appointment or commission fails to pass this examination, he may appeal to the Board of Boiler Rules for a second examination which shall be given by said Board, or if by examiners appointed by said Board, then by examiners other than those by whom the first examination was given and these examiners shall be appointed forthwith to give said second examination. Upon the result of this examination on appeal, the Board shall determine whether the applicant be qualified. The record of any applicant's examination, whether original or on appeal, shall be accessible to him and his employer. If the applicant is successful in passing the said examination, he is entitled to a certificate of competency.

A commission may be revoked by the Commissioner of Labor upon the recommendation of the chief inspector of boilers, for the incompetence or untrustworthiness of the holder thereof or for willful falsification of any matter or statement contained in his application or in a report of any inspection. A person whose commission is revoked may appeal from the revocation to the Board of Boiler Rules which shall hear the appeal and either set aside or affirm the revocation and its decision shall be final. The person whose commission has been revoked shall be entitled to be present in person and by counsel on the hearing of the appeal. If a certificate or commission is lost or destroyed, a new certificate or commission shall be issued in its place without another examination. A person who has failed to pass the examination for a commission or whose commission has been revoked shall be entitled to apply for a new examination and commission after 90 days from such failure or revocation. (1935, c. 326, s. 9; 1951, c. 544, s. 2; c. 1107, s. 5.)

§ 95-64. Boiler inspections; fee; certificate; suspension.

On and after April 1, 1935, each steam boiler used or proposed to be used within this State, except boilers exempt under G.S. 95-60, shall be thoroughly inspected internally and externally while not under pressure by the chief inspector or by one of the deputy inspectors or special inspectors provided for herein, as to its design, construction, installation, condition and operation; and if it shall be found to be suitable, and to conform to the rules and regulations of the Board of Boiler Rules, the owner or user of a steam boiler as required in this Article to be inspected shall pay to the chief inspector the sum of four dollars ($4.00) for each inspection certificate issued, and the chief inspector shall issue to the owner or user thereof an inspection certificate specifying the maximum pressure which it may be allowed to carry. Such inspection certificate shall be valid for not more than 14 months from its date, and it shall be posted under glass in the engine or boiler room containing such boiler, or an engine operated by it, or, in the case of a portable boiler, in the office of the plant where it is located for the time being. No inspection certificate issued for a boiler inspected by a special inspector shall be valid after the boiler for which it was issued shall cease to be insured by a duly authorized insurance company. The chief inspector or any deputy inspector may, at any time, suspend an inspection certificate when, in his opinion, the boiler for which it was issued may not continue to be operated without menace to the public safety, or when the boiler is found not to comply with the rules herein provided for and a special inspector shall have corresponding powers with respect to inspection certificates for boilers issued by the company employing him. Such suspension of an inspection certificate shall continue in effect until said boiler shall have been made to conform to the rules and regulations of the Board of Boiler Rules and until said inspection certificate shall have been reinstated by a State inspector, if the inspection certificate was suspended by a State inspector, or by a special inspector, if it was suspended by a special inspector. Not more than 14 months shall elapse between such inspections and there shall be at least four such inspections in 37 consecutive months. Each such boiler shall also be inspected externally while under pressure with at least the same frequency, and at no greater intervals. (1935, c. 326, s. 10; 1937, c. 125, s. 2; 1939, c. 361, s. 1; 1967, c. 490, s. 1; 1973, c. 1292, s. 1.)

State Government Reorganization. — The Board of Boiler Rules was transferred to the Department of Labor by § 143A-70, enacted by Session Laws 1971, c. 864.

§ 95-64.1. Inspection of low pressure steam heating boilers, hot water heating and supply boilers and tanks.

(a) This section applies only to low pressure steam heating boilers, hot water heating boilers, hot water supply boilers and hot water supply tanks, fired or unfired.

(b) On and after July 1, 1951, each boiler or tank used or proposed to be used within this State, except boilers or tanks exempt under G.S. 95-60, shall be thoroughly inspected as to their construction, installation, condition and operation as follows:

(1) Boilers and tanks shall be inspected both internally and externally biennially where construction will permit; provided that a grace period of two months longer than the 24 months' period may elapse between internal inspections of a boiler or tank while not under pressure or between external inspections of a boiler or tank while under pressure. The inspection herein required shall be made by the chief inspector, or by a deputy inspector or by a special inspector, provided for in this Article.

(2) If at any time a hydrostatic test shall be deemed necessary, it shall be made, at the discretion of the inspector, by the owner or user thereof.

(3) All boilers or tanks to be installed in this State after the date upon which the rules and regulations of the Board relating to such boilers or tanks become effective shall be inspected during construction as required by the applicable rules and regulations of the Board by an inspector authorized to inspect boilers and tanks in this State, or, if constructed outside the State, by an inspector holding a certificate from the National Board of Boiler and Pressure Vessel Inspectors, or a certificate of competency as an inspector of boilers for a state that has a standard of examination substantially equal to that of this State provided by G.S. 95-63.

(4) If upon inspection, a boiler or tank is found to comply with the rules and regulations of the Board, the owner or user thereof shall pay directly to the chief inspector, the sum of four dollars ($4.00) and the chief inspector, or his duly authorized representative, shall issue to such owner or user an inspection certificate bearing the date of inspection and specifying the maximum pressure under which such boiler or tank may be operated. Such inspection certificate shall be valid for not more than 26 months. Certificates shall be posted under glass in the room containing the boiler or tank inspected or in the case of a portable boiler or tank in a metal container to be fastened to the boiler or to be kept in a toolbox accompanying the boiler.

(5) No inspection certificate issued for an insured boiler or tank inspected by a special inspector shall be valid after the boiler or tank for which it was issued shall cease to be insured by a company duly authorized by this State to carry such insurance.

(6) The chief inspector or his authorized representative may at any time suspend an inspection certificate when, in his opinion, the boiler or tank for which it was issued, cannot be operated without menace to public safety, or when the boiler or tank is found not to comply with the rules and regulations herein provided. A special inspector shall have corresponding powers with respect to inspection certificates for boilers or tanks insured by the company employing him. Such suspension of an inspection certificate shall continue in effect until such boiler or tank shall have been made to conform to the rules and regulations of the Board, and until said inspection certificate shall have been reinstated. (1951, c. 1107, s. 6; 1967, c. 490, s. 2; 1973, c. 1292, s. 2.)

CASE NOTES

Cited in Page v. Sloan, 12 N.C. App. 433, 183 S.E.2d 813 (1971).

§ 95-65. Operation of unapproved boiler prohibited.

On and after July 1, 1935, it shall be unlawful for any person, firm, partnership or corporation to operate under pressure in this State a steam boiler to which this Article applies without a valid inspection certificate as provided for in this Article. The operation of a steam boiler without an inspection certificate shall constitute a misdemeanor on the part of the owner, user or operator thereof and be punishable by a fine not exceeding one hundred dollars ($100.00) or imprisonment not to exceed 30 days, or both, in the discretion of the court. (1935, c. 326, s. 11.)

§ 95-65.1. Operation of unapproved low pressure steam heating boilers, or hot water heating and supply boilers and tanks prohibited.

On and after July 1, 1951, it shall be unlawful for any person, firm, partnership, or corporation to operate under pressure in this State a low pressure steam heating boiler, hot water heating boiler, hot water supply boiler or hot water supply tank, fired or unfired, to which this Article applies without a valid inspection certificate as provided for in this Article. The operation of any such boiler or tank without an inspection certificate shall constitute a misdemeanor on the part of the owner, user, or operator thereof and be punishable by a fine not exceeding one hundred dollars ($100.00) or imprisonment not to exceed 30 days, or both in the discretion of the court. (1951, c. 1107, s. 7.)

§ 95-66. Installation of boilers not conforming to requirements prohibited; boilers now in use to conform.

No steam boiler or steam or hot water heating boiler or hot water supply tank or boiler, fired or unfired which does not conform to the rules and regulations formulated by the Board of Boiler Rules governing new installations shall be installed in this State after six months from the date upon which the said rules and regulations shall become effective by the approval of the Governor.

All boilers and tanks installed and ready for use, or being used, before the said six months shall have elapsed, shall be made to conform to the rules and regulations of the Board of Boiler Rules governing existing installations and the formula therein prescribed shall be used in determining the maximum allowable working pressure for such boilers and tanks. (1935, c. 326, s. 12; 1951, c. 1107, s. 8.)

§ 95-67. Inspection of boilers during construction in State; outside State.

All steam boilers and steam and hot water supply tanks and boilers to be installed after six months from the date upon which the rules and regulations of the Board of Boiler Rules shall become effective by the approval of the Governor shall be inspected during construction by an inspector authorized to inspect boilers in this State, or if constructed outside the State, by an inspector holding a certificate of authority from the Commissioner of Labor of this State, which certificate shall be issued by the said Commissioner of Labor to any inspector who holds a certificate of authority to inspect steam boilers issued by a state which shall have adopted boiler rules that require standards of construction and operation substantially equal to those of this State, or an inspector who holds a certificate of inspection issued by the National Board of Boiler and Pressure Vessel Inspectors. (1935, c. 326, s. 12; 1951, c. 1107, s. 9.)

§ 95-68. Fees for internal and external inspections.

The person using, operating or causing to be operated any boiler listed in this section, required by this Article to be inspected by the chief boiler inspector or a deputy inspector, shall pay to the inspector, for the inspection of any such boiler, fees in accordance with the following schedule:

Miniature boilers, which do not exceed 16 inches inside diameter of shell, 100 pounds per square inch maximum allowable working pressure:

General inspection . . . . . $ 8.00
Fire tube boilers with hand holes only:
Internal inspection 9.00
External inspection while under pressure 7.00
Fire tube boiler with manholes:
Internal inspection 17.00
External inspection while under pressure 7.00
Water tube boilers (coil type):
General inspection 9.00
Water tube boilers with not more than 500 square feet of heating surface:
Internal inspection 9.00
External inspection while under pressure 7.00
Water tube boilers with more than 500 but not more than 3,000 square feet of heating surface:
Internal inspection 17.00
External inspection while under pressure 7.00
Water tube boilers with more than 3,000 square feet of heating surface:
Internal inspection 27.00
External inspection while under pressure 10.00

Provided, that four dollars ($4.00) of each internal inspection fee shall be the fee for the certificate of inspection required by G.S. 95-64. The inspector shall give receipts for said fees and shall pay all sums so received to the Commissioner of Labor, who shall pay the same to the Treasurer of the State. The Treasurer of the State shall hold the fees collected under this section and under G.S. 95-64 in a special account to pay the salaries and expenses incident to the direct field inspection activities of this Article, the surplus, with the approval of the Director of the Budget, to be added to the appropriation for the supervision and administration of this Article within the Department of Labor. (1935, c. 326, s. 13; 1937, c. 125, s. 3; 1939, c. 361, s. 2; 1951, c. 544, s. 3; 1967, c. 490, s. 3; 1973, c. 1292, ss. 3-5; 1975, c. 541, s. 1.)

§ 95-68.1. Inspection fees for low pressure steam heating boilers or hot water heating and supply boilers and tanks.

The person using, operating or causing to be operated any low pressure steam heating boiler, hot water heating boiler, hot water supply boiler, or hot water supply tank, fired or unfired, required by this Article to be inspected by the chief boiler inspector or a deputy inspector, shall pay to the inspector for the biennial inspection of any such boiler or tank fees in accordance with the following schedule: Provided that four dollars ($4.00) of each inspection fee shall be the fee for the certificate of inspection required by G.S. 95-64.1:

Low pressure steam and hot water boilers, equipped only with hand holes and washout plugs . . . . . $ 6.00
Low pressure steam and hot water boilers, equipped with manhole . 15.00
Hot water supply boilers 4.00
Tanks that are not equipped with manhole 4.00
Tanks equipped with manhole 8.00

(1951, c. 1107, s. 10; 1967, c. 490, s. 4; 1973, c. 1292, s. 6.)

Revision of Boiler Inspection Fees. — Session Laws 1975, c. 541, which amended § 95-68, provides, in s. 2:

"All other boiler inspection fees pursuant to General Statutes 95-68.1 are hereby revised in accordance with the following schedule:

"Low pressure steam and hot water boilers, equipped only with hand holes and washout plugs . . . . . $ 8.00
"Low pressure steam and hot water boilers, equipped with manhole . . . 17.00
"Fired hot water supply boilers and fired hot water heaters equipped with a manhole 10.00
"Fired hot water supply boilers and fired hot water heaters without a manhole 5.00
"Each unfired pressure vessel subject to inspection equipped with a manhole 10.00
"Each unfired pressure vessel subject to inspection without a manhole . . . . 5.00"

§ 95-69. Bonds of chief inspector and deputy inspectors.

The chief inspector shall furnish a bond in the sum of five thousand dollars ($5,000), and each of the deputy inspectors shall furnish a bond in the sum of one thousand dollars ($1,000), conditioned upon the faithful performance of their duties and upon a true account of moneys handled by them respectively, and the payment thereof to the proper recipient. The cost of said bonds shall be paid by the State Treasurer out of the special fund provided for in G.S. 95-68. (1935, c. 326, s. 14; 1937, c. 125, s. 4.)

§ 95-69.1. Appeals to Board.

Any person aggrieved by an order or act of the Commissioner of Labor, or the chief inspector, under this Article may, within 15 days after notice thereof, appeal from such order or act to the Board which shall, within 30 days thereafter, hold a hearing after having given at least 10 days' written notice to all interested parties. The Board shall, within 30 days after such hearing, issue an appropriate order either approving, modifying or disapproving said order or act. A copy of such order by the Board shall be delivered to all interested parties. (1951, c. 1107, s. 12.)

§ 95-69.2. Court review of orders and decisions.

(a) Any order or decision made, issued or executed by the Board shall be subject to review in the superior court of the county in which the inspection took place on petition by any person aggrieved filed within 30 days from the date of the delivery of a copy of the order or decision made by the Board to such person. A copy of such petition for review as filed with and certified to by the clerk of said court shall be served upon the chairman of the Board. If such petition for review is not filed within the said 30 days the parties aggrieved shall be deemed to have waived the right to have the merits of the order or decision reviewed and there shall be no trial of the merits thereof by any court to which application may be made by petition or otherwise, to enforce or restrain the enforcement of the same.

(b) The chairman of the Board shall within 30 days, unless the time be extended by order of court, after the service of the copy of the petition for review as provided in paragraph (a) of this section, cause to be prepared and filed with the clerk of the Superior Court of Wake County a complete transcript of the record of the hearing, if any, had before the Board, and a true copy of the order or decision duly certified. The order or decision of the Board if supported by substantial evidence shall be presumed to be correct and proper. The court may change the place of hearing,

(1) Upon consent of the parties; or
(2) When the convenience of witnesses and the end of justice would be promoted by the change; or
(3) When the judge has at any time been interested as a party or counsel.

The cause shall be heard by the trial judge as a civil case upon transcript of the record for review of findings of fact and errors of law only. It shall be the

duty of the trial judge to hear and determine such petition with all convenient speed and to this end the cause shall be placed on the calendar for the next succeeding term for hearing ahead of all other cases except those already given priority by law. If on the hearing before the trial judge it shall appear that the record filed by the chairman of the Board is incomplete, he may by appropriate order direct the chairman to certify any or all parts of the record so omitted.

(c) The trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Board and to restrain the enforcement thereof.

(d) Appeals from all final orders and judgments entered by the superior court in reviewing the orders and decisions of the Board may be taken to the Supreme Court of North Carolina by any party to the action as in other civil cases.

(e) The commencement of proceedings under this section shall not operate as a stay of the Board's order or decision, unless so ordered by the court.

(f) The following rights may be exercised by any party in lieu of the right of review provided by the above subsections (a) through (d):

The person aggrieved by any order or decision of the Board may, within 30 days after delivery to him of a copy of the Board's order or decision, file an appeal and a request for trial de novo and right to jury trial in the superior court of the county in which the inspection took place. Such right must be granted. However, unless such appeal and request for right to trial de novo and jury trial is filed as provided above, such right shall be deemed waived. In the event of such trial de novo, the Board shall file with the clerk of said superior court a certified copy of the Board's order or decision from which appeal is taken, and also, upon written request filed 10 days prior to the trial, furnish to the appealing party a copy of the transcript of the record of the hearing held before the Board. Any party to the action may take appeal to the superior court from any final order and judgment entered by the superior court after any such trial de novo or jury trial, which appeal shall be as in other civil actions. (1951, c. 1107, s. 12; 1953, c. 675, s. 10.)

§§ 95-69.3 to 95-69.7: Reserved for future codification purposes.

Article 7A.

Uniform Boiler and Pressure Vessel Act.

§ 95-69.8. Short title.

This Article shall be known as the Uniform Boiler and Pressure Vessel Act of North Carolina. (1975, c. 895, s. 1.)

Cross References. — As to the Board of Boiler Rules and the Bureau of Boiler Inspection, see §§ 95-54 through 95-69.7.

§ 95-69.9. Definitions.

(a) The term "board" shall mean the North Carolina Board of Boiler and Pressure Vessel Rules;

(b) The term "boiler" shall mean a closed vessel in which water is heated, steam is generated, steam is superheated, or any combination thereof, under pressure or vacuum for use externally to itself by the direct application of heat from the combustion of fuels, or from electricity or nuclear energy. This term "boiler" shall also include fired units for heating or vaporizing liquids other

than water where these units are separate from processing systems and are complete within themselves;

(c) The term "Commissioner" shall mean the North Carolina Commissioner of Labor;

(d) The term "Director" shall mean the individual appointed by the Commissioner to hold the office of Director of the Boiler and Pressure Vessel Division within the Department of Labor;

(e) The term "inspection certificate" shall mean certification by the Director that a boiler or pressure vessel is in compliance with the rules and regulations adopted under this Article;

(f) The term "inspector's commission" shall mean a written authorization by the Commissioner for a person who has met the qualifications set out in this Article to conduct inspections of boilers and pressure vessels;

(g) The term "pressure vessel" shall mean a vessel in which the pressure is obtained from an indirect source or by the application of heat from an indirect source or a direct source, other than those included within the term "boiler." (1975, c. 895, s. 2.)

§ 95-69.10. Application of Article; exemptions.

(a) This Article shall apply to all boilers and pressure vessels constructed, used, or designed for operation in this State including all new and existing installations which are operated in connection with business buildings, institutional buildings, industrial buildings, assembly buildings, educational buildings, public residential buildings, recreation buildings, and other public buildings. This Article shall also apply to boilers and hot water supply tanks, and heaters located in hotels, motels, tourist courts, camps, cottages, resort lodges, and similar places whenever the owner or operator advertises in any manner for transit patronage, or solicits such business for temporary abode by transit patrons.

(b) This Article shall not apply to:

(1) Boilers and pressure vessels owned and/or operated by the federal government;

(2) Pressure vessels used for transportation or storage of compressed gases when constructed in compliance with the specifications of the U.S. Department of Transportation and when charged with gas marked, maintained, and periodically requalified for use, as required by appropriate regulations of the U.S. Department of Transportation;

(3) To portable boilers and pressure vessels used for agricultural purposes only or for pumping or drilling in an open field for water, gas or coal, gold, talc or other minerals and metals;

(4) Boilers and pressure vessels which are located in private residences or in apartment houses of less than six families;

(5) Pressure vessels used for transportation or storage of liquefied petroleum gas;

(6) Air tanks located on vehicles licensed under the rules and regulations of other state authorities operating under rules and regulations substantially similar to those of this State and used for carrying passengers or freight within interstate commerce;

(7) Air tanks installed on right-of-way of railroads and used directly in the operation of trains;

(8) Pressure vessels that do not exceed five cubic feet in volume and 250 PSIG pressure; or one and one-half cubic feet in volume and 600 PSIG pressure; or an inside diameter of six inches with no limitations on pressure;

(9) Pressure vessels operating at a working pressure not exceeding 15 PSIG pressure;

(10) Pressure vessels with a nominal water capacity of 120 gallons or less and containing water under pressure at ambient temperature, including those containing air, the compression of which serves as a cushion;

(11) Boilers and pressure vessels on railroad steam locomotives that are subject to federal safety regulations.

(c) The construction and inspection requirements established by the Department of Labor shall not apply to hot water supply boilers which are directly fired with oil, gas or electricity, or hot water supply tanks heated by steam or any other indirect means, which do not exceed any of the following limitations:

(1) Heat input of 200,000 BTU HR;

(2) Water temperature of 200 degrees F;

(3) Nominal water capacity of 120 gallons;

provided that they are equipped with ASME Code and National Board certified safety relief valves. (1975, c. 895, s. 3; 1979, c. 920, ss. 1, 2.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1979, inserted "and inspection" near the beginning of subsection (c) and deleted "and shall continue to be subject to field inspection" which previously appeared at the end of subsection (c).

§ 95-69.11. Powers and duties of Commissioner.

The Commissioner of Labor is hereby charged, directed, and empowered:

(1) To adopt, modify or revoke rules and regulations governing the construction, operation and use of boilers and pressure vessels;

(2) To supervise the office of the Director of Boiler and Pressure Vessel Division;

(3) To enforce rules and regulations adopted under authority of this Article;

(4) To inspect boilers and pressure vessels covered under this Article;

(5) To issue inspection certificates to those boilers and pressure vessels found in compliance with this Article;

(6) To enjoin violations of this Article in the civil and criminal courts of this State;

(7) To keep adequate records of the type, dimensions, age, conditions, pressure allowed upon, location and date of the last inspection of all boilers and pressure vessels to which this Article applies;

(8) To require such periodic reports from inspectors, owners, and operators of boilers and pressure vessels as he deems appropriate in carrying out the purposes of this Article;

(9) To have free access, without notice, to any location in this State, during reasonable hours, where a boiler or pressure vessel is being built, installed, or operated for the purpose of ascertaining whether such boiler or pressure vessel is built, installed or operated in accordance with the provisions of this Article;

(10) To investigate serious accidents involving boilers and pressure vessels to determine the causes of such accident(s), and he shall have full subpoena powers in conducting said investigation;

(11) To establish reasonable fees for the inspection and issuance of inspection certificates for boilers and pressure vessels;

(12) To establish reasonable fees for the examination and certification of inspectors;

(13) To appoint qualified individuals to the Board of Boiler and Pressure Vessel Rules. (1975, c. 895, s. 4.)

§ 95-69.12. Office of Director of Boilers and Pressure Vessels Division created; powers and duties.

There is hereby created the office of Director of the Boiler and Pressure Vessel Division within the North Carolina Department of Labor. The person holding this office shall assist the Commissioner in carrying out the provisions of this Article in accordance with the provisions of Chapter 126 of the General Statutes. The Director is charged with the responsibility for the administration of this Article on a day-to-day basis.

The Director shall be primarily responsible for the inspection of boilers and pressure vessels subject to this Article and for the issuance of inspection certificates for those boilers and pressure vessels found suitable. He shall also be responsible for the collection of fees for the inspection of boilers and pressure vessels and transmitting the same to the State Treasurer, where they shall be held in a special account to cover the operating expenses associated with the direct field inspections of this Article. All administrative functions pursuant to this Article shall be paid out of the State general fund. (1975, c. 895, s. 5.)

§ 95-69.13. Board of Boiler and Pressure Vessels Rules created; appointment, terms, compensation and duties.

(a) There is hereby created the North Carolina Board of Boiler and Pressure Vessels Rules consisting of nine members appointed by the Commissioner, of which three shall be appointed for a term of one year, three for a term of two years, one for a term of three years, one for a term of four years, and one for a term of five years. At the expiration of their respective terms of office, their successors shall be appointed for terms of five years each. Of these nine appointed members, one shall be a representative of the owners and users of steam boilers within this State, one a representative of boiler manufacturers within this State, one a representative of boilermakers within this State who has had not less than five years' practical experience as a boilermaker, one shall be a representative of the owners or users of pressure vessels within the State, one shall be a representative of the pressure vessel manufacturers within the State, one a representative of a boiler inspection and insurance company authorized to insure boilers and pressure vessels within the State, one a representative of the operating steam engineers in this State, one a contractor holding a Group I North Carolina Heating License, and one a mechanical engineer on the faculty of a recognized engineering college or a licensed professional engineer having boiler and pressure vessel experience. The Commissioner of Labor shall annually designate one member to serve as chairman.

(b) The Board shall meet at least twice annually and shall be responsible for:

(1) Studying and proposing rules and regulations, for adoption, modification or revocation by the Commissioner, governing the construction, installation, inspection, repair, alteration, use and operation of boilers and pressure vessels in this State. The rules and regulations so formulated shall conform as nearly as possible to the boiler code of the American Society of Mechanical Engineers and amendments and interpretations thereto made and approved by the council of the Society.

(2) Devise and administer examinations to applicants seeking a certificate of competency as inspectors of boilers and pressure vessels in this State.

(3) Issue, suspend, or revoke inspector's commission to inspectors of boilers and pressure vessels within this State.

(c) The members of the Board shall serve without salary but shall be paid a subsistence and travel allowance as established by the Advisory Budget Commission in accordance with Chapter 138 of the General Statutes. (1975, c. 895, s. 6; 1977, c. 788.)

Cross References. — As to the Board of Boiler Rules and the Bureau of Boiler Inspection, see §§ 95-54 through 95.69.7.

§ 95-69.14. Rules and regulations governing the construction, operation and use of boilers and pressure vessels.

The Commissioner, after consultation with the Board, may adopt, modify or revoke such rules and regulations governing the construction, installation, repair, alteration, inspection, use and operation of boilers and pressure vessels as he deems appropriate to insure the safe operation and avoidance of injury to person or property from boilers and pressure vessels.

The procedure for the adoption, modification or revocation of such rules and regulations shall be the same as that contained within the Administrative Procedure Act of North Carolina as the same appears in Chapter 150A of the General Statutes. (1975, c. 895, s. 7.)

§ 95-69.15. Classification of inspectors; qualifications; examinations; certificates of competency; inspector's commission.

(a) There shall be three types of inspectors authorized to conduct inspections and report their findings to the Director under this Article:

(1) Boiler and Pressure Vessel Inspector. — Shall be a qualified individual appointed by the Commissioner, to assist in conducting inspections under this Article and report on the suitability of boilers and pressure vessels so inspected;

(2) Special Inspector. — Shall be a qualified individual regularly employed by an insurance company authorized to insure in this State against injury to person and/or property from explosions and accidents involving boilers and pressure vessels;

(3) Owner-User Inspectors. — Shall be a qualified individual employed on a full-time basis by a company operating boilers or pressure vessels for its own use and not for resale, and maintains an established inspection program for periodic inspection of boilers and pressure vessels owned or used by that company and where such inspection program is under the supervision of one or more engineers having qualifications satisfactory to the Commissioner.

(b) Inspector's Commission. — Any company authorized to insure in this State against loss to person or property as a result of an explosion or accident involving boilers and pressure vessels or operating boilers and/or pressure vessels for its own use and not for resale, may apply for the issuance of an inspector's commission for an individual within its employ who has a certificate of competency.

A commission authorizes an inspector to make inspections on boilers and pressure vessels and report on the suitability of said boilers and pressure vessels to the Director. Those inspectors holding commissions as special inspectors shall be limited to making inspections on boilers and pressure vessels insured by their employer. Owner-user inspectors shall be limited to

conducting inspections on boilers and pressure vessels operated by their respective employers.

(c) Qualifications for Certificates of Competency. — To be entitled to a certificate of competency, as one of the above type inspectors, an individual must:

(1) Have passed an examination provided and administered by the Board; or

(2) Have passed an examination and been certified in a state having rules and regulations substantially similar to those effective within North Carolina; or

(3) Hold a certificate of competency of the National Board of Boiler and Pressure Vessel Inspectors; and

(4) Continue in the employ of the company requesting the certificate of competency from the Board. (1975, c. 895, s. 8.)

§ 95-69.16. Inspections; report, certificates, fees.

(a) All boilers and pressure vessels subject to the provisions of this Article shall be inspected by an authorized inspector, as set out in G.S. 95-69.15, at such intervals and by such methods as the Commissioner may from time to time prescribe by regulation. In determining the frequency with which various categories of boiler and pressure vessels shall be inspected, the Commissioner shall give due consideration the hazard involved and need for protection of the public. Methods of inspection must provide an adequate procedure to insure the safety of individuals likely to be injured by an explosion or accident involving a boiler or pressure vessel.

(b) Upon completion of an inspection the authorized inspector shall file a report on the suitability of the boiler or pressure vessel inspected with the Director. The inspector shall attach the fee paid for the inspection to his report.

(c) Upon receipt of the inspector's report and fee, the Director shall determine whether or not a boiler or pressure vessel is in compliance with the rules and regulations adopted under this Article. If the Director determines it is in compliance he shall issue an inspection certificate authorizing use of the boiler or pressure vessel. When the Director determines a boiler or pressure vessel is not in compliance, he shall so notify the owner or user within 10 working days. No boiler or pressure vessel may be operated without an inspection certificate, except pressure vessels being operated under owner-user provision where administrative procedures of equal safety and competency have been approved by the Board and Commissioner. No more than 60 days grace period may be granted beyond the certificate expiration date. An individual whose boiler or pressure vessel is found in noncompliance may appeal that determination to the Commissioner within 30 days after notification of the decision is received. (1975, c. 895, s. 9.)

§ 95-69.17. Review of administrative decisions.

(a) Final decisions of the Board or the Director involving revocation or suspension of an inspector's commission or inspection certificate shall not be made until the aggrieved party has been afforded an opportunity for a hearing after notice has been given in accordance with the Administrative Procedure Act of North Carolina as the same appears in Chapter 150A of the General Statutes.

(b) Final decisions by the Board or Director involving denial of an application for a certificate of competency, refusal to issue or renew an inspection certificate need not await a hearing on the merits. After the decision is conveyed to the affected party, that party shall have the right to appeal to the Commissioner for review within 30 days. The Commissioner shall afford the aggrieved party an opportunity for a hearing after which he may affirm, modify or revoke the decision below. The decisions of the Board or the Director within this category shall not be stayed pending review by the Commissioner.

(c) After review by the Commissioner of a decision of the Board or the Director, a party may obtain judicial review within 30 days in accordance with the Administrative Procedure Act. (1975, c. 895, s. 10.)

§ 95-69.18. Inspection certificates required; misrepresentation as inspector.

It shall be unlawful for any person, firm, partnership, association or corporation to operate or use any boiler or pressure vessel in this State, and to which this Article applies, without a valid inspection certificate issued by the North Carolina Department of Labor. Any person, firm, partnership, association or corporation found to be operating or using a boiler or pressure vessel without a valid inspection certificate shall be guilty of a misdemeanor and upon conviction be subject to a fine of one thousand dollars ($1,000) or imprisonment for 30 days, or both in the discretion of the court.

Any person who knowingly and willfully misrepresents himself as an authorized inspector in North Carolina, shall be guilty of a misdemeanor and upon conviction thereof be fined up to one thousand dollars ($1,000) or imprisonment for six months, or both in the discretion of the court. (1975, c. 895, s. 11.)

Article 8.

Bureau of Labor for the Deaf.

§§ 95-70 to 95-72: Repealed by Session Laws 1975, c. 412, s. 1.

Cross References. — As to transfer of the functions of the Bureau of Labor for the Deaf to the Department of Human Resources, see note to § 168-14.

Article 9.

Earnings of Employees in Interstate Commerce.

§ 95-73. Collections out of State to avoid exemptions forbidden.

No resident creditor or other holder of any book account, negotiable instrument, duebill or other monetary demand arising out of contract, due by or chargeable against any resident wage earner or other salaried employee of any railway corporation or other corporation, firm, or individual engaged in interstate business shall send out of the State, assign, or transfer the same, for value or otherwise, with intent to thereby deprive such debtor of his personal earnings and property exempt by law from application to the payment of his debts under the laws of the State of North Carolina, by instituting or causing to be instituted thereon against such debtor, in any court outside of this State, in such creditor's own name or in the name of any other person, any action, suit, or proceeding for the attachment or garnishment of such debtor's earnings in the hands of his employer, when such creditor and debtor and the railway corporation or other corporation, firm, or individual owing the wages or salary intended to be reached are under the jurisdiction of the courts of this State. (1909, c. 504, s. 1; C. S., s. 6568.)

CASE NOTES

The resident creditor is not forbidden to send his claim out of the State for collection by suit or otherwise, provided no effort is made, in the foreign state by attachment or garnishment, to deprive the resident debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State. Padgett v. Long, 225 N.C. 392, 35 S.E.2d 234 (1945).

§ 95-74. Resident not to abet collection out of State.

No person residing or sojourning in this State shall counsel, aid, or abet any violation of the provisions of G.S. 95-73. (1909, c. 504, s. 2; C. S., s. 6569.)

§ 95-75. Remedies for violation of § 95-73 or 95-74; damages; indictment.

Any person violating any provisions of G.S. 95-73 or 95-74 shall be answerable in damages to any debtor from whom any book account, negotiable instrument, duebill, or other monetary demand arising out of contract shall be collected, or against whose earnings any warrant of attachment or notice of garnishment shall be issued, in violation of the provisions of G.S. 95-73, to the full amount of the debt thus collected, attached, or garnisheed, to be recovered by civil action in any court of competent jurisdiction in this State; and any person so offending shall likewise be guilty of a misdemeanor, punishable by a fine of not more than two hundred dollars ($200.00). (1909, c. 504, s. 3; C. S., s. 6570.)

CASE NOTES

Necessary Allegation. — In a suit to recover damages for violation of the provisions of § 95-73, an allegation that the forbidden purpose was accomplished, by instituting in the foreign state an action, suit or proceeding for the attachment or garnishment of the debtor's earnings in the hands of his employer, would seem to be an essential element of the cause of action. An allegation that the debtor was threatened with attachment or garnishment of his wages and was forced to pay the foreign judgment in order to avoid same, is not sufficient. Padgett v. Long, 225 N.C. 392, 35 S.E.2d 234 (1945).

§ 95-76. Institution of foreign suit, etc., evidence of intent to violate.

In any civil or criminal action instituted in any court of competent jurisdiction in this State for any violation of the provisions of G.S. 95-73 and 95-74, proof of the institution or prosecution of any action, suit, or proceeding in violation of the provisions of G.S. 95-73, or the issuance of service therein of any warrant of attachment, notice, or garnishment or other like writ for the garnishment of earnings of the defendant therein, or of the payment by the garnishee therein of any final judgment rendered in any such action, suit, or proceeding shall be deemed prima facie evidence of the intent of the creditor or other holder of the debt sued upon to deprive such debtor of his personal earnings and property exempt from application to the payment of his debts under the laws of this State, in violation of the provisions of this Article. (1909, c. 504, s. 4; C. S., s. 6571.)

§ 95-77. Construction of Article.

No provision of this Article shall be so construed as to deprive any person entitled to its benefits of any legal or equitable remedy already possessed under the laws of this State. (1909, c. 504, s. 5; C. S., s. 6572.)

Article 10.

Declaration of Policy as to Labor Organizations.

§ 95-78. Declaration of public policy.

The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association. (1947, c. 328, s. 1.)

Legal Periodicals. — For discussion of this Article, see 25 N.C.L. Rev. 447.

For note on preemption and State injunctive enforcement of the "Right-to-Work" Law, see 36 N.C.L. Rev. 502 (1958).

For note entitled, "Application of Right-to-Work Laws in Multistate Workforce Situations," see 55 N.C.L. Rev. 685 (1977).

CASE NOTES

Article Is Constitutional. — This Article does not abridge the freedom of speech and the opportunities of unions and their members "peaceably to assemble and to petition the government for a redress of grievances," which are guaranteed by the First Amendment and made applicable to the states by the Fourteenth Amendment. Nor does it conflict with Art. I, § 10, of the United States Constitution, insofar as it impairs the obligation of contracts made prior to its enactment. Nor does it deny unions and their members equal protection of the laws contrary to the Fourteenth Amendment. Nor does it deprive employers, unions or members of unions of their liberty without due process of law in violation of the Fourteenth Amendment. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

This Article is a valid exercise of the police power of the State, and does not violate former § 17, Art. I, of the State Constitution (see now N.C. Const., Art. I, § 19). State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947), aff'd, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

Not Discriminatory. — This Article is applicable to all employers and employees within the State, and therefore the fact that persons or groups coming within its scope must perforce be affected in different degrees because of the difference of their economic, social or political positions, does not render the act unconstitutional as discriminatory. State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947), aff'd, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

Sections 95-79 to 95-81 constitute the public policy of North Carolina with respect to the right to work. Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974).

By this Article the legislature in emphatic language declared its public policy with respect to conditions incident to the right to employment. Douglas Aircraft Co. v. Local 379, Int'l Bhd. of Elec. Workers, 247 N.C. 620, 101 S.E.2d 800 (1958).

This Article defines certain rights of employers and employees. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973).

Construction of Section. — This section cannot be construed to contravene the national policy as between employer and supervisor. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

To enforce a provision of a construction contract whereby all of defendant

subcontractor's labor must be acceptable to the plaintiff general contractor by requiring subcontractor to remove its nonunion members from the project and replace them with union members would result in a direct violation of the public policy declared in this section and of the express prohibition contained in § 95-80. Poole & Kent Corp. v. C.E. Thurston & Sons, 21 N.C. App. 1, 203 S.E.2d 74, aff'd, 286 N.C. 121, 209 S.E.2d 450 (1974).

Provisions for a "closed shop" in agreements executed subsequent to the effective date of this Article, and such provisions in extensions of prior contracts executed subsequent to that date, are contrary to public policy and void. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Article Is in Force Except as Limited by National Labor Legislation. — Except to the extent Congress, in enacting labor legislation related to interstate commerce, has preempted the field, this Article is in full force and effect. Hudson v. Atlantic Coast Line R.R., 242 N.C. 650, 89 S.E.2d 441 (1955), cert. denied, 351 U.S. 949, 76 S. Ct. 844, 100 L. Ed. 1473 (1956); Allen v. Southern Ry., 249 N.C. 491, 107 S.E.2d 125 (1959).

Union Shop Agreement Valid under Federal Railway Labor Act. — A union shop agreement, complying in all respects with the provisions of the Union Shop Amendment of 1951 to the Federal Railway Labor Act is not void by virtue of this Article. Hudson v. Atlantic Coast Line R.R., 242 N.C. 650, 89 S.E.2d 441 (1955), cert. denied, 351 U.S. 949, 76 S. Ct. 844, 100 L. Ed. 1473 (1956).

A union shop agreement authorized by the Union Shop Amendment of 1951 to the Federal Railway Labor Act is valid in instances governed by the federal act, notwithstanding that otherwise it would be void under the North Carolina "Right-to-Work" Act embodied in this and sections following. Allen v. Southern Ry., 249 N.C. 491, 107 S.E.2d 125 (1959).

In an action to restrain alleged unlawful picketing pursuant to a conspiracy to force plaintiff to violate the State Right-to-Work Law, on motion to show cause why a temporary restraining order should not be continued, the facts were insufficient to show that continuance of the temporary restraining order enjoined the exercise of any rights of defendants protected by the Federal Labor Management Act, and the order would not be disturbed, the question being determinable upon the evidence to be offered upon the hearing upon the merits. J.A. Jones Constr. Co. v. Local 755 Int'l Bhd. of Elec. Workers, 246 N.C. 481, 98 S.E.2d 852 (1957).

The violation of this Article is a criminal offense. State v. Whitaker, 228 N.C. 352, 45 S.E.2d 860 (1947), aff'd, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 201 (1949).

Punishable as for Misdemeanor. — This Article is declaratory of public policy and was enacted in the interest of the public welfare, and therefore the violation of its provisions is a criminal offense punishable as for a misdemeanor, notwithstanding the failure of the statute to prescribe a penalty for its breach. The fact that the act incidentally provides for the redress of private injuries does not alter this result. State v. Bishop, 228 N.C. 371, 45 S.E.2d 858 (1947).

Applied in Brotherhood of Ry. & S.S. Clerks v. Allen, 373 U.S. 113, 83 S. Ct. 1158, 10 L. Ed. 2d 235 (1963).

Cited in Willard v. Huffman, 247 N.C. 523, 101 S.E.2d 373 (1958).

§ 95-79. Certain agreements declared illegal.

Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina. (1947, c. 328, s. 2.)

CASE NOTES

Picketing for the purpose of forcing an employer to employ only union labor is for an unlawful purpose by virtue of this section. Douglas Aircraft Co. v. Local 379, Int'l Bhd. of Elec. Workers, 247 N.C. 620, 101 S.E.2d 800 (1958).

Federal Preemption. — Where orderly and peaceful picketing is for the unlawful purpose of forcing an employer to breach the Right-to-Work Law embraced in this section by employing only union labor, and also constitutes an unfair labor practice within the

purview of the Federal Labor Management Relations Act, the North Carolina courts have no authority to issue a restraining order enjoining such picketing, since under the federal decisions the federal law exclusively preempts the field and removes the matter from the jurisdiction of the State courts. Douglas Aircraft Co. v. Local 379, Int'l Bhd. of Elec. Workers, 247 N.C. 620, 101 S.E.2d 800 (1958).

Void Agreement. — An agreement between an employer and its employees which makes union membership a prerequisite of employment is void in this jurisdiction. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

With Valid Severable Provisions. — While §§ 95-79 to 95-84 preclude "closed shop" agreements, these sections do not preclude provisions relating to working conditions, hours, rates of pay, training of journeymen, overtime, vacation and severance pay, and such provisions are severable and may be sustained irrespective of the invalidity of a "closed shop" provision in the contract. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Applied in Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974).

§ 95-80. Membership in labor organization as condition of employment prohibited.

No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. (1947, c. 328, s. 3.)

Cross References. — See notes under § 95-79.

Legal Periodicals. — For note entitled, "Application of Right-to-Work Laws in Multistate Workforce Situations," see 55 N.C.L. Rev. 685 (1977).

CASE NOTES

To enforce a provision of a construction contract whereby all of defendant subcontractor's labor must be acceptable to the plaintiff general contractor by requiring subcontractor to remove its nonunion members from the project and replace them with union members would result in a direct violation of the public policy declared in § 95-78 and of the express prohibition contained in this section. Poole & Kent Corp. v. C.E. Thurston & Sons, 21 N.C. App. 1, 203 S.E.2d 74, aff'd, 286 N.C. 121, 209 S.E.2d 450 (1974).

Cited in Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974).

§ 95-81. Nonmembership as condition of employment prohibited.

No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. (1947, c. 328, s. 4.)

Cross References. — See notes to § 95-83.

Legal Periodicals. — For note entitled, "Application of Right-to-Work Laws in Multistate Workforce Situations," see 55 N.C.L. Rev. 685 (1977).

For note on federal preemption of state damage remedies for discharge, see 53 N.C.L. Rev. 571 (1974).

CASE NOTES

Employer's Right to Discharge Supervisor for Union Membership Is Federal. — Congress and the federal courts have adopted a national industrial relations policy which gives an employer the right to discharge his supervisor for union membership. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 941, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

And the State is precluded from interfering with that policy. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 941, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

When plaintiff seeks to deprive an employer of his right to discharge his supervisor for membership in a union, the doctrine of federal preemption applies, and the state court is without jurisdiction over the subject matter of the controversy. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 941, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

Void Agreement. — An agreement between an employer and its employees which makes nonmembership in a labor union a prerequisite of employment is void in this jurisdiction. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

Jurisdiction over Violation. — Where the National Labor Relations Board has declined jurisdiction because the amount of interstate commerce involved is less than the jurisdictional amount fixed by the Board, a State court has jurisdiction of an action for damages brought for an alleged violation of this section. Willard v. Huffman, 250 N.C. 396, 109 S.E.2d 233, cert. denied, 361 U.S. 893, 80 S. Ct. 195, 4 L. Ed. 2d 150 (1959). See Keller v. Huffman Full Fashioned Mills, Inc., 251 N.C. 92, 110 S.E.2d 480 (1959).

Cited in Poole & Kent Corp. v. C.E. Thurston & Sons, 21 N.C. App. 1, 203 S.E.2d 74 (1974); Poole & Kent Corp. v. C.E. Thurston & Sons, 286 N.C. 121, 209 S.E.2d 450 (1974).

§ 95-82. Payment of dues as condition of employment prohibited.

No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization. (1947, c. 328, s. 5.)

§ 95-83. Recovery of damages by persons denied employment.

Any person who may be denied employment or be deprived of continuation of his employment in violation of G.S. 95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment. (1947, c. 328, s. 6.)

Legal Periodicals. — For note on federal preemption of state damage remedies for discharge, see 53 N.C.L. Rev. 571 (1974).

CASE NOTES

Employer's Right to Discharge Supervisor for Union Membership Is Federal. — Congress and the federal courts have adopted a national industrial relations policy which gives an employer the right to discharge his supervisor for union membership. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 941, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

And the State is precluded from interfering with that policy. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 941, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

When plaintiffs seek to deprive an employer of his right to discharge his supervisor for membership in a union, the doctrine of federal preemption applies, and the state court is without jurisdiction over the subject matter of the controversy. Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973), aff'd, 416 U.S. 941, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974).

What Plaintiff Must Show. — In order for the plaintiff in the instant case to recover for damages allegedly sustained as a result of his discharge in violation of the provisions of § 95-81, the burden is on him to show by competent evidence, and by the greater weight thereof, that he was discharged solely by reason of his participation in the discussions with his fellow employees in connection with their proposed plan to join a labor union or that such participation therein was the "motivating" or "moving cause" for the discharge. Willard v. Huffman, 247 N.C. 523, 101 S.E.2d 373, cert. denied, 361 U.S. 893, 80 S. Ct. 195, 4 L. Ed. 2d 150 (1958).

What Jury Must Find. — Where there is a conflict in the evidence as to the reason for discharge, in an action brought under the provisions of § 95-81 and the following sections, in order for a plaintiff to recover damages thereunder, the jury must find that the discharge resulted solely from the plaintiff's exercise of rights protected under this statute, or that the plaintiff's exercise of such rights was the motivating or moving cause for such discharge. Willard v. Huffman, 247 N.C. 523, 101 S.E.2d 373, cert. denied, 361 U.S. 893, 80 S. Ct. 195, 4 L. Ed. 2d 150 (1959).

Jurisdiction over Violation. — See same catchline under § 95-81.

Stated in Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272 (1978).

§ 95-84. Application of Article.

The provisions of this Article shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract. (1947, c. 328, s. 7.)

CASE NOTES

Applied in Beasley v. Food Fair of N.C., Inc., 282 N.C. 530, 193 S.E.2d 911 (1973).

Cited in Willard v. Huffman, 247 N.C. 523, 101 S.E.2d 373 (1958).

ARTICLE 11.

Minimum Wage Act.

§§ 95-85 to 95-96: Repealed by Session Laws 1979, c. 839, s. 2, effective July 1, 1979.

Cross References. — For present statute covering the subject matter of the repealed sections, see § 95-25.1 et seq.

Article 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

§ 95-97. Employees of units of government prohibited from becoming members of trade unions or labor unions.

No employee of the State of North Carolina, or of any agency, office, institution or instrumentality thereof, or any employee of a city, town, county, or other municipality or agency thereof, or any public employee or employees of an entity or instrumentality of government shall be, become, or remain a member of any trade union, labor union, or labor organization which is, or may become, a part of or affiliated in any way with any national or international labor union, federation, or organization, and which has as its purpose or one of its purposes, collective bargaining with any employer mentioned in this Article with respect to grievances, labor disputes, wages or salary, rates of pay, hours of employment, or the conditions of work of such employees. Nor shall such an employee organize or aid, assist, or promote the organization of any such trade union, labor union, or labor organization, or affiliate with any such organization in any capacity whatsoever.

The terms "employee," "public employee" or "employees" whenever used in this section shall mean any regular and full-time employee engaged exclusively in law-enforcement or fire prevention activity. (1959, c. 742.)

CASE NOTES

This section is unconstitutional on its face. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

This section is void on its face as an abridgement of freedom of association protected by the First and Fourteenth Amendments of the Constitution of the United States. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

Section 95-99 is so related to this section that it cannot survive the invalidation of that section. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

Applied in NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60 (4th Cir. 1965).

Cited in City of Winston-Salem v. Chauffeurs Local 391, 470 F. Supp. 442 (M.D.N.C. 1979).

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect. (1959, c. 742.)

Legal Periodicals. — For a note discussing judicial deference to the administrative discretion of prison officials in the context of Jones v. North Carolina Prisoners' Labor Unions, Inc., 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977), see 14 Wake Forest L. Rev. 647 (1978).

CASE NOTES

Constitutionality. — This section is a valid and constitutional exercise of the legislative authority of the General Assembly of North Carolina. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

This section is unenforceable in the face of the federal Railway Labor Act. International Longshoremen's Ass'n v. North Carolina Ports Auth., 463 F.2d 1 (4th Cir.), aff'd, 409 U.S. 982, 93 S. Ct. 318, 34 L. Ed. 2d 245 (1972).

The State Ports Authority, operating terminal railroads to transfer freight from ships to interstate carriers, is a carrier under the Railway Labor Act and is required to negotiate with a labor union on pay rates. International Longshoremen's Ass'n v. North Carolina Ports Auth., 463 F.2d 1 (4th Cir.), aff'd, 409 U.S. 982, 93 S. Ct. 318, 34 L. Ed. 2d 245 (1972).

The provisions of the Railway Labor Act providing for collective bargaining between carriers and the duly elected representatives of their employees are supreme and preempt the provisions of this section. International Longshoremen's Ass'n v. North Carolina State Ports Auth., 370 F. Supp. 33 (E.D.N.C. 1974), aff'd, 511 F.2d 1007 (4th Cir. 1975).

This section does not justify denial by city of request to withhold union dues from paychecks of city employees. Local 660, International Ass'n of Firefighters v. City of Charlotte, 518 F.2d 82 (4th Cir. 1975).

Regulations Relating to Prisoners' Labor Union. — Regulations promulgated by the Department of Correction prohibiting prisoners from soliciting other inmates to join a prisoners' labor union and barring union meetings and bulk mailings concerning the union from outside sources were not in violation of the First Amendment rights of free speech, association and assembly, or of equal protection under the Fourteenth Amendment. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 631 (1977).

Quoted in NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60 (4th Cir. 1965).

Cited in English v. Powell, 592 F.2d 727 (4th Cir. 1979); City of Winston-Salem v. Chauffeurs Local 391, 470 F. Supp. 442 (M.D.N.C. 1979).

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Municipal housing authority governed by this section. Mr. Robert E. Allen, Attorney, Housing Authority, Greensboro, 40 N.C.A.G. 315 (1969).

Municipalities cannot check off or deduct union dues for their employees. Mr. Milton Short, Councilman of the City of Charlotte, 40 N.C.A.G. 591 (1969).

§ 95-99. Penalty for violation of Article.

Any violation of the provisions of this Article is hereby declared to be a misdemeanor, and upon conviction, plea of guilty or plea of nolo contendere shall be punishable in the discretion of the court. (1959, c. 742.)

CASE NOTES

Section Unconstitutional. — This section is so related to § 95-97 that it cannot survive the invalidation of that section. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

Stated in NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60 (4th Cir. 1965).

§ 95-100. No provisions of Article 10 of Chapter 95 applicable to units of government or their employees.

The provisions of Article 10 of Chapter 95 of the General Statutes shall not apply to the State of North Carolina or any agency, institution, or instrumentality thereof or the employees of same nor shall the provisions of Article 10 of Chapter 95 of the General Statutes apply to any public employees or any employees of any town, city, county or other municipality or the agencies or instrumentalities thereof, nor shall said Article apply to employees of the State or any agencies, instrumentalities or institutions thereof or to any public employees whatsoever. (1959, c. 742.)

CASE NOTES

Cited in City of Winston-Salem v. Chauffeurs Local 391, 470 F. Supp. 442 (M.D.N.C. 1979).

ARTICLE 13.

Payments to or for Benefit of Labor Organizations.

§ 95-101. Definition.

As used in this Article, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employee or employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. (1963, c. 244.)

§ 95-102. Certain payments to and agreements to pay labor organizations unlawful.

It shall be unlawful for any carrier or shipper of property or any association of such carriers or shippers to agree to pay, or to pay, to or for the benefit of a labor organization, directly or indirectly, any charge by reason of the placing upon, delivery to, or movement by rail, or by a railroad car, of a motor vehicle, trailer, or container which is also capable of being moved or propelled upon the highways and any such agreement shall be void and unenforceable. (1963, c. 244.)

§ 95-103. Acceptance of such payments unlawful.

It shall be unlawful for any labor organization to accept or receive from any carrier or shipper of property, or any association of such carriers or shippers, any payment described in G.S. 95-102 above. (1963, c. 244.)

§ 95-104. Penalty.

Any person, firm, corporation, association or partnership which or who agrees to pay, or does pay, or agrees to receive, or does receive, any payment described in this Article shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00), nor more than one thousand dollars ($1,000) for each offense. Each act of violation, and each day during which such an agreement remains in effect, shall constitute a separate offense. (1963, c. 244.)

Article 14.

Inspection Services Fees.

§ 95-105. Fees authorized; elevators, escalators, etc.

The North Carolina Department of Labor is hereby authorized to assess and collect the following inspection service fees for the installation and alteration of elevators, escalators, dumbwaiters other than those installed or altered in restaurants and special equipment, based on the cost of installation or alteration:

Cost of Installation or Alteration	Unit Fee
$0 — $10,000	$ 70
10,001 — 30,000	110
30,001 — 50,000	155
50,001 — 80,000	195
80,001 — 100,000	215
Over 100,000	260

The North Carolina Department of Labor is hereby authorized to assess and collect a fee of ten dollars ($10.00) for the periodic inspection of elevators, escalators and dumbwaiters. (1975, c. 777, s. 1; 1977, c. 983.)

§ 95-106. Fees authorized; amusement devices; aerial tramways, etc.

The North Carolina Department of Labor is hereby authorized to assess and collect the following inspection service fees for annual inspections for each location within the State of amusement devices, aerial passenger tramways and inclined railroads:

Type Inspection	Unit Fee
Amusement Devices	$ 10
Gondolas, Chairlifts and Inclined Railroads	125
J- or T-Bars	56
Rope Tows	28

(1975, c. 777, s. 2.)

§ 95-107. Assessment and collection of fees; certificates of safe operation.

The assessment of the fees pursuant to this Article shall be made against the owner or operator of such equipment and shall be collected at the time of inspection. Certificates of safe operation shall be withheld by the Department of Labor until such time as the assessed fees are collected. (1975, c. 777, s. 3.)

§ 95-108. Disposition of fees.

All fees collected by the Department of Labor pursuant to this Article shall be deposited with the State Treasurer and shall be used exclusively for inspection purposes of the equipment referenced in this Article. (1975, c. 777, s. 4.)

§ 95-109. Inspection of erection of rides.

Inspection of erection of rides is related solely to carnivals and fairs. (1975, c. 777, s. 5.)

§§ 95-110 to 95-115: Reserved for future codification purposes.

Article 15.

Passenger Tramway Safety.

Repeal of Article. — This Article is repealed, effective July 1, 1981, by Session Laws 1977, c. 712, s. 2, as amended by Session Laws 1979, c. 744, s. 1. The 1977 act also repeals, with postponed effective dates, numerous other Chapters and Articles creating licensing and regulatory agencies, and sets up a Government Evaluation Commission whose function is to conduct a performance evaluation of the programs and functions of each such agency and report to General Assembly whether the program or function in question should be terminated, reconstituted, reestablished or continued. The Commission will go out of existence June 30, 1983. The 1977 act is codified as § 143-34.10 et seq.

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§ 95-116. Declaration of policy.

In order to safeguard life, health, property, and the welfare of this State, it shall be the policy of the State of North Carolina to protect its citizens and visitors from unnecessary mechanical hazards in the operation of ski tows, lifts, tramways and related devices to insure that reasonable design and construction are used, that accepted safety devices and sufficient personnel are provided for, and that periodic inspections and adjustments are made which are deemed essential to the safe operation of ski tows, ski lifts and passenger tramways. The primary responsibility for design, construction, maintenance, and inspection rests with the operators of such passenger tramway devices. The State, through the Commissioner of Labor, shall register all ski lift devices and passenger tramways and establish reasonable standards of design and operational practices, and cause to be made such inspections as may be necessary in carrying out this policy. (1969, c. 1021.)

§ 95-117. Definitions.

Each word or term defined in this Article has the meaning indicated in this section, unless a different meaning is plainly required by the context.

(1) "Commissioner" means the Commissioner of Labor of the State of North Carolina.

(2) "Industry" means activities of all those persons in the State who own, manage, or direct the operation of passenger tramways.

(3) "Operator" means any person, firm, corporation, or organization which owns, manages, or directs the operation of a passenger tramway. "Operator" may apply to the State or any political subdivision or instrumentality thereof.

(4) "Passenger tramway" means a device used to transport passengers uphill on skis, or in cars on tracks, or suspended in the air by the use of steel cables, chains or belts, or by ropes, and usually supported by trestles or towers with one or more spans. "Passenger tramway" shall include the following devices:

a. "Chair lift," a type of transportation on which passengers are carried on chairs suspended in the air and attached to a moving cable, chain or link belt supported by trestles or towers with one or more spans, or similar devices;

b. "J bar, T bar or platter pull," so-called and similar types of devices or means of transportation which pull skiers riding on skis by means of an attachment to a main overhead cable supported by trestles or towers with one or more spans;

c. "Multicar aerial passenger tramway," a device used to transport passengers in several open or in closed cars attached to, and suspended from, a moving wire rope or attached to a moving wire rope and supported on a standing wire rope, or similar device;

d. "Rope tow," a type of transportation which pulls the skiers, riding on skis as the skier grasps the rope manually, or similar devices;

e. "Skimobile," a device in which a passenger car running on steel or wooden tracks is attached to and pulled by a steel cable, or similar device;

f. "Two-car aerial passenger tramway," a device used to transport passengers in two open or enclosed cars attached to, and suspended from, a moving wire rope or attached to a moving wire rope and supported on a standing wire rope or similar device. (1969, c. 1021.)

§ 95-118. Registration required.

No passenger tramway shall be operated in this State unless it has been registered by the Commissioner of Labor. On or before November 1 in each year, every operator of a passenger tramway shall apply to the Commissioner of Labor, on forms prepared by said Commissioner, for registration of the passenger tramway which such operator owns or manages, or the operation of which he directs. The application shall contain such information as the Commissioner may reasonably require in order for him to determine whether the passenger tramway sought to be registered by such operator comply with the intent of this Article and the rules and regulations promulgated by the Commissioner as hereinafter provided. (1969, c. 1021.)

§ 95-119. Registration criteria and procedure.

The Commissioner shall issue to the applying operator without delay a registration certificate for each passenger tramway owned, managed, or the operation of which is directed by such operator when the Commissioner is satisfied:

(1) That the facts stated in the application are sufficient to enable the Commissioner to fulfill his duties under this Article; and

(2) That each such passenger tramway sought to be registered complies with the rules and regulations of the Commissioner promulgated pursuant to the provisions of this Article.

(3) In order to satisfy himself that the conditions described in subdivisions (1) and (2) of this section have been fulfilled, the Commissioner may cause to be made such inspections hereinafter described as he may reasonably deem necessary.

(4) When an operator installs a passenger tramway subsequent to November 1, of any year, such operator shall file a supplemental application for registration of such passenger tramway. Upon the receipt of such supplemental application, the Commissioner shall proceed immediately to initiate proceedings leading to the registration or rejection of registration of such passenger tramway pursuant to the provisions of this Article.

(5) Each registration shall expire on October 31, next following the day of issue. Each operator shall cause the registration certificate for each passenger tramway thus registered to be displayed prominently at the place where passengers are loaded thereon. (1969, c. 1021.)

§ 95-120. Powers and duties of the Commissioner.

In addition to all other powers and duties conferred and imposed upon the Commissioner by this Article, the Commissioner shall have and exercise the following powers and duties:

(1) To adopt and enforce reasonable rules and regulations relating to public safety in the construction, operation, and maintenance of passenger tramways. The rules and regulations authorized under this section shall conform as nearly as possible to the standards contained for mechanical engineering aerial passenger tramways safety code as adopted and used by the U.S.A. Standards Institute, B77.1—1960, with addenda B77.1(a)—1963, and B77.1(b)—1965, and as said safety code from [for] tramways may be amended from time to time, and in the formulation of said regulations the Commissioner may use and adopt any other safety code for tramways as issued by recognized scientific and mechanical societies. The said regulations shall not be discriminatory in their application to operators of passenger tramways, and the procedures of the Commissioner shall be as provided in this Article;

(2) To hold hearings and take evidence in all matters relating to the exercise and performance of the powers and duties vested in the Commissioner, subpoena witnesses, administer oaths, and compel the testimony of witnesses and the production of books, papers and records relevant to any inquiry;

(3) To approve, deny, revoke, and renew the registrations provided for in this Article and the procedures of the Commissioner with respect thereto shall be as provided in this Article with respect to the issuance of certificates or licenses;

(4) To cause the prosecution and the institution of actions for injunctions of all persons violating the provisions of this Article and to incur the necessary expenses thereof;

(5) To cause the seal of the Commissioner of Labor to be affixed to all registrations issued by him, and to employ, within the funds available to him, and prescribe the duties of all such personnel as the Commissioner may deem necessary in the administration of this Article. (1969, c. 1021.)

§ 95-121. Inspections and reports.

The Commissioner may cause to be made such inspections of the construction, operation, and maintenance of passenger tramways as he shall deem to be reasonably necessary. If, as the result of an inspection, it is found that a violation of the Commissioner's rules and regulations exists, or a condition in passenger tramway construction, operation or maintenance exists, which endangers safety of the public, an immediate report shall be made to the Commissioner for appropriate investigation and order. (1969, c. 1021.)

§ 95-122. Emergency shutdown.

When facts are presented to the Commissioner tending to show that an unreasonable hazard exists in the continued operation of a passenger tramway, and after such verification of said facts as is practical under the circumstances and consistent with the public safety, the Commissioner may by an emergency order require the operator of said tramway forthwith to cease using the same for the transportation of passengers. Such emergency order shall be in writing, signed by the Commissioner, and notice thereof shall be served upon the operator or his agent immediately in control of said passenger tramway by a true copy of such order, with a return being made of such service and endorsed on the original order. Such emergency shutdown shall be effective for a period not to exceed 48 hours from the time of service. Immediately after the issuance of an emergency order, the Commissioner shall conduct an investigation into the facts of the case and shall take such action as may be appropriate and as provided by the provisions of this Article. (1969, c. 1021.)

§ 95-123. Orders.

If, after investigation, the Commissioner finds that a violation of any of his rules and regulations exists, or that there is a condition in passenger tramway construction, operation, or maintenance which endangers the safety of the public, the Commissioner shall forthwith issue his written order setting forth his findings, the corrective action to be taken, and fixing a reasonable time for compliance therewith. Such orders shall be served upon the operator involved by certified mail, and shall become final, unless the operator shall seek judicial review of said order as hereinafter provided. The Commissioner shall have the power to institute injunctive proceedings in any court of competent jurisdiction of the judicial district in which the passenger tramway is located for the purpose of restraining the operation of said tramway or for compelling compliance with any lawful order of the Commissioner. Any appeal from an order of the Commissioner shall be made in conformance with the Article [Chapter] provided for judicial review of decisions of administrative agencies, the same being Chapter 150A of the General Statutes, as amended. (1969, c. 1021; 1973, c. 1331, s. 3.)

§ 95-124. Suspension of registration.

If any operator fails to comply with the lawful order of the Commissioner as issued under this Article, and within the time fixed thereby, the Commissioner may suspend the registration of the affected passenger tramway for such time as he may consider necessary for the protection of the safety of the public. Any operator who shall be convicted, or enter a plea of guilty or nolo contendere, to operating a passenger tramway which has not been registered by the Commissioner, or after its registration has been suspended by the Commissioner, shall be guilty of a misdemeanor and shall be punished by a fine of not more than fifty dollars ($50.00) per day for each day of the such illegal operations

or by imprisonment in the discretion of the court, or both such fine and imprisonment. (1969, c. 1021.)

§ 95-125. Effective date of initial applications.

This Article shall take effect and become operative on July 30, 1969, provided that the initial applications for registration of passenger tramways shall be filed on or before November 1, 1969, and passenger tramways in existence on November 1, 1969, may be operated without registration until final action is taken by the Commissioner on the application for registration thereof. (1969, c. 1021.)

Article 16.

Occupational Safety and Health Act of North Carolina.

§ 95-126. Short title and legislative purpose.

(a) This Article shall be known as the "Occupational Safety and Health Act of North Carolina" and also may be referred to by abbreviations as "OSHANC."

(b) Legislative findings and purpose:

(1) The General Assembly finds that the burden of employers and employees of this State resulting from personal injuries and illnesses arising out of work situations is substantial; that the prevention of these injuries and illnesses is an important objective of the government of this State; that the greatest hope of attaining this objective lies in programs of research, education and enforcement, and in the earnest cooperation of the federal and State governments, employers and employees.

(2) The General Assembly of North Carolina declares it to be its purpose and policy through the exercise of its powers to assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources:

a. By encouraging employers and employees in their effort to reduce the number of occupational safety and health hazards at the place of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

b. By providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

c. By authorizing the Commissioner to develop occupational safety and health standards applicable to business giving consideration to the needs of employers and employees and to adopt standards promulgated from time to time by the Secretary of Labor under the Occupational Safety and Health Act of 1970, and by creating a safety and health review board for carrying out adjudicatory functions under this Article;

d. By building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

e. By providing occupational health criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

f. By providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

g. By providing an effective enforcement program which shall include a prohibition against giving advance notice of an inspection and sanctions for any individual violating this prohibition;

h. By providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Article and accurately describe the nature of the occupational safety and health problem;

i. By encouraging joint employer-employee efforts to reduce injuries and diseases arising out of employment;

j. By providing for research in the field of occupational safety and health, by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

k. By exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

l. By authorizing the Commissioner to enter into contracts with the Department of Human Resources, or any other State or local units, to the end that the Commissioner and the Department of Human Resources and other State or local units may fully cooperate and carry out the ends and purposes of this Article.

m. The General Assembly of North Carolina appoints and elects the North Carolina Department of Labor as the designated agency to administer the Occupational Safety and Health Act of North Carolina. (1973, c. 295, s. 1; c. 476, s. 128.)

Legal Periodicals. — For survey of 1974 case law on proceedings under the Occupational Safety and Health Act, see 53 N.C.L. Rev. 1005 (1975).

§ 95-127. Definitions.

In this Article, unless the context otherwise requires:

(1) The term "Advisory Council" shall mean the Advisory Council or body established under this Article.

(2) The term "Board" means the Safety and Health Review Board established under this Article.

(3) The term "classified service" means a position included in the State Merit System of Personnel Administration subject to the laws, rules and regulations of the State Personnel Board as administered by the State Personnel Director and as set forth in Chapter 126 of the General Statutes, 1971 Cumulative Supplement to Volume 3B.

(4) The term "Commissioner" means the Commissioner of Labor of North Carolina.

(5) The term "days" shall mean a calendar day unless otherwise noted.

(6) The term "Department" means the Department of Labor of North Carolina.

(7) The term "Deputy Commissioner" means the Deputy Commissioner of the North Carolina Department of Labor, who is appointed by the Commissioner to aid and assist the Commissioner in the performance of his duties. The Deputy Commissioner shall exercise such power and authority as delegated to him by the Commissioner.

(8) The term "Director" means the officer or agent appointed by the Commissioner of Labor for the purpose of assisting in the administration of the Occupational Safety and Health Act of North Carolina.

(9) The term "employee" means an employee of an employer who is employed in a business or other capacity of his employer, including any and all business units and agencies owned and/or controlled by the employer.

(10) The term "employer" means a person engaged in a business who has employees, including any state or political subdivision of a state, but does not include the employment of domestic workers employed in the place of residence of his or her employer.

(11) The term "established federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any act of Congress in force on the date of enactment of this Article, and adopted by the Secretary of Labor under the Occupational Safety and Health Act of 1970.

(12) The term "federal act," as referred to in this Article, means the Occupational Safety and Health Act of 1970 (Public Law 91-596, 91st Congress, Act of December 29, 1970, 84 Stat. 1950).

(13) The term "imminent danger" means any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death, or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Article.

(14) The term "issue" means an industrial, occupational or hazard grouping.

(15) The term "occupational safety and health standards" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, safety devices, operations or processes reasonably necessary and appropriate to provide safe and healthful employment and places of employment, and shall include all occupational safety and health standards adopted and promulgated by the Secretary which also may be and are adopted by the State of North Carolina under the provisions of this Article. This term includes but is not limited to interim federal standards, consensus standards, any proprietary standards or permanent standards, as well as temporary emergency standards which may be adopted by the Secretary, promulgated as provided by the Occupational Safety and Health Act of 1970, and which standards or regulations are published in the Code of Federal Regulations or otherwise properly promulgated under the federal act or any appropriate federal agencies.

(16) The term "person" means one or more individuals, partnerships, associations, corporations, business trusts, legal representatives.

(17) The term "Secretary" means the United States Secretary of Labor.

(18) A "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use at such place of employment, unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.

(19) The term "State" means the State of North Carolina. (1973, c. 295, s. 2.)

Editor's Note. — The 1971 Cumulative Supplement of Volume 3B, referred to in subdivision (3), was incorporated in the bound volume when that volume was replaced in 1974 and 1981.

OPINIONS OF ATTORNEY GENERAL

Grower or Owner of Temporary Labor Camps Is Responsible for Enforcement of Safety and Health Regulations. — See opinion of Attorney General to Mr. Weldon B. Denny, Assistant Director, Occupational Safety and Health Act of N.C., 43 N.C.A.G. 245 (1973).

§ 95-128. Coverage.

The provisions of this Article or any standard or regulation promulgated pursuant to this Article shall apply to all employers and employees except:

(1) The federal government, including its departments, agencies and instrumentalities;

(2) Employees whose safety and health are subject to protection under the Atomic Energy Act of 1954, as amended;

(3) Employees whose safety and health are subject to protection under the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801) and the Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. 725), or the Federal Railroad Safety Act of 1970 (45 U.S.C. 431-41);

(4) Railroad employees whose safety and health are subject to protection under the Federal Safety Appliance Act (45 U.S.C. 1-50), or the Federal Railroad Safety Act of 1970 (45 U.S.C. 431-41);

(5) Employees engaged in all maritime operations;

(6) Employees whose employer is within that class and type of employment which does not permit federal funding, on a matching basis, to the State in return of State enforcement of all occupational safety and health issues. (1973, c. 295, s. 3.)

§ 95-129. Rights and duties of employers.

Rights and duties of employers shall include but are not limited to the following provisions:

(1) Each employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees;

(2) Each employer shall comply with occupational safety and health standards or regulations promulgated pursuant to this Article;

(3) Each employer shall refrain from any unreasonable restraint on the right of the Commissioner or Director, or their lawfully appointed agents, to inspect the employer's place of business. Each employer shall assist the Commissioner, the Director or the lawful agents of either or both of them, in the performance of their inspection duties by supplying or by making available information, any necessary personnel or necessary inspection aides;

(4) Any employer, or association of employers, is entitled to participate in the development of standards by submission of comments on proposed standards, participation in hearings on proposed standards, or by requesting the development of standards on a given issue under G.S. 95-131;

(5) Any employer is entitled, under G.S. 95-137, to review of any citation issued because of his alleged violation of any standard promulgated under this Article, or the length of the abatement period allowed for the correction of an alleged violation;

(6) Any employer is entitled, under G.S. 95-137, to a review of any penalty in the form of civil damages assessed against him because of his alleged violation of this Article;
(7) Any employer is entitled, under G.S. 95-132, to seek an order granting a variance from any occupational safety or health standard;
(8) Any employer is entitled, under G.S. 95-152, to protection of his trade secrets and other legally privileged communications. (1973, c. 295, s. 4.)

§ 95-130. Rights and duties of employees.

Rights and duties of employees shall include but are not limited to the following provisions:

(1) Employees shall comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this Article which are applicable to their own actions and conduct.
(2) Employees and representatives of employees are entitled to participate in the development of standards by submission of comments on proposed standards, participation in hearings on proposed standards, or by requesting the development of standards on a given issue under G.S. 95-131.
(3) Employees shall be notified by their employer of any application for a temporary order granting the employer a variance from any provision of this Article or standard or regulation promulgated pursuant to this Article.
(4) Employees shall be given the opportunity to participate in any hearing which concerns an application by their employer for a variance from a standard promulgated under this Article.
(5) Any employee who may be adversely affected by a standard or variance issued pursuant to this Article may file a petition for review with the Commissioner who shall review the matters set forth and alleged in the petition.
(6) Any employee who has been exposed or is being exposed to toxic materials or harmful physical agents in concentrations or at levels in excess of that provided for by any applicable standard shall have a right to file a petition for review with the Commissioner who shall investigate and pass upon same.
(7) Subject to regulations issued pursuant to this Article any employee or authorized representative of employees shall be given the right to request an inspection and to consult with the Commissioner, Director, or their agents, at the time of the physical inspection of any work place as provided by the inspection provision of this Article.
(8) No employee shall be discharged or discriminated against because such employee has filed any complaint or instituted or caused to be instituted any proceeding or inspection under or related to this Article or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Article.
(9) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of (8) hereinafter mentioned may, within 30 days after such violation occurs, file a complaint with the Commissioner alleging such discrimination. Upon receipt of such complaint, the Commissioner shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Commissioner determines that the provisions of the above subdivision have been violated, he shall bring an action against such person in the superior court division of the General Court of Justice

in the county wherein the discharge or discrimination occurred. In any such action the superior court shall have jurisdiction, for cause shown to restrain violations of subdivision (8) of this section and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(10) Within 90 days of the receipt of a complaint filed under subdivision (9) above the Commissioner shall notify the complainant of his determination.

(11) Any employee or representative of employees who believes that any period of time fixed in the citation given to his employer for correction of a violation is unreasonable has the right to contest such time for correction by filing a written and signed notice within 20 days from the date the citation is posted within the establishment.

(12) Nothing in this or any other provision of this Article shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others. (1973, c. 295, s. 5.)

CASE NOTES

Stated in Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979).

§ 95-131. Development and promulgation of standards; adoption of federal standards and regulations.

(a) All occupational safety and health standards promulgated under the federal act by the Secretary, and any modifications, revision, amendments or revocations in accordance with the authority conferred by the federal act or any other federal act or agency relating to safety and health and adopted by the Secretary shall in all respects be the rules and regulations of the Commissioner of this State unless the Commissioner shall make, promulgate and publish an alternative State rule, regulation or standard as effective as the federal requirement and providing safe and healthful employment in places of employment as required by the federal act and standards and regulations heretofore referred to and as provided by the Occupational Safety and Health Act of 1970. All standards and regulations promulgated under the federal act by the Secretary, and any modifications, revisions, or revocations in accordance with the authority conferred by the federal act, or any other federal act or agency relating to safety and health and adopted by the Secretary, shall become effective upon the date the same is filed by the Commissioner in the office of the Attorney General.

(b) In the event the Commissioner shall develop his own standards and regulations relating to occupational safety and health which he shall consider to be as effective and efficient as any of the federal regulations or standards, then the Commissioner may by regulation promulgate, modify, or revoke any occupational safety or health standard developed by him in the following manner:

(1) Whenever the need or desirability of promulgating a regulation or standard by the Commissioner which serves the objective of this Article is indicated by information submitted in writing to the Commissioner by any interested person, employer, employee, or representative of any organization of employers or employees or upon

information derived from recognized standards-producing organizations or upon the basis of information developed by the Commissioner or otherwise available to him, he shall determine the scope of issue to be covered by such standard or regulation and the method to be followed in the development of such standard or regulation. If the Commissioner finds it desirable he may request the recommendation of the Advisory Council appointed under this Article and shall provide such Advisory Council with any proposals of his own, together with all pertinent factual information developed by technical experts or otherwise available, including the result of research, demonstrations, experiments, and experience. Recommendations of the Advisory Council shall be submitted to the Commissioner within 90 days from the date of the receipt of such request or within such longer or shorter period as may be prescribed by the Commissioner, but in no event for a period which is longer than 270 days.

(2) When the Commissioner wishes to promulgate a regulation or standard in this section, he shall consider any proposed revisions prior to publication of proposed standards and regulations under subdivision (3) of this subsection, and may make revisions appropriate to the effectiveness of the proposed standards and regulations.

(3) The Commissioner shall, following the review provided for in subdivision (2) above, publish a notice that he intends to issue a standard or regulation modifying or revoking an occupational safety or health standard or regulation in one newspaper of general circulation in Asheville, Charlotte, Durham, Greensboro, Raleigh, Wilmington and Winston-Salem, and shall afford interested persons a period of 30 days after publication to submit written data or comments. The notice shall describe the content of the proposed regulation and shall state where copies of the proposed rule, regulation or standard may be obtained.

(4) On or before the last day of the period provided for the submission of written data or comment under subdivision (3) above, any interested person may file with the Commissioner written objections to the proposed regulation, rule or standard, stating the grounds therefor and requesting a public hearing on such objections. Within 30 days after the last day for filing such objections, the Commissioner shall issue a call for a public hearing on the proposed occupational safety or health rule, regulation or standard to which such objections have been filed. The notice of hearing shall be published in one newspaper of general circulation in Asheville, Charlotte, Durham, Greensboro, Raleigh, Wilmington and Winston-Salem, 30 days prior to the hearing. The notice shall include the date, time, and place of the hearing and shall indicate concisely and accurately the subject matter of the proposed rule, regulation or standard to which objections have been filed. It shall also state where copies of the full text of the proposed rule, regulation or standard may be obtained.

(5) The hearing shall be presided over by the Commissioner or any authorized agent of the Department, or he may delegate such presiding to the Director and shall provide reasonable opportunity for reception of opinions, memoranda and advice concerning such proposed regulation, rule or standard by interested persons and organizations.

(6) Within 60 days after the expiration of the period provided for the submission of written data or comments as provided by this section, or within 60 days after the completion of any hearing held under the provision of this section, the Commissioner shall issue a regulation promulgating, modifying, or revoking such occupational safety or health standard, rule or regulation so developed by him, or make a determination that such rule, standard or regulation shall not be

issued. In addition, he shall issue a statement of reasons for any changes made from the proposed regulation, rule or standard, or reasons why no regulation, rule or standard was issued. Such regulation, rule or standard may contain a provision delaying its effective date for such period (not in excess of 90 days) as the Commissioner determines may be necessary to insure that affected employers and employees will be informed of the existence of the rule, regulation or standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the rule, regulation or standard. Notice of such promulgation, modification or revocation, shall be published in the same manner as heretofore provided in this section and as related to the publication of proposed rules, regulations and standards. Copies of the Commissioner's ruling shall be made available without cost to reasonably interested parties.

(7) Upon adoption by the enactment of this Article of the occupational safety or health standards, rules or regulations, promulgated under the federal act by the Secretary, and modifications, revisions, or revocations in accordance with the authority conferred by the federal act or any other federal act or agency relating to safety and health adopted by the Secretary, such rules, regulations and standards may be issued and promulgated without meeting the requirements of publication of proposed regulations, rules or standards and without meeting the requirements of hearings as provided in this section. Notice published in the federal register, with reference to proposed change of standards, shall be deemed to be notice to employers and employees with regard to that change. Hearings and the findings of the Secretary of Labor with reference to the proposed change of standards, shall be substituted for the hearing and findings of the Commissioner.

(c) (1) The Commissioner shall provide, without regard to the aforementioned subdivision in this section, for an emergency temporary standard to take immediate effect upon publication of such emergency temporary standard in one newspaper of general circulation in Asheville, Charlotte, Durham, Greensboro, Raleigh, Wilmington and Winston-Salem if he determines (i) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (ii) that such emergency standard is necessary to protect employees from such danger.

(2) Emergency standards may cover issues not dealt with by statutes or regulations in existence and may displace standards heretofore promulgated.

(3) Any such emergency temporary standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in subdivision (4) of this subsection.

(4) Upon publication of such emergency temporary standard, the Commissioner shall commence a proceeding in accordance with G.S. 95-131(c) of this Article, and the emergency standard as published shall also serve as a proposed regulation for the proceeding. He shall thereupon promulgate a standard under this subdivision no later than six months after publication of the emergency standard as provided in subdivision (1) of this subsection.

(d) (1) Regulations issued under subsections (b) and (c) of this section shall provide insofar as possible the highest degree of safety and health protection for employees; other considerations shall be the latest available scientific data in the field, the feasibility of the standard,

and experience gained under this and other health and safety laws. Whenever practical the standards promulgated shall be expressed in terms of objective criteria and of the performance desired. In promulgating standards dealing with toxic materials or harmful physical agents, the Commissioner, after consultation and recommendations of the Department of Human Resources, shall set a standard which most adequately assures, to the extent possible, on the basis of the most available evidence that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

(2) Upon adoption of this Article, all rules and procedures set forth in section 6(b)(7) of the federal act will be hereinafter adopted and applied.

(e) The Commissioner shall not develop or promulgate State standards, for products distributed or used in interstate commerce, which are different from federal standards for such products unless the promulgation of such State standard, or standards, are required by compelling local conditions and do not unduly burden interstate commerce. (1973, c. 295, s. 6; c. 476, s. 128; 1975, 2nd Sess., c. 983, s. 81.)

§ 95-132. Variances.

(a) Temporary Variances. — (1) The Commissioner may upon written application by an employer issue an order granting such employer a temporary variance from standards adopted by this Article or promulgated by the Commissioner under this Article. Any such order shall prescribe the practices, means, methods, operations and processes which the employer must adopt or use while the variance is in effect and state in detail a program for coming into compliance with the standard.

(2) An application for a temporary variance shall contain all information required as enumerated in 29 C.F.R. 1905.10(b) which is hereby incorporated by reference, as if herein fully set out.

(3) Upon receipt of an application for an order granting a temporary variance, the Commissioner to whom such application is addressed may issue an interim order granting such a temporary variance, for the purpose of permitting time for an orderly consideration of such application. No such interim order may be effective for longer than 180 days.

(4) Such a temporary variance may be granted only after notice to employees and interested parties and opportunity for hearing. The temporary variance may be for a period of no longer than required to achieve compliance or one year, whichever is shorter, and may be renewed only once. Application for renewal of a variance must be filed in accordance with provisions in the initial grant of the temporary variance.

(5) An order granting a temporary variance shall be issued only if the employer establishes

a. (i) That he is unable to comply with the standard by the effective date because of unavailability of professional or technical personnel or materials and equipment required or necessary construction or alteration of facilities or technology, (ii) that all available steps have been taken to safeguard his employees against the hazards covered by the standard, and (iii) that he has an effective program for coming into compliance with the standard as quickly as practicable, or

b. That he is engaged in an experimental program as described in subsection (c) of this section as hereinafter stated.

(b) Permanent Variances. — (1) Any affected employer may apply to the Commissioner for a rule or order for a permanent variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Commissioner shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard.

(2) The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question.

(3) Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Commissioner on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(c) Experimental Variances. — The Commissioner is authorized to grant a variance from any standard or portion thereof whenever he determines that such variance is necessary to permit an employer to participate in an experiment approved by him designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers. (1973, c. 295, s. 7.)

§ 95-133. Office of Director of Occupational Safety and Health; powers and duties of the Director.

(a) There is hereby created and established in the North Carolina Department of Labor a division to be known as the Office of Occupational Safety and Health. The Commissioner shall appoint a Director to administer this division who shall be subject to the direction and supervision of the Commissioner. The Director shall carry out the responsibilities of the State of North Carolina as prescribed under the Occupational Safety and Health Act of 1970, and any subsequent federal laws or regulations relating to occupational safety and health, and this Article, as written, revised or amended by legislative enactment and as delegated or authorized by the Commissioner. The Commissioner shall make and promulgate such rules, amendments, or revisions in rules, as he may deem advisable for the administration of the office, he shall also accept and use the services, facilities, and personnel of any agency of the State or of any subdivision of State government, either as a free service or by reimbursement. The Director shall devote full time to his duties of office and shall not hold any other office. The Director, subject to the approval of the Commissioner, shall select a professional staff of qualified and competent employees to assist in the statewide administration of the Article. All of the employees referred to herein shall be under the classified service, as herein defined in G.S. 95-127, subdivision (3).

(b) Subject to the general supervision of the Commissioner and Deputy Commissioner, the Director shall be responsible for the administration and enforcement of all laws, rules and regulations which it is the duty of the Office to administer and enforce. The Director shall have the power, jurisdiction and authority to:

(1) Uniformly superintend, enforce and administer applicable occupational safety and health laws of the State of North Carolina;
(2) Make or cause to be made all necessary inspections, analyses and research for the purpose of seeing that all laws and rules and regulations which the office has the duty, power and authority to enforce are promptly and effectively carried out;
(3) Make all necessary investigations, develop information and reports upon conditions of employee safety and health, and upon all matters relating to the enforcement of this Article and all lawful regulations issued thereunder;
(4) Report to the Federal Occupational Safety and Health Administration any information which it may require;
(5) Recommend to the Commissioner such rules, regulations, standards, or changes in rules, regulations and standards which the Director deems advisable for the prevention of accidents, occupational hazards or the prevention of industrial or occupational diseases;
(6) Recommend to the Commissioner that he institute proceedings to remove from his or her position any employee of the Office who accepts any favor, privilege, money, object of value, or property of any kind whatsoever or who shall give prior notice of a compliance inspection of a work place unless authorized under the provisions of this Article;
(7) Employ experts, consultants or organizations for work related to the occupational safety and health program of the Office and compensate same with the approval of the Commissioner;
(8) Institute hearings, investigations, request the issuance of citations and propose such penalties as he may in his judgment consider necessary to carry out the provisions of this Article;
(9) The Commissioner shall have the power and authority to issue all types of notices, citations, cease and desist orders, or any other pleading, form or notice necessary to enforce compliance with this Article as hereinafter set forth. The Commissioner is also empowered and authorized to apply to the courts of the State having jurisdiction for orders or injunctions restraining unlawful acts and practices prohibited by this Article or not in compliance with this Article and to apply for mandatory injunctions to compel enforcement of the Article, and the Commissioner is authorized, and further authorized by and through his agents, to institute criminal actions or proceedings for such violations of the Article as are subject to criminal penalties. The Director shall recommend to the Commissioner the imposition and amount of civil penalties provided by this Article, and the Commissioner may institute such proceedings as necessary for the enforcement and payment of such civil penalties subject to such review of the Board as hereinafter set forth.
(10) The Director may recommend to the Commissioner that any person, firm, corporation or witness be cited for contempt or for punishment as of contempt, and the Commissioner is authorized to enter any order of contempt or as of contempt as he may deem proper and necessary, and any hearing examiner may recommend to the Commissioner that such order or citation for contempt be made.
(11) The Commissioner or the Director, or their authorized agents, shall have the power and authority to issue subpoenas for witnesses and for the production of any and all papers and documents necessary for any hearing or other proceeding and to require the same to be served by the process officers of the State. The Commissioner and the Director may administer any and all oaths that are necessary in the enforcement of this Article and may certify as to the authenticity of all records, papers, documents and transcripts under the seal of the Department of Labor.

(12) All orders, citations, cease and desist orders, stop orders, sanctions and contempt orders, civil penalties and the proceedings thereon shall be subject to review by the Board as hereinafter provided, including all assessments for civil penalties. (1973, c. 295, s. 8.)

§ 95-134. Advisory Council.

(a) There is hereby established a State Advisory Council on Occupational Safety and Health consisting of 11 members, appointed by the Commissioner, composed of three representatives from management, three representatives from labor, four representatives of the public sector with knowledge of occupational safety and occupational health professions and one representative of the public sector with knowledge of migrant labor. The Commissioner shall designate one of the members from the public sector as chairman and all members of the State Advisory Council shall be selected insofar as possible upon the basis of their experience and competence in the field of occupational safety and health.

(b) The Council shall advise, consult with, and make recommendations to the Commissioner on matters relating to the administration of this Article. The Council shall hold no fewer than two meetings during each calendar year. All meetings of the Advisory Council shall be open to the public and a transcript shall be kept and made available for public inspection.

(c) The Director shall furnish to the Advisory Council such secretarial, clerical and other services as he deems necessary to conduct the business of the Advisory Council. The members of the Advisory Council shall be compensated for reasonable expenses incurred, including necessary time spent in traveling to and from their place of residence within the State to the place of meeting, and mileage and subsistence as allowed to State officials. The members of the Advisory Council shall be compensated on a per diem basis which shall be fixed by the Governor and the Advisory Budget Commission.

(d) In addition to its other duties, the Advisory Council shall assist the Commissioner in formulating and setting standards under the provisions of this Article. For this purpose the Commissioner may appoint persons qualified by experience and affiliation to present the viewpoint of the employers involved, persons similarly qualified to present the viewpoint of the workers involved, and some persons to represent the health and safety agencies of the State. The Commissioner for this purpose may include representatives of professional organizations of technicians or professionals specializing in occupational safety or health. Such persons appointed for temporary purposes may be paid such per diem and expenses of attending meetings as may be fixed by the Commissioner and Advisory Budget Commission. (1973, c. 295, s. 9; 1977, c. 806.)

§ 95-135. Safety and Health Review Board.

(a) The Safety and Health Review Board is hereby established. The Board shall be composed of three members from among persons who, by reason of training, education or experience, are qualified to carry out the functions of the Board under this Article. The Governor shall appoint the members of the Board and name one of the members as chairman of the Board. The terms of the members of the Board shall be six years except that the members of the Board first taking office shall serve, as designated by the Governor at the time of appointment, one for a term of two years, one for a term of four years, and the member of the Board designated as chairman shall serve for a term of six years. Any vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled by the Governor for the remainder of the unexpired term. The Governor shall fill all

vacancies occurring by reason of the expiration of the term of any members of the Board.

(b) The Board shall hear and issue decisions on appeals entered from citations and abatement periods and from all types of penalties. Appeals from orders of the Director dealing with conditions or practices that constitute imminent danger shall not be stayed by the Board until after full and adequate hearing. The Board in the discharge of its duties under this Article is authorized and empowered to administer oaths and affirmations and institute motions, cause the taking of depositions, interrogatories, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with any appeal or proceeding for review before the Board.

(c) The Board shall meet at least once each calendar quarter but it may hold call meetings or hearings upon at least three days' notice to each member by the chairman and at such time and place as the chairman may fix. The chairman shall be responsible on behalf of the Board for the administrative operations of the Board and shall appoint such hearing examiners and other employees as he deems necessary to assist in the performance of the Board's functions and fix the compensation of such employees with the approval of the Governor. The assignment and removal of hearing examiners shall be made by the Board, and any hearing examiner may be removed for misfeasance, malfeasance, misconduct, immoral conduct, incompetency, the commission of any crime, or for any other good and adequate reason as found by the Board. The Board shall give notice to such hearing examiner, along with written allegations as to the charges against him, and the same shall be heard by the Board, and its decision shall be final. The compensation of the members of the Board shall be on a per diem basis and shall be fixed by the Governor with the approval of the Advisory Budget Commission. The chairman of the Board may be paid a higher rate of compensation than the other two members of the Board. For the purpose of carrying out its duties and functions under this Article, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members of the Board. On matters properly before the Board the chairman may issue temporary orders, subpoenas, and other temporary types of orders subject to the subsequent review of the Board. The issuance of subpoenas, orders to take depositions, orders requiring interrogatories and other procedural matters of evidence issued by the chairman shall not be subject to review.

(d) Every official act of the Board shall be entered of record and its hearings and records shall be open to the public. The Board is authorized and empowered to make such procedural rules as are necessary for the orderly transaction of its proceedings. Unless the Board adopts a different rule, the proceedings, as nearly as possible, shall be in accordance with the Rules of Civil Procedure, G.S. 1A-1. The Board may order testimony to be taken by deposition in any proceeding pending before it at any stage of such proceeding. Any person, firm or corporation, and its agents or officials, may be compelled to appear and testify and produce like documentary evidence before the Board. Witnesses whose depositions are taken under this section, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the State.

(e) The rules of procedure prescribed or adopted by the Board shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section.

(f) Any member of the Board may be removed by the Governor for inefficiency, neglect of duty, or any misfeasance or malfeasance in office. Before such removal the Governor shall give notice of hearing and state the allegations against the member of the Board, and the same shall be heard by

the Governor, and his decision shall be final. The principal office of the Board shall be in Raleigh, North Carolina, but whenever it deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, the Board may hold hearings or conduct other proceedings at any place in the State.

(g) In case of a contumacy, failure or refusal of any person to testify before the Board, give any type of evidence, or to produce any books, records, papers, correspondence, memoranda or other records, such person upon such failure to obey the orders of the Board may be punished for contempt or any other matter involving contempt as set forth and described by the general laws of the State. The Board shall issue no order for contempt without first finding the facts involved in the proceeding. Witnesses appearing before the Board shall be entitled to the same fees as those paid for the services of said witnesses in the courts of the State, and all such fees shall be taxed against the interested parties according to the judgment and discretion of the Board.

(h) The Director shall consult with the chairman of the Board with respect to the preparation and presentation to the Board for adoption of all necessary forms or citations, notices of all kinds, forms of stop orders, all forms and orders imposing penalties and all forms of notices or applications for review by the Board, and any and all other procedural papers and documents necessary for the administration of the Article as applied to employers and employees and for all procedures and proceedings brought before the Board for review.

(i) A hearing examiner appointed by the chairman of the Board shall hear, and make a determination upon, any proceeding instituted before the Board and may hear any motion in connection therewith, assigned to such hearing examiner, and shall make a report of any such determination which constitutes his final disposition of the proceedings. A copy of the report of the hearing examiner shall be furnished to the Director and all interested parties involved in any appeal or any proceeding before the hearing examiner for his determination. The report of the hearing examiner shall become the final order of the Board 30 days from the date of said report as determined by the hearing examiner, unless within such period any member of the Board had directed that such report shall be reviewed by the entire Board as a whole. Upon application for review of any report or determination of a hearing examiner, before the 30-day period expires, the Board shall schedule the matter for hearing, on the record, except the Board may allow the introduction of newly discovered evidence, or in its discretion the taking of further evidence upon any question or issue. All interested parties to the original hearing shall be notified of the date, time and place of such hearing and shall be allowed to appear in person or by attorney at such hearing. Upon review of said report and determination by the hearing examiner the Board may adopt, modify or vacate the report of the hearing examiner and notify the interested parties. The report, decision or determination of the Board upon review shall be final unless further appeal is made to the courts under the provisions of Chapter 150A of the General Statutes, as amended, entitled: "Judicial Review of Decisions of Certain Administrative Agencies." (1973, c. 295, s. 10; c. 1331, s. 3.)

Editor's Note. — "Judicial Review of Decisions of Certain Administrative Agencies," quoted in subsection (i), is the title of former Article 33 of Chapter 143. Chapter 150A is entitled "Administrative Procedure Act."

§ 95-136. Inspections.

(a) In order to carry out the purposes of this Article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:

(1) To enter without delay, and at any reasonable time, any factory, plant, establishment, construction site, or other area, work place or environment where work is being performed by an employee of an employer; and

(2) To inspect and investigate during regular working hours, and at other reasonable times, and within reasonable limits, and in a reasonable manner, any such place of employment and all pertinent conditions, processes, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

(b) In making his inspections and investigations under this Article, the Commissioner may issue subpoenas to require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be reimbursed for all travel and other necessary expenses which shall be claimed and paid in accordance with the prevailing travel regulations of the State. In case of a failure or refusal of any person to obey a subpoena under this section, the district judge or superior court judge of the county in which the inspection or investigation is conducted shall have jurisdiction upon the application of the Commissioner to issue an order requiring such person to appear and testify or produce evidence as the case may require, and any failure to obey such order of the court may be punished by such court as contempt thereof.

(c) Subject to regulations issued by the Commissioner a representative of the employer and an employee authorized by the employees shall be given an opportunity to consult with or to accompany the Commissioner, Director, or their authorized agents, during the physical inspection of any work place described under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Commissioner, Director, or their authorized agents, shall consult with a reasonable number of employees concerning matters of health and safety in the work place.

(d) (1) Any employees or an employee representative of the employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice of such violation or danger to the Commissioner or Director. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by employees or the employee representatives of the employees, and a copy shall be provided the employer or his agent no later than at the time of inspection. Upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy of any record published, released or made available pursuant to subsection (e) of this section. If upon receipt of such notification the Commissioner or Director determines there are reasonable grounds to believe that such violation or danger exists, the Commissioner or Director or their authorized agents shall promptly make a special investigation in accordance with the provisions of this section as soon as practicable to determine if such violation or danger exists. If the Commissioner or Director determines there are not reasonable grounds to believe that a violation or danger exists he shall notify the employees or representatives of the employees, in writing, of such determination.

(2) Prior to, during and after any inspection of a work place, any employees or representative of employees employed in such work place may notify the inspecting Commissioner, Director, or their agents, in writing, of any violation of this Article which they have reason to believe exists in such work place. The Commissioner shall, by regulation, establish procedures for informal review of any refusal

by a representative of the Commissioner or Director to issue a citation with respect to any such alleged violation and shall furnish the employees or representatives of employees requesting such review a written statement of the reason for the Commissioner's or Director's final disposition of the case.

(e) The Commissioner is authorized to compile, analyze, and publish, in summary or detailed form, all reports or information obtained under this section.

(f) (1) Inspections conducted under this section shall be accomplished without advance notice, subject to the exception in subdivision (2) below this subsection.

(2) The Commissioner or Director may authorize the giving to any employer or employee advance notice of an inspection only when the giving of such notice is essential to the effectiveness of such inspection, and in keeping with regulations issued by the Commissioner.

(g) The Commissioner shall prescribe such rules and regulations as he may deem necessary to carry out his responsibilities under this Article, including rules and regulations dealing with the inspection of an employer's establishment. (1973, c. 295, s. 11.)

CASE NOTES

Constitutionality. — Subsection (a) of this section is essentially identical to § 8(a) of the Federal Occupational Safety and Health Act of 1970, 29 U.S.C. § 657(a), which the United States Supreme Court found unconstitutional in Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978); Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, cert. denied, 297 N.C. 299, 254 S.E.2d 923 (1979).

Subsection (a) of this section violates the Fourth and Fourteenth Amendments to the United States Constitution to the extent it authorizes warrantless searches. Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698, cert. denied, 297 N.C. 299, 254 S.E.2d 923 (1979).

Cited in Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656 (1979); Brooks v. Taylor Tobacco Enterprises, Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

§ 95-137. Issuance of citations.

(a) If, upon inspection or investigation, the Director or his authorized representative has reasonable grounds to believe that an employer has not fulfilled his duties as prescribed in this Article, or has violated any standard, regulation, rule or order promulgated under this Article, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provisions of the act, standards, rules and regulations, or orders alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Director may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimus violations which have no direct or immediate relationship to safety or health, and violations of State agencies or political subdivisions thereof. Each citation or notice in lieu of citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Director, at or near such place a violation referred to in the citation occurred.

(b) Procedure for Enforcement. — (1) If, after an inspection or investigation, the Director issues a citation under any provisions of this Article, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of

any penalty, if any, he has recommended to the Commissioner to be proposed under the provisions of this Article and that the employer has 15 working days within which to notify the Director that he wishes to contest the citation or proposed assessment of penalty. If, within 15 working days from the receipt of the notice issued by the Director, the employer fails to notify the Director that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under the provisions of this Article within such time, the citation and the assessment as proposed to the Commissioner shall be deemed final and not subject to review by any court.

(2) If the Director has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Board in case of any review proceedings under this Article initiated by the employer in good faith and not solely for a delay or avoidance of penalties), the Director shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under this Article by reason of such failure and that the employer has 15 working days within which to notify the Director that he wishes to contest the Director's notification of the proposed assessment of penalty. If, within 15 working days from the receipt of notification issued by the Director, an employer fails to notify the Director that he intends to contest the notification or proposed recommendation of penalty, the notification and the proposed assessment made by the Director shall be final and not subject to review by any court.

(3) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

(4) If an employer notifies the Director that he intends to contest a citation issued under the provisions of this Article or notification issued under the provisions of this Article, or if, within 15 working days of the receipt of a citation under this Article, any employee or his representative files a notice with the Director alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Director shall immediately advise the Board of such notification, and the Board shall afford an opportunity for a hearing. The Board shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Director's citation or the proposed penalty fixed by the Commissioner, or directing other appropriate relief, and such order shall become final 30 days after its issuance. Upon showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that an abatement has not been completed because of factors beyond his reasonable control, the Director, after an opportunity for a hearing as provided in this Article, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the chairman of the Board shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this section. (1973, c. 295, s. 12.)

§ 95-138. Civil penalties.

(a) Any employer who willfully or repeatedly violates the requirements of this Article, any standard, rule or order promulgated pursuant to this Article, or regulations prescribed pursuant to this Article, may upon the recommendation of the Director to the Commissioner be assessed by the Commissioner a

civil penalty of not more than ten thousand dollars ($10,000) for each violation. Any employer who has received a citation for a serious violation of the requirements of this Article or any standard, rule, or order promulgated under this Article or of any regulation prescribed pursuant to this Article, shall be assessed by the Commissioner a civil penalty of up to one thousand dollars ($1,000) for each such violation. If the violation is adjudged not to be of a serious nature, then the employer may be assessed a civil penalty of up to one thousand dollars ($1,000) for each such violation. Any employer who fails to correct a violation for which a citation has been issued under this Article within the period allowed for its correction (which period shall not begin to run until the date of the final order of the Board in the case of any review proceedings in this Article initiated by the employer in good faith and not solely for the delay or avoidance of penalties), may be assessed a civil penalty of not more than one thousand dollars ($1,000). Such assessment shall be made to apply to each day during which such failure or violation continues. Any employer who violates any of the posting requirements, as prescribed under the provision of this Article, shall be assessed a civil penalty of not more than one thousand dollars ($1,000) for such violation. The Commissioner upon recommendation of the Director, or the Board in case of a review, shall have authority to assess all civil penalties provided by this Article, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer and the record of previous violations.

(b) All civil penalties and interest recovered by the Commissioner, together with the costs thereof, shall be paid into the general fund of the State treasury. (1973, c. 295, s. 13.)

§ 95-139. Criminal penalties.

Any employer who willfully violates any standard, rule, regulation or order promulgated pursuant to the authority of this Article, and said violation causes the death of any employee, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than ten thousand dollars ($10,000) or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be a fine of not more than twenty thousand dollars ($20,000) or by imprisonment for not more than one year, or by both. This section shall not prevent any prosecuting officer of the State of North Carolina from proceeding against such employer on a prosecution charging any degree of willful or culpable homicide. Any person who gives advance notice of any inspection to be conducted under this Article, without authority from the Commissioner, Director, or any of their agents to whom such authority has been delegated, shall be guilty of a misdemeanor, and upon conviction thereof, be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment for not more than six months, or by both. Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or any other document filed or required to be maintained pursuant to this Article, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than ten thousand dollars ($10,000) or by imprisonment for not more than six months, or by both. Whoever shall commit any kind of assault upon or whoever kills a person engaged in or on account of the performance of investigative, inspection, or law-enforcement functions shall be subject to prosecution under the general criminal laws of the State and upon such charges as the proper prosecuting officer shall charge or allege. (1973, c. 295, s. 14.)

§ 95-140. Procedures to counteract imminent dangers.

(a) The superior courts of this State shall have jurisdiction, upon petition of the Commissioner, to restrain any conditions or practices in any place of employment which are such that a danger exists, which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Article. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct, or remove such imminent danger and prohibit the employment or presence of any individual in locations or under conditions where such imminent danger exists, except those individuals whose presence is necessary to avoid, correct or remove such imminent danger or to maintain the capacity of a continuous process operation to assume normal operations without a complete cessation of operations, or where a cessation of operations is necessary to permit such to be accomplished in a safe and orderly manner.

(b) Upon the filing of any such petition the superior court shall, without the necessity of showing an adequate remedy at law, have jurisdiction to grant injunctive relief or temporary restraining order pending the outcome of an enforcement proceeding pursuant to this Article. The proceeding shall be as provided under the statutes and Rules of Civil Procedure of this State except that no temporary restraining order issued without notice shall be effective for a period longer than five days.

(c) Whenever and as soon as an inspector concludes that conditions or practices described in this section exist in any place of employment, he shall inform the affected employees and employers of the danger and that he is recommending to the Commissioner that relief be sought. If the Commissioner arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employee, may bring an action against the Commissioner in the superior court of the district in which the imminent danger is alleged to exist or the employer has its principal office or place of business, for a writ of mandamus to compel the Commissioner to seek such an order for such relief as may be appropriate. (1973, c. 295, s. 15.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

§ 95-141. Judicial review.

Any person or party in interest who has exhausted all administrative remedies available under this Article and who is aggrieved by a final decision in a contested case is entitled to judicial review in accordance with Chapter 150A as amended, of the General Statutes, the same being entitled: "Judicial Review of Decisions of Certain Administrative Agencies." The Commissioner may file in the office of the clerk of the superior court of the county wherein the person, firm or corporation under order resides, or, if a corporation is involved, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal. Whereupon, the clerk of said court shall enter judgment in accordance therewith and notify the parties. Such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though said judgment had been rendered in a suit duly heard and determined by the superior court of the General Court of Justice. (1973, c. 295, s. 16; c. 1331, s. 3.)

Editor's Note. — "Judicial Review of Decisions of Certain Administrative Agencies," quoted in the first sentence, is the title of former Article 33 of Chapter 143. Chapter 150A is entitled "Administrative Procedure Act."

§ 95-142. Legal representation of the Department of Labor.

It shall be the duty of the Attorney General to represent the Department of Labor or designate some member of his staff to represent them in all actions or proceedings in connection with this Article. (1973, c. 295, s. 17.)

§ 95-143. Record keeping and reporting.

(a) Each employer shall make available to the Commissioner, or his agents, in such manner as the Commissioner shall require, copies of the same records and reports regarding his activities relating to this Article as are required to be made, kept, or preserved by section 8(c) of the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596) and regulations made pursuant thereto.

(b) Each employer shall make, keep and preserve and make available to the Commissioner such records regarding his activities relating to this Article as the Commissioner may prescribe by regulation as necessary and appropriate for the enforcement of this Article or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this section such regulations may include provisions requiring employers to conduct periodic inspections. The Commissioner shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep the employees informed of their protections and obligations under this Article, including the provisions of applicable standards. The Commissioner shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first-aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(c) The Commissioner shall issue regulations requiring employers to maintain accurate records of employee exposure to potentially toxic materials of [or] harmful physical agents which are required to be monitored or measured under this Article. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provisions for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable safety and health standard promulgated under this Article and shall inform any employee who is being thus exposed of the corrective action being taken.

(d) Any information obtained by the Commissioner or his duly authorized agents under this Article shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible. (1973, c. 295, s. 18.)

§ 95-144. Statistics.

(a) In order to further the purposes of this Article, the Commissioner shall develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. The Commissioner shall compile accurate statistics on work injuries and illnesses which shall include all disabling, serious or significant injuries or illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first-aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job. On the basis of records made and kept pursuant to the provisions of this Article, employers shall file such reports with the Commissioner as he shall prescribe by regulations and as may be necessary to carry out his functions.

(b) A listing of employment by area and industry of employers who have an assigned account number by the Employment Security Commission shall be supplied annually to the Commissioner by the Employment Security Commission of this State. The listing of employment by area and industry shall contain at least the following: employer name; Employment Security Commission account number; indication of whether multiple or a single report unit; number of reporting units; average employment; establishment size code; geographical area; any four-digit code; and any other information deemed necessary by the Commissioner to meet federal reporting requirements. (1973, c. 295, s. 19.)

§ 95-145. Reports to the Secretary.

(a) The Commissioner shall require employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan in force under this Article were not in effect, and

(b) The Commissioner shall make such reports to the Secretary in such form and containing such information as the Secretary from time to time shall require. (1973, c. 295, s. 20.)

§ 95-146. Continuation and effectiveness of this Article.

The Commissioner shall from time to time furnish to the Secretary information and assurances that this Article is being administered by adequate methods and by standards and enforcement procedures which are and will continue to be as effective as federal standards. (1973, c. 295, s. 21.)

§ 95-147. Training and employee education.

(a) The Commissioner, after consultation with appropriate departments and agencies of the State and subdivisions of government, shall conduct, directly or by grants or contracts, (i) education programs to provide an adequate supply of qualified personnel to carry out the purposes of this Article, and (ii) informational, educational and training programs on the importance of and proper use of adequate safety and health equipment to encourage voluntary compliance.

(b) The Commissioner is also authorized to conduct, directly or by grants or contracts, short-term training of personnel engaged in work related to the Commissioner's responsibilities under this Article.

(c) The Commissioner shall provide employers and employees programs covering recognition, avoidance and prevention of unsafe and unhealthful working conditions in places of employment and shall advise employers and employees, or their representatives, [of] effective means to prevent occupational injuries and illnesses. (1973, c. 295, s. 22.)

§ 95-148. Safety and health programs of State agencies and local governments.

It shall be the responsibility of each administrative department, commission, board, division or other agency of the State and of counties, cities, towns and subdivisions of government to establish and maintain an effective and comprehensive occupational safety and health program which is consistent with the standards and regulations promulgated under this Article. The head of each agency shall:

(1) Provide safe and healthful places and conditions of employment, consistent with the standards and regulations promulgated by this Article;

(2) Acquire, maintain, and require the use of safety equipment, personal protective equipment, and devices reasonably necessary to protect employees;

(3) Consult with and encourage employees to cooperate in achieving safe and healthful working conditions;

(4) Keep adequate records of all occupational accidents and illnesses for proper evaluation and corrective action;

(5) Consult with the Commissioner as to the adequacy as to form and content of records kept pursuant to this section;

(6) Make an annual report to the Commissioner with respect to occupational accidents and injuries and the agency's program under this section.

The Commissioner shall transmit annually to the Governor and the General Assembly a report of the activities of the State agency and instrumentalities under this section. If the Commissioner has reason to believe that any local government program or program of any agency of the State is ineffective, he shall, after unsuccessfully seeking by negotiations to abate such failure, include this in his annual report to the Governor and the General Assembly, together with the reasons therefor, and may recommend legislation intended to correct such condition.

The Commissioner shall have access to the records and reports kept and filed by State agencies and instrumentalities pursuant to this section unless such records and reports are required to be kept secret in the interest of national defense, in which case the Commissioner shall have access to such information as will not jeopardize national defense.

The Commissioner will not impose civil or criminal penalties against any State agency or political subdivision or violations described and covered by this Article.

Employees of any agency or department covered under this section are afforded the same rights and protections as granted employees in the private sector. (1973, c. 295, s. 23.)

§ 95-149. Authority to enter into contracts with other State agencies and subdivisions of government.

The Commissioner is authorized and empowered to enter into contracts with the Department of Public Health or any other State officer or State agency or State instrumentality, or any municipality, county, or other political subdivision of the State, for the enforcement, administration, and any other application of the provisions of this Article. (1973, c. 295, s. 24.)

§ 95-150. Assurance of adequate funds to enforce Article.

The Commissioner shall submit to the General Assembly a budget and request for appropriations to adequately administer this Article which shall be sufficient to give satisfactory assurance that this State will devote adequate funds to the administration and enforcement of the standards herein provided and the proper administration of this Article as required by federal standards. (1973, c. 295, s. 25.)

§ 95-151. Discrimination.

No employer, employee, or any other person related to the administration of this Article shall be discriminated against in any work, procedure, or employment by reason of sex, race, ethnic origin, or by reason of religious affiliation. (1973, c. 295, s. 26.)

§ 95-152. Confidentiality of trade secrets.

All information reported to or otherwise obtained by the Commissioner or his agents or representatives in connection with any inspection or proceeding under this Article which contains or which might reveal a trade secret shall be considered confidential, as provided by section 1905 of Title 18 of U.S.C., except as to carrying out this Article or when it is relevant in any proceeding under this Article. In any such proceeding the Commissioner, the Board or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets. (1973, c. 295, s. 27.)

§ 95-153: Reserved for future codification purposes.

§ 95-154. Authorization for similar safety and health federal-state programs.

Consistent with the requirements and conditions provided in this Article the State, upon the recommendation of the Commissioner of Labor and approval of the Governor, may enter into agreements or arrangements with other federal agencies for the purpose of administering occupational safety and health measures for such employees and employers within the State of North Carolina as may be covered by such federal safety and health statutes. (1973, c. 295, s. 29.)

§ 95-155. Construction of Article and severability.

This Article shall receive a liberal construction to the end that the safety and health of the employees of the State may be effectuated and protected. If any provision of this Article or the application thereof to any person or circumstance is held to be invalid, such invalidity shall not affect other provisions or applications of the Article which can be given effect without the invalid provision or application, and to this end the provisions of this Article are severable. (1973, c. 295, s. 30.)

§§ 95-156 to 95-160: Reserved for future codification purposes.

ARTICLE 17.

The Uniform Wage Payment Law of North Carolina.

§§ 95-161 to 95-172: Repealed by Session Laws 1979, c. 839, s. 2, effective January 1, 1980.

Cross References. — For present statute covering the subject matter of the repealed sections, see § 95-25.1 et seq.

Chapter 96.

Employment Security.

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Article 1.

Employment Security Commission.

§ 96-1. Title.

This Chapter shall be known and may be cited as the "Employment Security Law." Any reference to the Unemployment Compensation Commission shall be deemed a reference to the Employment Security Commission and all powers, duties, funds, records, etc., of the Unemployment Compensation Commission are transferred to the Employment Security Commission. (Ex. Sess., 1936, c. 1, s. 1; 1947, c. 598, s. 1; 1977, c. 727, s. 1.)

Legal Periodicals. — For article discussing unemployment compensation, see 15 N.C.L. Rev. 377.

For discussion of the 1939 and 1947 amendments to this Chapter, see 17 N.C.L. Rev. 415, and 25 N.C.L. Rev. 415.

For explanation of the purposes and effects of the 1957 amendments to this Chapter, see 36 N.C.L. Rev. 53 (1957).

CASE NOTES

One of the major purposes of the Employment Security Act was to provide a fund by systematic accumulations during periods of employment to be retained and used for the benefit of persons furloughed from their jobs through no fault of their own. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292, cert. denied, 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963).

The General Assembly may determine the scope of this Chapter, and the definitions and tests prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Comp. Comm'n v. City Ice & Coal Co., 216 N.C. 6, 3 S.E.2d 290 (1939).

Construction in Favor of Validity. — The intent of the legislature to provide a wide scope in the application of this Chapter to mitigate the economic evils of unemployment and to bring within its provisions employments therein defined beyond the scope of existing definitions or categories, is apparent from the language used, and all doubts as to constitutionality should be resolved in favor of the validity of the chapter and all its provisions. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

The "Employment Security Law" must be construed to promote and not to defeat the legislative policy as declared in this Chapter, and the courts will not construe the Chapter in such manner as to discourage parties from entering into contracts designed to lessen the hardships incident to termination of employment. In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

Weight to Be Given Federal Construction. — Our State Unemployment Compensation Act (now Employment Security Law) was passed pursuant to a plan national in scope, and therefore serious consideration is to be given to the construction placed upon similar language of the federal statute by the Commissioner of Internal Revenue, but the interpretation of the act is finally for our courts, and neither the ruling of the Commissioner nor that of the State Unemployment Compensation Commission (now Employment Security Commission) is conclusive. Unemployment Comp. Comm'n v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E.2d 592 (1939).

Cited in B-C Remedy Co. v. Unemployment Comp. Comm'n, 226 N.C. 52, 36 S.E.2d 733, 163 A.L.R. 773 (1946); Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

§§ 96-1.1 to 96-1.5: Repealed by Session Laws 1977, c. 727, ss. 2-6.

§ 96-2. Declaration of State public policy.

As a guide to the interpretation and application of this Chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. (Ex. Sess. 1936, c. 1, s. 2.)

Cross References. — As to intent to provide wide scope in application of Chapter, see note to § 96-1.

Legal Periodicals. — For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

CASE NOTES

Legislative Intent. — The legislature has sought to provide aid to those out of work through no fault of their own. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

The matter of policy is in the exclusive province of the legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relations to the end sought to be accomplished. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941), applying provisions seeking to make State neutral in labor disputes.

Design of Employment Security Law. — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

Strict Construction. — Sections of this Chapter imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication or by adding to one disqualifying provision words found only in another. In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

"Through No Fault of Their Own". — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

Nowhere in the act is the word, "work," defined. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

Section 96-14 Prevails Over This Section. — Section 96-14, which sets out the specific grounds for disqualification of benefits, will prevail over the general policy provisions of this section. In re Usery, 31 N.C. App. 703, 230 S.E.2d 585 (1976).

Applied in In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

§ 96-3. Employment Security Commission.

(a) Organization. — There is hereby created a commission to be known as the Employment Security Commission of North Carolina. The Commission shall consist of seven members to be appointed by the Governor on or before July 1, 1941. The Governor shall have the power to designate the member of said Commission who shall act as the chairman thereof. The chairman of the Commission shall not engage in any other business, vocation or employment. Three members of the Commission shall be appointed by the Governor to serve for a term of two years. Three members shall be appointed to serve for a term of four years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four years each, thereafter, and the member of said Commission designated by the Governor as chairman shall be appointed for a term of four years from and after his appointment. Any member appointed to fill a vacancy occurring in any of the appointments made by the Governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The Governor may at any time after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions. — The Commission shall establish two coordinate divisions: the North Carolina State Employment Service Division, created pursuant to G.S. 96-20, and the Unemployment Insurance Division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except insofar as the Commission may find that such separation is impracticable. Notwithstanding any other provision of this Chapter, administrative organization of the agency shall be in accordance with that which the Commission finds most desirable in order to perform the duties and functions of the agency.

(c) Salaries. — The chairman of the Employment Security Commission of North Carolina, appointed by the Governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be fixed by the Governor subject to the approval of the Advisory Budget Commission; and the members of the Commission, other than the chairman, shall each receive the same amount per diem for their services as is provided for the members of other State boards, commissions, and committees who receive compensation for their services as such, including necessary

time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(d) Quorum. — The chairman and three members of the Commission shall constitute a quorum. (Ex. Sess. 1936, c. 1, s. 10; 1941, c. 108, s. 10; c. 279, ss. 1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1; 1953, c. 401, s. 1; 1957, c. 541, s. 5; 1965, c. 795, s. 1; 1977, c. 727, s. 7; 1979, c. 660, s. 1.)

Effect of Amendments. — The 1979 amendment deleted "and no member of the Commission shall serve as an officer or a committee member of any political party organization" which previously appeared at the end of the fourth sentence of subsection (a).

CASE NOTES

Commission Is State Agency. — The Commission is an agency created by statute for a public purpose and is an agency of the State. Prudential Ins. Co. of America v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

§ 96-4. Administration.

(a) Duties and Powers of Commission. — It shall be the duty of the Commission to administer this Chapter. The Commission shall meet at least once in each 60 days and may hold special meetings at any time at the call of the chairman or any three members of the Commission, and the Commission shall have power and authority to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of this Chapter. Such rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this Chapter, which the Commission shall prescribe. The Commission shall determine its own organization and methods of procedure in accordance with the provisions of this Chapter, and shall have an official seal which shall be judicially noticed. The chairman of said Commission shall, except as otherwise provided by the Commission, be vested with all authority of the Commission, including the authority to conduct hearings and make decisions and determinations, when the Commission is not in session and shall execute all orders, rules and regulations established by said Commission. Not later than November 20 preceding the meeting of the General Assembly, the Commission shall submit to the Governor a report covering the administration and operation of this Chapter during the preceding biennium, and shall make such recommendation for amendments to this Chapter as the Commission deems proper. Such report shall include a balance sheet of the moneys in the fund in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then current contributions, which reserve shall be set up by the Commission in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period. Whenever the Commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, it shall promptly so inform the Governor and the legislature, and make recommendations with respect thereto.

(b) Regulations and General and Special Rules. — General and special rules may be adopted, amended, or rescinded by the Commission only after public hearing or opportunity to be heard thereon, of which proper notice has been given by mail to the last known address in cases of special rules, or by publication as herein provided, and by one publication as herein provided as

to general rules. General rules shall become effective 10 days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this State. Special rules shall become effective 10 days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the Commission and shall become effective in the manner and at the time prescribed by the Commission.

(c) Publication. — The Commission shall cause to be printed for distribution to the public the text of this Chapter, the Commission's regulations and general rules, its biennial reports to the Governor, and any other material the Commission deems relevant and suitable, and shall furnish the same to any person upon application therefor.

(d) Personnel. — Subject to other provisions of this Chapter, the Commission is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of its duties. It shall provide for the holding of examinations to determine the qualifications of applicants for the positions so classified, and except for temporary appointments not to exceed six months in duration, shall appoint its personnel on the basis of efficiency and fitness as determined in such examinations. All positions shall be filled by persons selected and appointed on a nonpartisan merit basis. The Commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this Chapter, and may, in its discretion, bond any person handling moneys or signing checks hereunder.

(e) Advisory Councils. — The Governor shall appoint a State Advisory Council and local advisory councils, composed in each case of an equal number of employer representatives and employee representatives who may fairly be regarded as representative because of their vocation, employment, or affiliations, and have such members representing the general public as the Governor may designate. Such councils shall aid the Commission in formulating policies and discussing problems related to the administration of this Chapter, and in assuring impartiality and freedom from political influence in the solution of such problems. Such local advisory councils shall serve without compensation, but shall be reimbursed for any necessary expenses. Each member of the State Advisory Council attending actual meetings of such Council shall be paid the same amount per diem for his services as is provided for the members of other State boards, commissions and committees, who receive compensation for their services, including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office, and his actual mileage and subsistence as allowed to State officials.

(f) Employment Stabilization. — The Commission, with the advice and aid of its advisory councils, and through its appropriate divisions, shall take all appropriate steps to reduce and prevent unemployment; to encourage and assist in the adoption of practical methods of vocational training, retraining and vocational guidance; to investigate, recommend, advise, and assist in the establishment and operation, by municipalities, counties, school districts, and the State, of reserves for public works to be used in times of business depression and unemployment; to promote the reemployment of unemployed workers throughout the State in every other way that may be feasible; and to these ends to carry on and publish the results of investigations and research studies.

(g) Records and Reports. —

(1) Each employing unit shall keep true and accurate employment records, containing such information as the Commission may prescribe. Such records shall be open to inspection and be subject to being copied by the Commission or its authorized representatives at any

reasonable time and as often as may be necessary. Any employing unit doing business in North Carolina shall make available in this State to the Commission, such information with respect to persons, firms, or other employing units performing services for it which the Commission deems necessary in connection with the administration of this Chapter. The Commission may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which the Commission deems necessary for the effective administration of this Chapter. Information thus obtained shall not be published or be open to public inspection (other than to public employees in the performance of their public duties including the information required to be obtained pursuant to G.S. 128-27(e), G.S. 135-5(e), and G.S. 143-166(y)) in any manner revealing the employing unit's identity, but any claimant at a hearing before an appeal tribunal or the Commission shall be supplied with information from such records to the extent necessary for the proper presentation of his claims. Any individual may be supplied with information as to his potential benefit rights from such records. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00), or imprisoned for not longer than 90 days, or both. All reports, statements, information and communications of every character so made or given to the Commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the Commission from the employing unit's books and records shall be absolute privileged communications in any civil or criminal proceedings other than proceedings instituted pursuant to this Chapter and proceedings involving the administration of this Chapter: Provided, nothing herein contained shall operate to relieve any employing unit from disclosing any information required by this Chapter or as prescribed by the Commission involving the administration of this Chapter.

(2) If the Commission finds that any employer has failed to file any report or return required by this Chapter or any regulation made pursuant hereto, or has filed a report which the Commission finds incorrect or insufficient, the Commission may make an estimate of the information required from such employer on the basis of the best evidence reasonably available to it at the time, and make, upon the basis of such estimate, a report or return on behalf of such employer, and the report or return so made shall be deemed to be prima facie correct, and the Commission may make an assessment based upon such report and proceed to collect contributions due thereon in the manner as set forth in G.S. 96-10(b) of this Chapter: Provided, however, that no such report or return shall be made until the employer has first been given at least 10 days' notice by registered mail to the last known address of such employer: Provided further, that no such report or return shall be used as a basis in determining whether such employing unit is an employer within the meaning of this Chapter.

(h) Oaths and Witnesses. — In the discharge of the duties imposed by this Chapter, the chairman and any duly authorized representative or member of the Commission shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this Chapter.

(i) Subpoenas. — In case of contumacy by, or refusal to obey a subpoena issued to any person by the Commission or its authorized representative, any clerk of a superior court of this State within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Commission, or its duly authorized representatives, shall have jurisdiction to issue to such person an order requiring such person to appear before the Commission, or its duly authorized representatives, there to produce evidence if so ordered, or there to give testimony touching upon the matter under investigation or in question; and any failure to obey such order of the said clerk of superior court may be punished by the said clerk of superior court as a contempt of said court. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, or other records in obedience to a subpoena of the Commission, shall be punished by a fine of not more than fifty dollars ($50.00) or by imprisonment for not longer than 30 days.

(j) Protection against Self-Incrimination. — No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the Commission or in obedience to the subpoena of the Commission or any member thereof, or any duly authorized representative of the Commission, in any cause or proceeding before the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(k) State-Federal Cooperation. — In the administration of this Chapter, the Commission shall cooperate, to the fullest extent consistent with the provisions of this Chapter, with the federal agency, official, or bureau fully authorized and empowered to administer the provisions of the Social Security Act approved August 14, 1935, as amended, shall make such reports, in such form and containing such information as such federal agency, official, or bureau may from time to time require, and shall comply with such provisions as such federal agency, official, or bureau may from time to time find necessary to assure the correctness and verification of such reports; and shall comply with the regulations prescribed by such agency, official, or bureau governing the expenditures of such sums as may be allotted and paid to this State under Title III of the Social Security Act for the purpose of assisting in the administration of this Chapter. The Commission shall further make its records available to the Railroad Retirement Board, created by the Railroad Retirement Act and the Railroad Unemployment Insurance Act, and shall furnish to the Railroad Retirement Board at the expense of the Railroad Retirement Board, such copies thereof as the Board shall deem necessary for its purposes in accordance with the provisions of section 303 (c) of the Social Security Act as amended.

Upon request therefor, the Commission shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment, the name, address, ordinary occupation, and employment status of each recipient of benefits, and such recipient's rights to further benefits under this Chapter.

The Commission is authorized to make such investigations, secure and transmit such information, make available such services and facilities and exercise such of the other powers provided herein with respect to the administration of this Chapter as it deems necessary or appropriate to facilitate the administration of any employment security or public employment service law,

and in like manner, to accept and utilize information, services and facilities made available to this State by the agency charged with the administration of such other employment security or public employment service law.

The Commission shall fully cooperate with the agencies of other states and shall make every proper effort within its means to oppose and prevent any further action which would, in its judgment, tend to effect complete or substantial federalization of State unemployment insurance funds or State employment security programs.

(l) Reciprocal Arrangements. —

(1) The Commission is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby:

a. Services performed by an individual for a single employing unit for which services are customarily performed in more than one state shall be deemed to be services performed entirely within any one of the states

1. In which any part of such individual's service is performed or
2. In which such individual has his residence or
3. In which the employing unit maintains a place of business, provided there is in effect, as to such services, an election by the employing unit, approved by the agency charged with the administration of such state's employment security law, pursuant to which the services performed by such individual for such employing unit are deemed to be performed entirely within such state.

b. Combining wage credits. — The Commission shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under this Chapter with his wages and employment covered under one or more laws of the federal government and the unemployment compensation laws of other states which are approved by the United States Secretary of Labor in consultation with the state unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in such situations and which include provisions for (1) applying the base period of a single state law to a claim involving the combining of an individual's wages and employment covered under two or more state unemployment compensation laws, and (2) avoiding the duplicate use of wages and employment by reason of such combining.

c. The services of the Commission as agent may be made available to other states in taking interstate claims for such states.

d. Contributions due under this Chapter with respect to wages for insured work shall for the purposes of G.S. 96-10 be deemed to have been paid to the fund as of the date payment was made as contributions therefor under another state or federal employment security law, but no such arrangement shall be entered into unless it contains provisions for such reimbursement to the fund of such contributions as the Commission finds will be fair and reasonable as to all affected interests.

e. The services of the Commission may be made available to such other agencies to assist in the enforcement and collection of judgments of such other agencies.

f. The services on vessels engaged in interstate or foreign commerce for a single employer, wherever performed, shall be deemed performed within this State or within such other state.

g. Benefits paid by agencies of other states may be reimbursed to such agencies in cases where services of the claimant were "employment" under this Chapter and contributions have been paid by the employer to this agency on remuneration paid for such services; provided the amount of such reimbursement shall not exceed the amount of benefits such claimant would have been entitled to receive under the provisions of this Chapter.

(2) Reimbursements paid from the fund pursuant to subparagraphs b and c of subdivision (1) of this subsection shall be deemed to be benefits for the purpose of G.S. 96-6, 96-9 and 96-12. The Commission is authorized to make to other states or federal agencies and to receive from such other state or federal agencies, reimbursements from or to the fund, in accordance with arrangements entered into pursuant to subdivision (1) of this subsection.

(3) To the extent permissible under the laws and Constitution of the United States, the Commission is authorized to enter into or cooperate in arrangements whereby facilities and services provided under this Chapter and facilities and services provided under the employment security law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the Employment Security Law of this State or under a similar law of such government.

(m) The Commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any "employing unit" or "employer" as said terms are defined by G.S. 96-8(4) and 96-8(5) and subdivisions thereunder. The Commission shall have the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Employment Security Law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the Employment Security Law including the right to determine the amount of contributions, if any, which may be due the Commission by any employer. Hearings may be before the Commission or a Deputy Commissioner and shall be held in the central office of the Commission or at any other designated place within the State. They shall be open to the public and shall consist of a review of the evidence taken by a hearing officer designated by the Commission and a determination of the law applicable to that evidence. The Commission shall provide for the taking of evidence by a hearing officer who shall be a member of the legal staff of the Commission. Such hearing officer shall have the same power to issue subpoenas, administer oaths, conduct hearings and take evidence as is possessed by the Commission and such hearings shall be recorded, and he shall transmit all testimony and records of such hearings to the Commission for its determination. All such hearings conducted by such hearing officer shall be scheduled and held in any county in this State in which the employing unit or employer either resides, maintains a place of business, or conducts business; however, the Commission may require additional testimony at any hearings held by it at its office. From all decisions or determinations made by the Commission or a Deputy Commissioner any party affected thereby shall be entitled to an appeal to the superior court. Before such party shall be allowed to appeal, he shall within 10 days after notice of such decision or determination, file with the Commission exceptions to the decision or the determination of the Commission, which exceptions will state the grounds of objection to such decision or determination. If any one of such exceptions shall be overruled then such party may appeal from the order overruling the exceptions, and shall, within 10 days after the decision overruling the exceptions, give notice of his appeal. When an exception is made to the facts as found by the Commission, the appeal shall be to the superior court in term time but the decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all

questions of fact supported by any competent evidence. When an exception is made to any rulings of law, as determined by the Commission, the appeal shall be to the judge of the superior court at chambers. The party appealing shall, within 10 days after the notice of appeal has been served, file with the Commission exceptions to the decision or determination overruling the exception which statement shall assign the errors complained of and the grounds of the appeal. Upon the filing of such statement the Commission shall, within 30 days, transmit all the papers and evidence considered by it, together with the assignments of errors filed by the appellant to a judge of the superior court holding court or residing in some district in which such appellant either resides, maintains a place of business or conducts business, or, unless the appellee objects after being given reasonable opportunity to object, to a judge of the Superior Court of Wake County: Provided, however, the 30-day period specified herein may be extended by agreement of parties. If there be no exceptions to any facts as found by the Commission the facts so found shall be binding upon the court and it shall be heard by the judge at chambers at some place in the district, above mentioned, of which all parties shall have 10 days' notice.

(n) The cause shall be entitled "State of North Carolina on Relationship of the Employment Security Commission of North Carolina against (here insert name of appellant)," and if there are exceptions to any facts found by the Commission it shall be placed on the civil issue docket of such court and shall have precedence over other civil actions except those described in G.S. 96-10(b), and such cause shall be tried under such rules and regulations as are prescribed for the trial of other civil causes. By consent of all parties the appeal may be held and determined at chambers before any judge of a district in which the appellant either resides, maintains a place of business or conducts business, or said appeal may be heard before any judge holding court therein, or in any district in which the appellant either resides, maintains a place of business or conducts business. Either party may appeal to the appellate division from the judgment of the superior court under the same rules and regulations as are prescribed by law for appeals, except that if an appeal shall be taken on behalf of the Employment Security Commission of North Carolina it shall not be required to give any undertaking or make any deposit to secure the cost of such appeal and such court may advance the cause on its docket so as to give the same a speedy hearing.

(o) The decision or determination of the Commission when docketed in the office of the clerk of the superior court of any county and when properly indexed and cross-indexed shall have the same force and effect as a judgment rendered by the superior court, and if it shall be adjudged in the decision or determination of the Commission that any employer is indebted to the Commission for contributions, penalties and interest or either of the same, then said judgment shall constitute a lien upon any realty owned by said employer in the county only from the date of docketing of such decision or determination in the office of the clerk of the superior court and upon personalty owned by said employer in said county only from the date of levy on such personalty, and upon the execution thereon no homestead or personal property exemptions shall be allowed; provided, that nothing herein shall affect any rights accruing to the Commission under G.S. 96-10. The provisions of this section, however, shall not have the effect of releasing any liens for contributions, penalties or interest, or either of the same, imposed by other law, nor shall they have the effect of postponing the payment of said contributions, penalties or interest, or depriving the said Employment Security Commission of North Carolina of any priority in order of payment provided in any other statute under which payment of the said contributions, penalties and interest or either of the same may be required. The superior court or any appellate court shall have full power and authority to issue any and all executions, orders, decrees, or writs

that may be necessary to carry out the terms of said decision or determination of the Commission or to collect any amount of contribution, penalty or interest adjudged to be due the Commission by said decision or determination. In case of an appeal from any decision or determination of the Commission to the superior court or from any judgment of the superior court to the appellate division all proceedings to enforce said judgment, decision, or determination shall be stayed until final determination of such appeal but no proceedings for the collection of any amount of contribution, penalty or interest due on same shall be suspended or stayed unless the employer or party adjudged to pay the same shall file with the clerk of the superior court a bond in such amount not exceeding double the amount of contribution, penalty, interest or amount due and with such sureties as the clerk of the superior court deems necessary conditioned upon the payment of the contribution, penalty, interest or amount due when the appeal shall be finally decided or terminated.

(p) The conduct of hearings shall be governed by suitable rules and regulations established by the Commission. The manner in which appeals and hearings shall be presented and conducted before the Commission shall be governed by suitable rules and regulations established by it. The Commission shall not be bound by common-law or statutory rules of evidence or by technical or formal rules of procedure but shall conduct hearings in such manner as to ascertain the substantial rights of the parties.

(q) Notices of hearing shall be issued by the Commission or its authorized representative and sent by registered mail, return receipt requested, to the last known address of any employing unit, employers, persons, or firms involved. The notice shall be sent at least 10 days prior to the hearing date and shall contain notification of the place, date, hour, and purpose of the hearing. Subpoenas for witnesses to appear at any hearing shall be issued by the Commission or its authorized representative and shall order him to appear at the time, date and place shown thereon. Any bond or other undertaking required to be given in order to suspend or stay any execution shall be given payable to the Employment Security Commission of North Carolina. Any such bond or other undertaking may be forfeited or sued upon as are any other undertakings payable to the State.

(r) None of the provisions or sections herein set forth in subsections (m)-(q) shall have the force and effect nor shall the same be construed or interpreted as repealing any of the provisions of G.S. 96-15 which provide for the procedure and determination of all claims for benefits and such claims for benefits shall be prosecuted and determined as provided by said G.S. 96-15. (Ex. Sess. 1936, c. 1, s. 11; 1939, c. 2; c. 27, s. 8; c. 52, s. 5; cc. 207, 209; 1941, c. 279, ss. 4, 5; 1943, c. 377, ss. 16-23; 1945, c. 522, ss. 1-3; 1947, c. 326, ss. 1, 3, 4, 26; c. 598, ss. 1, 6, 7; 1949, c. 424, s. 1; 1951, c. 332, ss. 1, 18; 1953, c. 401, ss. 1-4; 1955, c. 385, ss. 1, 2; c. 479; 1957, c. 1059, s. 1; 1969, c. 44, s. 63; c. 575, ss. 1, 2; 1971, c. 673, ss. 1, 2; 1977, c. 727, ss. 8-10; 1979, c. 660, s. 2; 1979, 2nd Sess., c. 1212, s. 2.)

Effect of Amendments. — The 1979 amendment in subsection (d) deleted a former fourth sentence, which read: "The Commission shall not employ or pay any person who is an officer or committee member of any political party organization."

The 1979, 2nd Sess., amendment, effective July 1, 1980, inserted "including the information required to be obtained pursuant to G.S. 128-27(e), G.S. 135-5(e) and G.S. 143-166(y)" at the end of the parenthetical phrase in the fifth sentence of subdivision (1) of subsection (g).

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

CASE NOTES

Authority of Chairman of Commission. — By subsection (a) of this section the chairman of the Employment Security Commission, except as otherwise provided by the Commission, is vested with all authority of the Commission, including authority to conduct hearings and make decisions when the Commission is not in session. State ex rel. Employment Security Comm'n v. Roberts, 230 N.C. 262, 52 S.E.2d 890 (1949).

The decision and order of the chairman, under subsection (a), are deemed the decision and order of the Commission. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Merits of Labor Disputes. — The Commission is charged with administering the benefits provided in this Chapter in accordance with the objective standards and criteria set up in the Chapter, but the merits of labor disputes do not belong to the Commission, these being matters properly pertaining to the field of labor relations. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941).

Due Process Rights of Employees. — To acknowledge that constitutional restraints exist upon a State government in dealing with its employees is not to say that all such employees have a right to due process notice and hearing before they can be removed from their employment. Nantz v. Employment Security Comm'n, 28 N.C. App. 626, 222 S.E.2d 474, aff'd, 290 N.C. 473, 226 S.E.2d 340 (1976).

The procedure for hearings before the Commission and incident to appeal to the superior court is set forth in detail in this section. State ex rel. Employment Security Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

Conclusiveness of Findings of Fact on Review. — The findings of fact of the Employment Security Commission are conclusive upon review when there is any competent evidence or reasonable inference from such evidence to support them. Graham v. Wall, 220 N.C. 84, 16 S.E.2d 691 (1941); State ex rel. Employment Security Comm'n v. Roberts, 230 N.C. 262, 52 S.E.2d 890 (1949); State ex rel. Employment Security Comm'n v. Champion Distrib. Co., 230 N.C. 464, 53 S.E.2d 674 (1949). See State ex rel. Employment Security Comm'n v. Kermon, 232 N.C. 342, 60 S.E.2d 580 (1950); State ex rel. Employment Security Comm'n v. Monsees, 234 N.C. 69, 65 S.E.2d 887 (1951); State ex rel. Employment Security Comm'n v. Coe, 239 N.C. 84, 79 S.E.2d 177 (1953); In re Stutts, 245 N.C. 405, 95 S.E.2d 919 (1957); State ex rel. Employment Security Comm'n v. Hennis Freight Lines, 248 N.C. 496, 103 S.E.2d 829 (1958).

Scope of Review in Superior Court. — In appeals from the Employment Security Commission, the reviewing court may determine upon proper exceptions whether the facts found by the commission were supported by competent evidence and whether the findings so supported sustain the legal conclusions and the award made, but in no event may the reviewing court consider the evidence for the purpose of finding the facts for itself. State ex rel. Employment Security Comm'n v. Paul's Young Men's Shop, Inc., 32 N.C. App. 23, 231 S.E.2d 157 (1977).

The mandatory provisions in subsection (m) of this section are controlling, and the trial in the superior court on appeal must be subject to the limitation that the decision or determination of the Commission upon such review in the superior court "shall be conclusive and binding as to all questions of fact supported by any competent evidence." State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

When, in a proceeding under this Chapter to determine the liability of a defendant for taxation as an employer, exceptions are taken to the findings of fact made by the Commission in accordance with the procedure prescribed, defendant is not entitled to a trial de novo of the issues raised by his exceptions. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

If the findings of fact of the Employment Security Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the end that the commission make proper findings. State ex rel. Employment Security Comm'n v. Paul's Young Men's Shop, Inc., 32 N.C. App. 23, 231 S.E.2d 157 (1977).

Right of Jury Trial Not Infringed. — The provision of this section that the Commission's findings of fact in a proceeding before it should be conclusive on appeal when supported by competent evidence is constitutional, and objection thereto on the ground that it deprives a defendant of his right to trial by jury is untenable, since the provision relates to the administrations of a tax law and the machinery for the collection of taxes, and further, since in addition to the remedy of appeal from the decision of the Commission, the statute provides that a defendant may pay the tax under protest and sue for its recovery. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

Appeal by Commission from Judgment of Superior Court. — The Commission is not entitled to appeal from a judgment of the superior court that the employer does not come

within this Chapter, entered in a proceeding by an employee for compensation; and where the Commission desired to have the liability of an employer for unemployment compensation contribution judicially determined on its contentions that the employer and another concern controlled by the same interests constituted but a single employing unit, it was held that it must follow the procedure prescribed by § 96-10. In re Mitchell, 220 N.C. 65, 16 S.E.2d 476, 142 A.L.R. 931 (1941).

Applied in State ex rel. Employment Security Comm'n v. Simpson, 238 N.C. 296, 77 S.E.2d 718 (1953); as to subsection (m), in State ex rel. Employment Security Comm'n v. Smith, 235 N.C. 104, 69 S.E.2d 32 (1952).

Quoted in Nantz v. Employment Security Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976).

Cited in State ex rel. Unemployment Comp. Comm'n v. National Life Ins. Co., 219 N.C. 576, 14 S.E.2d 689, 139 A.L.R. 895 (1941); Raynor v. Commissioners for Town of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941); In re Employment Security Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951); State ex rel. North Carolina Util. Comm'n v. Old Fort Finishing Plant, 264 N.C. 416, 142 S.E.2d 8 (1965); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

§ 96-5. Employment Security Administration Fund.

(a) Special Fund. — There is hereby created in the State treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this Chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this State for the purpose described in G.S. 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of this Chapter. The fund shall consist of all moneys appropriated by this State, all moneys received from the United States of America, or any agency thereof, including the Secretary of Labor, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this Chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this Chapter shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

(b) Replacement of Funds Lost or Improperly Expended. — If any moneys received from the Secretary of Labor under Title III of the Social Security Act,

or any unencumbered balances in the Employment Security Administration Fund or any moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this State or its political subdivisions and matched by such moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, are found by the Secretary of Labor, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Secretary of Labor for the proper administration of this Chapter, it is the policy of this State that such moneys, not available from the Special Employment Security Administration Fund established by subsection (c) of this section, shall be replaced by moneys appropriated for such purpose from the general funds of this State to the Employment Security Administration Fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Secretary of Labor, the Commission shall promptly pay from the Special Employment Security Administration Fund such sum if available in such fund; if not available, it shall promptly report the amount required for such replacement to the Governor and the Governor shall, at the earliest opportunity, submit to the legislature a request for the appropriation of such amount.

(c) There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this Chapter subsequent to June 30, 1947, shall be paid into this fund. No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this Chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source and also shall be used by the Commission for incidental extensions, repairs, enlargements or improvements. Refunds of interest allowable under G.S. 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to G.S. 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.

(d) The other provisions of this section and G.S. 96-6, to the contrary notwithstanding, the Commission is authorized to requisition and receive from

its account in the unemployment trust fund in the treasury of the United States of America, in the manner permitted by federal law, such moneys standing to its credit in such fund, as are permitted by federal law to be used for expense of administering this Chapter and to expend such moneys for such purpose, without regard to a determination of necessity by a federal agency. The State Treasurer shall be treasurer and custodian of the amounts of money so requisitioned. Such moneys shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the State treasury.

(e) Reed Bill Fund Authorization. — Subject to a specific appropriation by the General Assembly of North Carolina to the Employment Security Commission out of funds credited to and held in this State's account in the Unemployment Trust Fund by the Secretary of the Treasury of the United States pursuant to and in accordance with section 903 of the Social Security Act, the Commission is authorized to utilize such funds for the administration of the Employment Security Law, including personal services, operating and other expenses incurred in the administration of said law, as well as for the purchase or rental, either or both, of offices, lands, buildings or parts of buildings, fixtures, furnishings, equipment, supplies and the construction of buildings or parts of buildings, suitable for use in this State by the Employment Security Commission, and for the payment of expenses incurred for the construction, maintenance, improvements or repair of, or alterations to, such real or personal property. Provided, that any such funds appropriated by the General Assembly shall not exceed the amount in the Unemployment Trust Fund which may be obligated for expenditure for such purposes; and provided that said funds shall not be obligated for expenditure, as herein provided, after the close of the two-year period which begins on the effective date of the appropriation. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2; 1951, c. 332, s. 18; 1953, c. 401, ss. 1, 5; 1977, c. 727, ss. 11-13.)

§ 96-6. Unemployment Insurance Fund.

(a) Establishment and Control. — There is hereby established as a special fund, separate and apart from all public moneys or funds of this State, an Unemployment Insurance Fund, which shall be administered by the Commission exclusively for the purposes of this Chapter. This fund shall consist of:

(1) All contributions collected under this Chapter, together with any interest earned upon any moneys in the fund;
(2) Any property or securities acquired through the use of moneys belonging to the fund;
(3) All earnings of such property or securities;
(4) Any moneys received from the federal unemployment account in the unemployment trust fund in accordance with Title XII of the Social Security Act as amended;
(5) All moneys credited to this State's account in the Unemployment Trust Fund pursuant to section 903 of Title IX of the Social Security Act, as amended, (U.S.C.A. Title 42, sec. 1103 (a));
(6) All moneys paid to this State pursuant to section 204 of the Federal-State Extended Unemployment Compensation Act of 1970;
(7) Reimbursement payments in lieu of contributions.

All moneys in the fund shall be commingled and undivided.

(b) Accounts and Deposit. — The State Treasurer shall be ex officio the treasurer and custodian of the fund who shall disburse such fund in accordance with the directions of the Commission and in accordance with such regulations as the Commission shall prescribe. He shall maintain within the fund three separate accounts:

(1) A clearing account,
(2) An unemployment trust fund account, and
(3) A benefit account.

All moneys payable to the fund, upon receipt thereof by the Commission, shall be forwarded immediately to the treasurer who shall immediately deposit them in the clearing account. Refunds payable pursuant to G.S. 96-10 may be paid from the clearing account upon warrants issued upon the treasurer as provided in G.S. 143-3.2 under the requisition of the Commission. After clearance thereof, all other moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States of America to the credit of the account of this State in the unemployment trust fund, established and maintained pursuant to section 904 of the Social Security Act, as amended, any provision of law in this State relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this State to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this State's account in the unemployment trust fund. Moneys in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the Commission, in any bank or public depository in which general funds of the State may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the unemployment insurance fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the unemployment insurance fund shall be deposited in said fund.

(c) Withdrawals. — Moneys shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits (including extended benefits) and in accordance with regulations prescribed by the Commission. The Commission shall, from time to time, requisition from the unemployment trust fund such amounts, not exceeding the accounts standing to its account therein, as it deems necessary for the payment of benefits for a reasonable future period. Upon receipt thereof the treasurer shall deposit such moneys in the benefit account and shall pay all warrants drawn thereon as provided in G.S. 143-3.2 and requisitioned by the Commission for the payment of benefits solely from such benefit account. Expenditures of such moneys in the benefit account and refunds from the clearing account shall not be subject to approval of the Budget Bureau or any provisions of law requiring specific appropriations or other formal release by State officers of money in their custody. All warrants issued upon the treasurer for the payment of benefits and refunds shall be issued as provided in G.S. 143-3.2 as requisitioned by the chairman of the Commission or a duly authorized agent of the Commission for that purpose. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during succeeding periods, or, in the discretion of the Commission, shall be redeposited with the Secretary of the Treasury of the United States of America, to the credit of this State's account in the unemployment trust fund, as provided in subsection (b) of this section.

(d) Management of Funds upon Discontinuance of Unemployment Trust Fund. — The provisions of subsections (a), (b), and (c), to the extent that they relate to the unemployment trust fund, shall be operative only so long as such unemployment trust fund continues to exist, and so long as the Secretary of the Treasury of the United States of America continues to maintain for this State

a separate book account of all funds deposited therein by this State for benefit purposes, together with this State's proportionate share of the earnings of such unemployment trust fund, from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, or securities therein belonging to the Unemployment Insurance Fund of this State shall be transferred to the treasurer of the Unemployment Insurance Fund, who shall hold, invest, transfer, sell, deposit, and release such moneys, properties, or securities in a manner approved by the Commission, in accordance with the provisions of this Chapter: Provided, that such moneys shall be invested in the following readily marketable classes of securities: Bonds or other interest-bearing obligations of the United States of America or such investments as are now permitted by law for sinking funds of the State of North Carolina; and provided further, that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the Unemployment Insurance Fund only under the direction of the Commission.

(e) Benefits shall be deemed to be due and payable under this Chapter only to the extent provided in this Chapter and to the extent that moneys are available therefor to the credit of the Unemployment Insurance Fund, and neither the State nor the Commission shall be liable for any amount in excess of such sums. (Ex. Sess. 1936, c. 1, ss. 9, 18; 1939, c. 27, s. 7; c. 52, s. 4; c. 208; 1941, c. 108; 1945, c. 522, s. 4; 1947, c. 326, s. 6; 1953, c. 401, ss. 1, 6; 1959, c. 362, s. 1; 1961, c. 454, ss. 1-3; 1969, c. 575, s. 3; 1971, c. 673, ss. 3, 4.)

CASE NOTES

Applied in State ex rel. Employment Security Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

§ 96-7. Representation in court.

(a) In any civil action to enforce the provisions of this Chapter, the Commission and the State may be represented by any qualified attorney who is designated by it for this purpose.

(b) All criminal actions for violation of any provision of this Chapter, or of any rules or regulations issued pursuant thereto, shall be prosecuted as now provided by law by the district attorney or by the prosecuting attorney of any county or city in which the violation occurs. (Ex. Sess. 1936, c. 1, s. 17; 1937, c. 150; 1973, c. 47, s. 2.)

ARTICLE 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

As used in this Chapter, unless the context clearly requires otherwise:

(1) "Benefits" means the money payments payable to an individual, as provided in this Chapter, with respect to his unemployment.

(2) "Commission" means the Employment Security Commission established by this Chapter.

(3) "Contributions" means the money payments to the State Unemployment Insurance Fund required by this Chapter.

(4) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person which has or had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this Chapter. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this Chapter unless such agent or employee is an employer subject to the tax imposed by the Federal Unemployment Tax Act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of such work: Provided, however, that nothing herein, on or after July 1, 1939, shall be construed to apply to that part of the business of such "employers" as may come within the meaning of that term as it is defined in section one (a) of the Railroad Unemployment Insurance Act.

(5) "Employer" means:

a. Any employing unit which (a) within the current or preceding calendar year, and which for some portion of a day in each of 20 different calendar weeks within such calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week); or (b) in any calendar quarter in either the current or preceding calendar year paid for service in employment wages of one thousand five hundred dollars ($1,500) or more. Provided further, for the purpose of this paragraph, "employment" shall include services which would constitute "employment" but for the fact that such services are deemed to be performed entirely within another state pursuant to an election under an arrangement entered into by the Commission pursuant to subsection (l) of G.S. 96-4, and an agency charged with the administration of any other state or federal employment security law. Provided further, for the purpose of this paragraph, "week" means a period of seven consecutive calendar days, and when a calendar week falls partly within each of two calendar years, the days of that week up to January 1 shall be deemed one calendar week, and the days beginning January 1, another such week.

b. Any employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this Chapter, or which acquired a part of the organization, trade, or business of another, which at the time of such acquisition was an employer subject to this Chapter; provided, such other would have been an employer under paragraph a of this subdivision if such part had constituted its entire organization, trade, or business; provided further, that G.S. 96-10, subsection (d), shall not be applicable to an individual or employing unit acquiring such part of the organization, trade or business. The provisions of G.S.

96-11(a) to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this Chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this Chapter. A successor by total acquisition under the provisions of this paragraph may be relieved from coverage hereunder by making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and provided the Commission finds the predecessor was an employer at the time of such acquisition only because such predecessor had failed to make application for termination of coverage as provided in G.S. 96-11 of this Chapter. A successor under the provisions of this paragraph who becomes an employer by virtue of having acquired a part of the organization, trade or business of the predecessor hereunder may be relieved from coverage upon making written application with the Commission within 60 days from the date the Commission mails him a notification of his liability and the Commission finds that the predecessor could have terminated by making the application under G.S. 96-11 if the part acquired had constituted all of the predecessor's business.

c. Any employing unit which acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit and which, if treated as a single unit with such other employing unit, would be an employer under paragraph a of this subdivision, provided the acquiring employing unit is owned, or controlled (by legally enforceable means or otherwise), directly or indirectly, by the same interests which own, or control (by legally enforceable means or otherwise), directly or indirectly, the employing unit from which the organization, trade, or business, or substantially all the assets were acquired.

d. Any employing unit which, having become an employer under paragraphs a, b, or c, has not, under G.S. 96-11, ceased to be an employer subject to this Chapter; or

e. For the effective period of its election pursuant to G.S. 96-11(c) any other employing unit which has elected to become fully subject to this Chapter.

f. Any employing unit not an employer by reason of any other paragraph of this subdivision, for which within any calendar year, services in employment are or were performed with respect to which such employing unit is or was liable for any federal tax against which credit may or could have been taken for contributions required to be paid into a State Unemployment Insurance Fund; or which as a condition for approval of this Chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required, pursuant to such act, to be an "employer" under this Chapter; or any employing unit required to be covered by the Federal Unemployment Tax Act; provided, that such employer, notwithstanding the provisions of G.S. 96-11, shall cease to be subject to the provisions of this Chapter during any calendar year if the Commission finds that during such period

the employer was not subject to the provisions of the Federal Unemployment Tax Act and any other provision of this Chapter.

g. Any employing unit with its principal place of business located outside the State of North Carolina which engages in business within the State of North Carolina and which employing unit has in employment one or more individuals for some portion of a day in as many as 20 different calendar weeks in any period of 12 consecutive months or has had in employment and paid for service wages in any quarter in 12 consecutive calendar months in the amount of one thousand five hundred dollars ($1,500) or more shall be deemed to be an employer subject to the other provisions of this Chapter.

h. Any employing unit which maintains an operating office within this State from which the operations of an American vessel operating on navigable waters within or within and without the United States or ordinarily and regularly supervised, managed, directed, and controlled: Provided, the employing unit would be an employer by reason of any other paragraph of this subdivision.

i. Any employing unit which acquired a part of the organization, trade or business of another which if treated as a single unit which such part acquired would be an employer under paragraph a of this subdivision if such part acquired had constituted all of the organization, trade or business of the predecessor, provided the acquiring employing unit is owned, or controlled (by legally enforceable means or otherwise), directly or indirectly, by the same interests which own, or control (by legally enforceable means or otherwise), directly or indirectly, the employing unit from which such part of the organization, trade, or business was acquired.

j. Notwithstanding any other provision of this Chapter, "employer" means any institution of higher education or State hospital located in this State which is an agency or instrumentality of this State, or which is owned or operated by the State or an instrumentality of this State (or by this State and one or more states or their instrumentalities), provided such employing unit, in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive), has or had in employment one or more individuals (not necessarily simultaneously and irrespective of whether the same individuals are or were employed in each such week), or in any calendar quarter in either the current or preceding calendar year paid for services in employment wages of one thousand five hundred dollars ($1,500) or more.

k. Notwithstanding any other provision of this Chapter, "employer" means any nonprofit organization or a group of organizations (hereafter, where the words "nonprofit organization" are used in this Chapter, it shall include a group of nonprofit organizations), corporations, any community chest, fund, or foundation which are organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals and which is exempt or may be exempted from federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954, provided such employing unit for some portion of a day in each of 20 different calendar weeks within the current or preceding calendar year (whether or not such weeks are or were consecutive) has or had in employment four or more individuals (not necessarily

simultaneously and irrespective of whether the same individuals are or were employed in each such week).

l. For the purposes of paragraphs j and k, "institution of higher education" means an educational institution in this State which (a) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such certificate; (b) is legally authorized in this State to provide a program of education beyond high school; (c) provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree or a program of training to prepare students for gainful employment in a recognized occupation; (d) is a public or other nonprofit institution; and (e) notwithstanding any of the foregoing provisions of this subsection, all universities, colleges, community colleges, and technical institutes in this State are institutions of higher education for the purposes of this section.

For the purposes of these paragraphs, "hospital" means an institution licensed by the Department of Human Resources as authorized under Chapter 122 of the General Statutes of North Carolina, and an institution licensed by the Department of Human Resources as authorized under Chapter 131 of the General Statutes of North Carolina.

m. For purposes of this Chapter, "secondary school" means any school not an institution of higher education as defined in G.S. 96-8(5)*l.*

n. With respect to employment on and after January 1, 1978, any person or employing unit who (a) during any calendar quarter in the current calendar year or the preceding calendar year paid wages of twenty thousand dollars ($20,000) or more for agricultural labor, or (b) on each of some 20 days during the current or preceding calendar year, each day being in a different calendar week, employed at least 10 individuals in employment in agricultural labor for some portion of the day. Provided, that with respect to agricultural labor performed by a crew on and after January 1, 1978, the crew leader shall be deemed an employer if (1) either of the requirements set forth in the first sentence of this paragraph are met; and (2) the crew members are not employed by another person within the meaning of the first sentence of this paragraph; (3) and if the crew leader holds a valid certificate of registration under the Farm Labor Contractor Registration Act of 1963; or substantially all the members of the crew operate or maintain tractors, mechanized harvesting or crop dusting equipment, or any other mechanized equipment, which is provided by the crew leader. For purposes of this paragraph, the term "crew leader" means an individual who (1) furnishes individuals to perform agricultural labor for any other person, (2) pays (either on his behalf or on behalf of such other person) the individuals so furnished by him for the agricultural labor performed by them, and (3) has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person. The farm operator shall be deemed to be the employer of any worker hired by the farm operator; any assignment to work with a crew or under a crew leader notwithstanding. All the workers shall be deemed the employees of the farm operator when the crew leader does not qualify as the employer under the provisions set out in this paragraph.

o. With respect to employment on and after January 1, 1978, any person who during any calendar quarter in the current calendar year or the preceding calendar year paid wages in cash of one thousand dollars ($1,000) or more for domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.

p. With respect to employment on and after January 1, 1978, any state and local governmental employing unit, including the State of North Carolina, a county board of education, a city board of education, the State Board of Education, the Board of Trustees of the University of North Carolina, the board of trustees of other institutions and agencies supported and under the control of the State, any other agency of and within the State by which a teacher or other employee is paid, and any county, incorporated city or town, the light and water board or commission of any incorporated city or town, the board of alcoholic control of any county or incorporated city or town, county and/or city airport authorities, housing authorities created and operated under and by virtue of Chapter 157 of the General Statutes, redevelopment commissions created and operated under and by virtue of Article 37, Chapter 160 of the General Statutes, county and/or city or regional libraries, county and/or city boards of health, district boards of health, any other separate, local governmental entity, jointly owned or operated governmental entities, and the Retirement System.

q. With respect to employment on and after January 1, 1978, any nonprofit elementary and secondary school.

(6) a. "Employment" means service performed including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term "employee" includes an officer of a corporation, but such term does not include (i) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common-law rules. An employee who is on paid vacation or is on paid leave of absence due to illness or other reason shall be deemed to be in employment irrespective of the failure of such individual to perform services for the employing unit during such period.

b. The term "employment" shall include an individual's entire service, performed within or both within and without this State if:

1. The service is localized in this State; or

2. The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

3. The service, wherever performed, is within the United States, or Canada; such service is not covered under the unemployment compensation law of any other state or Canada; and the place from which the service is directed or controlled is in this State.

c. Services performed within this State but not covered under paragraph b of this subdivision shall be deemed to be employment subject to this Chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.

d. Services not covered under paragraph b of this subdivision, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this Chapter if the individual performing such service is a resident of this State and the Commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this Chapter, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to subsection (l) of G.S. 96-4 shall be deemed to be employment during the effective period of such election.

e. Service shall be deemed to be localized within a state if:
   1. The service is performed entirely within such state; or
   2. The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the State, for example, is temporary or transitory in nature or consists of isolated transactions.

f. The term "employment" shall include:
   1. Services covered by an election pursuant to G.S. 96-11, subsection (c), of this Chapter; and
   2. Services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to G.S. 96-4, subsection (l), of this Chapter during the effective period of such election.
   3. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if such individual is employed on and in connection with such vessel when outside the United States: Provided, such service is performed on or in connection with the operations of an American vessel operating on navigable waters within or within and without the United States and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State: Provided further, that this subparagraph shall not be applicable to those services excluded in subdivision (6), paragraph k, subparagraph 6 of this section.
   4. Any service of whatever nature performed by an individual for an employing unit on or in connection with an American aircraft under a contract of service which is entered into within the United States or during the performance of which

and while the employee is employed on the aircraft it touches at a port in the United States, if such individual is employed on and in connection with such aircraft when outside the United States; provided such service is performed on or in connection with the operations of an American aircraft and such operations are ordinarily and regularly supervised, managed, directed, and controlled from an operating office maintained by the employing unit in this State.

5. Notwithstanding any other provision of this Chapter, "employment" shall include any individual who performs services irrespective of whether the master-servant relationship exists, for remuneration for any employing unit:
   (a) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk) or laundry or dry-cleaning services, for his principal;
   (b) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations if the contract of services contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employment" under the provisions of this subsection if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.
6. Service of an individual who is a citizen of the United States, performed outside of the United States (except in Canada), in the employ of an American employer (other than service which is deemed "employment" under the provisions of paragraph (b) or (e) of this subsection or the parallel provisions of another state's law), if:
   (i) The employer's principal place of business in the United States is located in this State; or
   (ii) The employer has no place of business in the United States, but
      (I) The employer is an individual who is a resident of this State; or
      (II) The employer is a corporation which is organized under the laws of this State; or
      (III) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this State is greater than the number who are residents of any other state; or
   (iii) None of the criteria of divisions (i) and (ii) of this subparagraph is met but the employer has elected coverage in this State, or, the employer having failed to elect coverage in any state, the individual has filed a claim for

benefits, based on such service, under the law of this State.

(iv) An "American employer," for the purposes of this paragraph, means a person who is:

(I) An individual who is a resident of the United States; or

(II) A partnership if two thirds or more of the partners are residents of the United States; or

(III) A trust, if all of the trustees are residents of the United States; or

(IV) A corporation organized under the laws of the United States or of any state;

(V) For the purposes of this subparagraph, United States includes all the states, the District of Columbia, and the Commonwealth of Puerto Rico.

7. Services with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment insurance fund, or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this Chapter.

g. On and after January 1, 1978, the term "employment" includes services performed in agricultural labor when a person or employing unit (a) during any calendar quarter in the current calendar year or the preceding calendar year pays wages of twenty thousand dollars ($20,000) or more for agricultural labor, or (b) on each of some 20 days during the preceding calendar year, each day being in a different calendar week, employs at least 10 individuals in employment in agricultural labor for some portion of the day. For purposes of this Chapter, the term "agricultural labor" includes all services performed: (1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife; (2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm; (3) in connection with the production or harvesting of crude gum (oleoresin) from a living tree, and the following products if processed by the original producer of crude gum from which derived; gum spirits of turpentine and gum resin, or in connection with the ginning of cotton or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes; or (4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if such operator produced more than one half of the commodity with respect to which such service is performed; (B) in the employ of a group of operators of farms (or a cooperative

organization of which such operators are members) in performance of service described in subparagraph (A), but only if such operators produced more than one half of the commodity with respect to which such service is performed. (C) The provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; (D) on a farm operated for profit if such service is not in the course of the employer's trade or business. As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards. Provided, such labor is not agricultural labor performed before January 1, 1980, by an individual who is an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the Immigration and Nationality Act.

h. On and after January 1, 1978, the term "employment" includes domestic service in a private home, local college club or local chapter of a college fraternity or sorority performed for a person who pays cash remuneration of one thousand dollars ($1,000) or more on or after January 1, 1978, in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in such domestic service.

i. On and after January 1, 1978, the term "employment" includes service performed for any State and local governmental employing unit. Provided, however, that employment shall not include service performed (a) as an elected official; (b) as a member of a legislative body or a member of the judiciary, of a State or political subdivision thereof; (c) as a member of the State National Guard or Air National Guard; (d) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood, or similar emergency; or (e) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week.

j. On and after January 1, 1978, the term "employment" includes services performed in any calendar year by employees of nonprofit elementary and secondary schools.

k. The term "employment" shall not include:

1. Prior to January 1, 1978, services performed in the employ of this State, or of any political subdivision thereof, or any instrumentality of this State or its political subdivisions except from and after January 1, 1972, services performed for employers as defined in G.S. 96-8(5)j, and 96-11(c)(3), and except as otherwise provided in this Chapter.

2. Except with respect to service performed for an employer as defined in G.S. 96-8(5)j, service performed prior to January 1, 1978, in the employ of any other state or its political subdivisions, or of the United States Government, or of an instrumentality of any other state or states or their political subdivisions or of the United States and service performed in the employ of the United States Government or an instrumentality of the United States exempt under the Constitution of the United States from the contributions imposed

by this Chapter, except that to the extent that the Congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state employment security law, all of the provisions of this Chapter shall be applicable to such instrumentalities, and to services performed for such instrumentalities, in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services: Provided, that if this State shall not be certified for any year by the Secretary of Labor under section 3304 of the Federal Internal Revenue Code of 1954, the payments required of such instrumentalities with respect to such year shall be refunded by the Commission from the fund in the same manner and within the same period as is provided in G.S. 96-10(e) with respect to contributions erroneously collected.

3. Service with respect to which unemployment insurance is payable under an employment security system established by an act of Congress: Provided, that the Commission is hereby authorized and directed to enter into agreements with the proper agencies under such act of Congress, which agreements shall become effective 10 days after publication thereof in the manner provided in G.S. 96-4(b) for general rules, to provide potential rights to benefits under this Chapter, acquired rights to unemployment insurance under act of Congress, or who have, after acquiring potential rights to unemployment insurance, under such act of Congress, acquired rights to benefits under this Chapter.
4. Prior to January 1, 1978, service performed in agricultural labor as defined in G.S. 96-8(6)g.
5. Prior to January 1, 1978, domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.
6. Service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft by an individual if the individual is performing services on and in connection with such vessel or aircraft when outside the United States; or, service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by such individual as an ordinary incident to any such activity), except (i) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and (ii) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the registered tonnage of merchant vessels under the laws of the United States).
7. Services performed by an individual in the employ of a son, daughter, or spouse; services performed by a child under the age of 21 in the employ of his father or mother or of a partnership consisting only of parents of the child.
8. Service performed by an individual during any calendar quarter for any employing unit or an employer as an insurance agent or as an insurance solicitor, or as a securities salesman if all such service performed during such calendar quarter by

such individual for such employing unit or employer is performed for remuneration solely by way of commission; service performed by an individual for an employing unit as a real estate agent or a real estate salesman as defined in G.S. 93A-2, provided, that such real estate agent or salesman is compensated solely by way of commission and is authorized to exercise independent judgment and control over the performance of his work.

9. Services performed in employment as a newsboy or newsgirl selling or distributing newspapers or magazines on the street or from house to house.
10. Except as provided in G.S. 96-8(6)f5(a), service covered by an election duly approved by the agency charged with the administration of any other state or federal employment security law in accordance with an arrangement pursuant to subdivision (l) of G.S. 96-4 during the effective period of such election.
11. Casual labor not in the course of the employing unit's trade or business.
12. Service in any calendar quarter in the employ of any organization exempt from income tax under the provisions of section 501(a) of the Internal Revenue Code of 1954 (other than an organization described in section 401(a) of said Internal Revenue Code of 1954) or under section 521 of the Internal Revenue Code of 1954, if the remuneration for such service is less than fifty dollars ($50.00).
13. Service in the employ of a school, college, or university, if such service is performed (i) by a student who is enrolled and is regularly attending classes at such school, college, or university, or (ii) by the spouse of such a student, if such spouse is advised, at the time such spouse commences to perform such service, that (I) the employment of such spouse to perform such service is provided under a program to provide financial assistance to such student by such school, college, or university, and (II) such employment will not be covered by any program of unemployment insurance.
14. Service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers.
15. Services performed (i) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or (ii) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or (iii) in a facility conducted for the purpose of carrying out a pro-

gram of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work; or (iv) as a part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training, unless a federal law, rule or regulation mandates unemployment insurance coverage to individuals in a particular work-relief or work-training program; (v) after December 31, 1971, by an inmate for a hospital in a State prison or other State correctional institution or by a patient in any other State-operated hospital, and services performed by patients in a hospital operated by a nonprofit organization shall be exempt; (vi) after December 31, 1971, in the employ of a hospital, if such service is performed by a patient of such hospital; (vii) after December 31, 1977, by an inmate of a custodial or penal institution.

(7) "Employment office" means a free public employment office, or branch thereof, operated by this State or maintained as a part of a state-controlled system of public employment offices.

(8) "Fund" means the Unemployment Insurance Fund established by this Chapter, to which all contributions required and from which all benefits provided under this Chapter shall be paid.

(9) "State" includes, in addition to the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(10) Total and partial unemployment.

a. For the purpose of establishing a benefit year, an individual shall be deemed to be unemployed:

1. If he has payroll attachment but, during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a benefit year is established, it shall begin on the Sunday of the calendar week within which the payroll week ending date falls.

2. If he has no payroll attachment on the date he reports to apply for unemployment insurance. If a benefit year is established, it shall begin on the Sunday of the calendar week with respect to which the claimant met the reporting requirements provided by Commission regulation.

b. For benefit weeks within an established benefit year, a claimant shall be deemed to be:

1. Totally unemployed, irrespective of job attachment, if his earnings for such week, including payments defined in subparagraph c below, would not reduce his weekly benefit amount as prescribed by G.S. 96-12(c).

2. Partially unemployed, if he has payroll attachment but during the payroll week for which he is requesting benefits he worked less than three customary scheduled full-time days in the establishment, plant, or industry in which he is employed and whose earnings from such employment (including

payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

3. Part-totally unemployed, if the claimant had no job attachment during all or part of such week and whose earnings for odd jobs or subsidiary work (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

c. No individual shall be considered unemployed if, with respect to the entire calendar week, he is receiving, has received, or will receive as a result of his separation from employment, remuneration in the form of (i) wages in lieu of notice, (ii) accrued vacation pay, (iii) terminal leave pay, (iv) severance pay, (v) separation pay, or (vi) dismissal payments or wages by whatever name. Provided, however, if such payment is applicable to less than the entire week, the claimant may be considered to be unemployed as defined in subsections a and b of this paragraph.

d. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may by regulation otherwise prescribe.

e. An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the Commission may by regulation otherwise prescribe.

(11) "Employment Security Administration Fund" means the Employment Security Administration Fund established by this Chapter, from which administrative expenses under this Chapter shall be paid.

(12) "Wages" means all remuneration for services from whatever source.

(13) a. "Wages" shall include commissions and bonuses and any sums paid to an employee by an employer pursuant to an order of the National Labor Relations Board or by private agreement, consent or arbitration for loss of pay by reason of discharge and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash, and the reasonable amount of gratuities, including tips which an employee receives directly from a customer and reports to the employer and which the employer considers as salary for the purpose of meeting minimum wage requirements, shall be estimated and determined in accordance with rules prescribed by the Commission: Provided, if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such manner as may by authorized regulations be prescribed. Such regulations shall, so far as possible, secure results reasonably similar to those which would prevail if the individual were paid his wages at regular intervals: Provided further, that the term "wages" shall not include the amount of any payment with respect to services to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for individuals in its employ generally or for a class or classes of such individuals (including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any such payment), on account of (i) retirement, or (ii) sickness or accident disability, or (iii) medical and hospitalization expenses in connection with sickness or accident disability, or (iv) death: Provided, further,

wages shall not include payment by an employer without deduction from the remuneration of the employee of the tax imposed upon an employee under the Federal Insurance Contributions Act.

b. "Wages" shall not include any payment made to, or on behalf of, an employee or his beneficiary from or to a trust which qualifies under the conditions set forth in section 401(a)(1) and (2) of the Internal Revenue Code of 1954 or under or to an annuity plan which at the time of such payment meets the requirements of section 401(a)(3), (4), (5) and (6) of such code and exempt from tax under section 501(a) of such code at the time of such payment, unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as beneficiary of the trust.

(14) "Week" means such period of seven consecutive calendar days as the Commission may by regulations prescribe.

(15) "Calendar quarter" means the period of three consecutive calendar months ending on March 31, June 30, September 30, or December 31.

(16) "Weekly benefit amount." An individual's "weekly benefit amount" means the amount of benefits he would be entitled to receive for one week of total unemployment.

(17) a. Repealed by Session Laws 1977, c. 727, s. 33.

b. Repealed by Session Laws 1977, c. 727, s. 33.

c. As to claims filed on or after October 1, 1974, for claimants who do not have a benefit year in progress, "benefit year" shall mean the one-year period beginning with the first day of a week with respect to which an individual first registers for work and files a valid claim for benefits. A valid claim shall be deemed to have been filed only if such individual, at the time the claim is filed, is unemployed, and has been paid wages in his base period totaling at least five hundred sixty-five dollars and fifty cents ($565.50), and equal to at least one and one-half times his high-quarter wages, which high-quarter wages must equal at least one hundred and fifty dollars ($150.00).

d. As to claims filed on or after January 1, 1978, for claimants who did not have benefit years in progress, "benefit year" shall mean the 52 week period beginning with the Sunday of the calendar week with respect to which an individual first registers for work and files a valid claim for benefits. The requirements of sub-subdivision a above shall apply to such claims.

(18) For benefit years established on and after July 1, 1953, the term "base period" shall mean the first four of the last six completed calendar quarters immediately preceding the first day of an individual's benefit year as defined in subdivision (17) of this section. For benefit years established on and after January 1, 1978, the term "base period" shall mean the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year as defined in G.S. 96-8(17).

(19) Repealed by Session Laws 1977, c. 727, s. 35.

(20) The term "American vessel," as used in this Chapter, means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is performing service solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state and the term "American aircraft" means an aircraft registered under the laws of the United States.

(21) The words "Employment Security Law" as used in this Chapter mean any law enacted by this State or any other state or territory or by the federal government providing for the payment of unemployment insurance benefits.

(22) Average Weekly Insured Wage. — "Average weekly insured wage" is the quotient obtained by dividing the total of the wages, as defined in G.S. 96-8(12) and (13), reported by all insured employers by the monthly average in insured employment under this Chapter during the immediately preceding calendar year and further dividing the quotient obtained by 52 to obtain a weekly rate. (For this computation the data as released annually in the Employment Security Commission's publication "North Carolina Insured Employment and Wage Payment" shall be used). The quotient thus obtained shall be deemed to be the average weekly wage for such year.

(23) With respect to weeks of unemployment beginning on or after January 1, 1978, wages for insured work shall include wages paid for previously uncovered services. For the purposes of this subdivision, the term "previously uncovered services" means services (a) which were not employment as defined in G.S. 96-8(6) and were not services covered pursuant to G.S. 96-11(c) at any time during the one-year period ending December 31, 1977; and (b) which (1) are agricultural labor as provided in G.S. 96-8(5)n and G.S. 96-8(6)g or domestic service as provided in G.S. 96-8(5)o and G.S. 96-8(6)h, or (2) are services performed by an employee of this State or of a local governmental unit, as provided in G.S. 96-8(5)p and G.S. 96-8(6)i or by an employee of a nonprofit educational institution which is not an institution of higher education, as provided in G.S. 96-8(5)r [G.S. 96-8(5)q] and G.S. 96-8(6)j; except to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 was paid on the basis of such services.

(24) Work, for purposes of this Chapter, means any performance or effort, physical or mental, done for remuneration or in expectation of remuneration, whether or not the one for whom such work is performed is a covered employer under this Chapter.

(25) For purposes of G.S. 96-13(a)3, an implied contract is defined as a reasonable assurance. (Ex. Sess. 1936, c. 1, s. 19; 1937, c. 448, s. 5; 1939, c. 27, ss. 11-13; c. 52, ss. 6, 7; c. 141; 1941, cc. 108, 198; 1943, c. 377, ss. 31-34; c. 552, ss. 1, 2; 1945, c. 522, ss. 5-10; c. 531, ss. 1, 2; 1947, c. 326, ss. 7-12; c. 598, ss. 1, 5, 8; 1949, c. 424, ss. 3-8½; cc. 523, 863; 1951, c. 322, s. 1; c. 332, ss. 2, 3, 18; 1953, c. 401, ss. 1, 7-11; 1955, c. 385, ss. 3, 4; 1957, c. 1059, ss. 2-4; 1959, c. 362, ss. 2-6; 1961, c. 454, ss. 4-15; 1965, c. 795, ss. 2-5; 1969, c. 575, ss. 4-6, 15; 1971, c. 367; c. 673, ss. 5-13; c. 863; c. 1231, s. 1; 1973, c. 172, s. 1; c. 476, ss. 133, 152; c. 740, s. 2; c. 1138, ss. 1, 2; 1975, c. 226, s. 3; 1977, c. 727, ss. 14-36; 1979, c. 660, ss. 3-12.)

Editor's Note. — Session Laws 1977, c. 727, s. 58, provides: "If U.S. Public Law 94-566 or the federal acts it amends should be adjudged unconstitutional or invalid in its or their application or stayed pendente lite as to State or local employees by a court of competent jurisdiction, then the coverage of those employees under this act is automatically stayed or repealed to the extent of the adjudged inapplicability. The repeal shall be effective from the date of final disposition upon appeal or from the date of expiration of the right of appeal and shall apply to relevant matters pending at that time. If Public Law 94-566 or those provisions thereof relating to coverage of State and local employees should at any time be repealed by the U.S. Congress, then the provisions of this act relating to coverage of State and local employees shall be automatically repealed."

Article 37 of Chapter 160, referred to in this section, has been transferred to Chapter 160A as Article 22, § 160A-500 et seq.

Effect of Amendments. — The 1979 amendment added the last two sentences of paragraph n of subdivision (5), inserted "jointly owned or operated governmental entities" near the end of paragraph p of subdivision (5), deleted "the Virgin Islands" preceding "or Canada" in both places in paragraph b3 of subdivision (6), substituted "k" for "g" near the end of paragraph f3 of subdivision (6), deleted "or the Virgin Islands" following "except in Canada" near the beginning of paragraph f6 of subdivision (6), deleted "or is domestic service in a private home of the employer" following "business" in provision (D) in the second sentence of paragraph g of subdivision (6), in subdivision (6) rewrote paragraph k7, inserted "or newsgirl" in paragraph k9 of subdivision (6), and added subdivisions (24) and (25).

Legal Periodicals. — For a survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

CASE NOTES

I. General Consideration.
II. "Employer" — Examples.
III. "Employment" — Examples.

Editor's Note. — The relevance of many of the decisions reported below may be affected by subsequent amendatory statutes.

I. GENERAL CONSIDERATION.

This section provides the qualifications for benefits under the Employment Security Law. In re Shuler, 255 N.C. 559, 122 S.E.2d 393 (1961).

Definitions and Tests Applied According to Legislative Intent. — The General Assembly has power to determine scope of the Unemployment Compensation Act, and the definitions and tests therein prescribed will be applied by the courts in accordance with the legislative intent. Unemployment Comp. Comm'n v. City Ice & Coal Co., 216 N.C. 6, 3 S.E.2d 290 (1939).

Common-Law Relationship of Master and Servant Extended. — Employments taxable under this Chapter are not confined to the common-law relationship of master and servant, but the legislature, under its power to determine employments which shall be subject to the tax, has, by the definitions contained in the Chapter and the administrational procedure sat up therein for determining whether an employment is subject to the Chapter, enlarged its coverage beyond the common-law definition of master and servant, and the scope of the Chapter must be determined upon the facts of each particular case. State ex rel. Unemployment Comp. Comm'n v. National Life Ins. Co., 219 N.C. 576, 14 S.E.2d 689, 139 A.L.R. 895 (1941). See State ex rel. Unemployment Comp. Comm'n v. L. Harvey & Son Co., 227 N.C. 291, 42 S.E.2d 86 (1947).

This section is not violative of constitutional provisions when properly interpreted and applied. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

Liberal Construction. — The terms "employment," "employer," "employing unit," "wages," and "remuneration" as used in this Chapter must be liberally construed to effectuate its purpose to relieve the evils of unemployment, and the definition of the terms as contained in the Chapter are controlling and are broader than the common-law meaning of the terms, and the Chapter includes in its scope relationships which might be excluded by a strict common-law application of the definition of an independent contractor. Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939).

Effect of Reinstatement of Liability after Prior Exemption. — Where an employer, otherwise subject to the provisions of this Chapter, is exempted from those provisions by legislative action, and by legislative action that exemption is subsequently terminated, and, additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under this Chapter that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. State ex rel. Employment Security Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640 (1979).

Subdivision (4) Construed. — Former subdivision (4) merely determined who should be liable for the contributions to the Commission on wages paid to employees as between an employing unit and a contractor or subcontractor under certain specified circumstances. State ex rel. Unemployment Comp. Comm'n v. Nissen, 227 N.C. 216, 41 S.E.2d 734 (1947).

Subdivision (5)b Construed. — Subdivision (5)b of this section is a definitive statute by which it can be determined whether or not an employing unit which is the transferee of all, substantially all, or a part of an organization, trade, or business of another, is subject to the provisions of the Employment Security Law and required to make the contributions as provided therein. State ex rel. Employment Security Comm'n v. News Publishing Co., 228 N.C. 332, 45 S.E.2d 391 (1947). But see the 1949 amendment to § 96-9(c)(4).

In subdivision (5)b of this section, the employing unit that acquires only a part of the organization, trade, or business of another is expressly exempted from the lien imposed by § 96-10(d) on the assets transferred, although the former owner may not have paid all the contributions due at the time of the transfer. If it had been the intent and purpose of the legislature in enacting § 96-9(c)(4), to authorize the transfer of such percentage of the reserve account as the transferred assets bear to the entire assets of the transferor, when only a part of the organization, trade, or business is transferred, then there would be no sound reason for exempting such assets from the provisions of § 96-10(d). State ex rel. Employment Security Comm'n v. News Publishing Co., 228 N.C. 332, 45 S.E.2d 391 (1947). But see the 1949 amendment to § 96-9(c)(4).

Read in context, subdivision (5)b of this section contemplates a transaction in which the purchaser, instead of buying physical assets as such, succeeds in some real sense to the organization, trade or business, or some part thereof, of a covered employer, ordinarily as a going concern. The underlying idea is that of continuity, the new employing unit succeeding to and continuing the business or some part thereof of the former employing unit. State ex rel. Employment Security Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

Where defendant company was composed of new persons, engaged in a new business, under a new name, and did not purchase the predecessor's accounts receivable, customer lists, good will, right to use trade name, or any assets except the equipment and raw materials in the plant, there was no continuity of organization, trade or business such as is contemplated by subdivision (5)b of this section. State ex rel. Employment Security Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

Subdivision (5)d Construed. — The provision that enterprises "controlled" by the same "interests" shall be considered a single employing unit, as contained in former paragraph d of subdivision (5) of this section, was given the distinct definite and commonly understood meaning of its wording. Unemployment Comp. Comm'n v. City Ice & Coal Co., 216 N.C. 6, 3 S.E.2d 290 (1939).

Where the three defendant corporations had common officers and directors and substantially identical stockholders, and maintained a central business office where each kept its records and handled all clerical matters, the three corporations were owned and controlled directly or indirectly by the same interests within the meaning of former paragraph d of subdivision (5) of this section and constituted but a single employing unit within the meaning of the section. Unemployment Comp. Comm'n v. City Ice & Coal Co., 216 N.C. 6, 3 S.E.2d 290 (1939).

Former paragraph d of subdivision (5) of this section, relating to employing units owned or controlled by the same interests, etc., when properly interpreted and applied, was not open to successful attack on the ground that it would result in the deprivation of property without due process of law or constitute a denial of the equal protection of the laws. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

An individual who operated three places of business, employing in the aggregate more than eight employees, was an "employer" as defined in former paragraph d of subdivision (5) of this section, relating to employing units owned or controlled by the same interests, etc. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

Subdivision (6)a Construed. — The employment contemplated by subdivision (6)a was to be one for personal services rendered for remuneration. State ex rel. Employment Security Comm'n v. Tinnin, 234 N.C. 75, 65 S.E.2d 884 (1951).

Subdivision (6)f Construed. — Where services were rendered for remuneration, subdivision (6)f of this section formerly provided that the burden was on the party for whose benefit the services were rendered to prove that they were rendered free from his control or direction over the performance of such services, that they were outside the usual course of the business for which the services were performed, and that the person performing the service was customarily engaged in an independently established trade, occupation, profession, or business; and since the matters of exemption were stated conjunctively, all three elements were required to be shown in order that exemption from the Chapter could be secured. Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939); State ex rel. Employment Security Comm'n v. Coe, 239 N.C. 84, 79 S.E.2d 177 (1953).

Before the 1949 amendment to subdivision (6), paragraphs a and f, it was held that the provisions of the Employment Security Law classifying and designating those persons who

are subject to the provisions of this Chapter, rather than the common-law definition of the relationship of master and servant, were controlling, when not capricious or unreasonable. And the burden was upon the employer to show to the satisfaction of the Employment Security Commission that persons performing services came within the exceptions enumerated in former paragraphs 1, 2 and 3 of subdivision (6)f. State ex rel. Employment Security Comm'n v. Champion Distrib. Co., 230 N.C. 464, 53 S.E.2d 674 (1949).

One is not entitled to unemployment benefits merely because he meets the legislative definition of "totally unemployed." In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

Deferment of Benefits Until Exhaustion of Severance and Vacation Pay. — Discharged employees who are entitled under a contract to severance and vacation pay are not entitled to unemployment benefits until the moneys paid as severance and vacation pay have been exhausted by time elapsed at the employees' weekly wage rate. In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

The fact that the legislature not only amended the definition of "wages" in 1953, but added, in 1955, a disqualifying provision, is clear evidence of its intent to prevent the collection of unemployment benefits so long as the employee had vacation or severance pay payable to him. It is a clear declaration that the legislature did not intend that an employer should be required to provide greater compensation to an unemployed individual than to the same individual when at work. In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

Employee Is Entitled to Benefits If He Does Not Work and Is Not Paid for Services. — A laid-off employee is entitled to the insurance benefits under the State law if he is totally unemployed; that is, if he does not work, and is not paid and not due pay for services. In re Shuler, 255 N.C. 559, 122 S.E.2d 393 (1961).

Payments under Supplemental Unemployment Benefit Plan. — Under the wage and service test fixed by this section, payments to laid-off employees under a supplemental unemployment benefit plan do not constitute wages. In re Shuler, 255 N.C. 559, 122 S.E.2d 393 (1961).

Benefits received by a laid-off employee from a trust fund set up pursuant to a collective bargaining agreement should not be deducted from unemployment insurance benefits due such employee under the Employment Security Act. In re Shuler, 255 N.C. 559, 122 S.E.2d 393 (1961).

Cited in State ex rel. Employment Security Comm'n v. Kermon, 232 N.C. 342, 60 S.E.2d 580 (1950); State ex rel. Employment Security Comm'n v. Paul's Young Men's Shop, Inc., 32 N.C. App. 23, 231 S.E.2d 157 (1977).

II. "EMPLOYER"—EXAMPLES.

Corporation Held Contractee and Not Mere Lessor. — The corporate defendant operated a department store. Upon the discontinuance of its shoe department, it entered into a contract with the individual defendant under which he occupied space in the store at a rental of a fixed percentage of the gross and carried on the shoe business under the name of the corporation, with full authority to hire and fire employees and order stock, but under which the corporation required money from sales to be turned over to it immediately as received, controlled the extension of credit and owned all accounts, paid sales taxes and advertised in its own name with the individual defendant paying for the proportion of advertising devoted to shoes. It was held that the corporation was a contractee and not a mere landlord, and that the corporation was liable under former subdivision (4), for unemployment compensation tax on wages paid by the individual to his employees for the period of operation prior to the amendment of 1945. State ex rel. Unemployment Comp. Comm'n v. L. Harvey & Son Co., 227 N.C. 291, 42 S.E.2d 86 (1947).

Employer Required to Pay Contributions. — Where, prior to the purchase of the business by defendant, there had been employed therein more than eight individuals for 12 weeks during the calendar year, and defendant, after purchasing the business, employs more than eight employees for 16 weeks during the remainder of the year, defendant is an employer required to pay contributions upon the wages of his employees under the provisions of the Employment Security Act. State ex rel. Employment Security Comm'n v. Whitehurst, 231 N.C. 497, 57 S.E.2d 770 (1950).

III. "EMPLOYMENT"—EXAMPLES.

Agreement of Purchaser to Perform Service in Connection with Purchase. — Evidence that a municipal corporation sold certain standing timber to defendant at a stipulated price per thousand board feet and that in connection with the purchase, and that defendant agreed to remove all sawdust, to keep the bushes down and to pile no brush on the premises of the corporation, supported the finding of the Employment Security Commission that the defendant was not in the employ of the municipal corporation, within the meaning of this section. State ex rel. Employment Security Comm'n v. Simpson, 238 N.C. 296, 77 S.E.2d 718 (1953).

Insurance Soliciting Agents. — Soliciting agents and managers, in their capacity as soliciting agents, are subject to a high degree of control by the insurance company employing them under their written contract, and usually

their services are rendered to the company in the offices of the company, and are directly related and contribute to the primary purpose for which the company is organized, and therefore their services constitute an "employment" within this Chapter. Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939). But see subdivision (6)g9 of this section.

Research Assistant. — The claimant's services as a research assistant under a fellowship granted to students by the University of North Carolina were not "employment" within the meaning of the act. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

Salesmen. — The evidence tended to show that the services performed by defendant's salesmen were in the usual course of defendant's business, that goods were loaded on the salesmen's cars on defendant's premises, and the unsold goods returned there, that the salesmen were bonded, were allotted territory by defendant, were not permitted to sell any competitor's merchandise, paid no license or sales tax, were reported as employees in federal returns and their taxes deducted from the payroll, were required to turn in all money for goods sold and were paid weekly on a commission basis. Held: The evidence supports the finding of the Employment Security Commission that the salesmen were "employees" within the meaning of this section. State ex rel. Employment Security Comm'n v. Champion Distrib. Co., 230 N.C. 464, 53 S.E.2d 674 (1949). But see the 1949 amendment to subdivision (6), paragraphs a and f.

Shoeshine Boy. — Findings were held sufficient to support the conclusions of the Employment Security Commission that a shoeshine boy "engaged" by a barbershop was an employee and not an independent contractor, so as to bring the employer within the coverage of the Employment Security Law during the period in question. State ex rel. Employment Security Comm'n v. Coe, 239 N.C. 84, 79 S.E.2d 177 (1953).

Special School Employee. — Project Headstart is a school within the ordinary meaning of the term, and the situation of an employee of Project Headstart is one of those addressed by the "secondary school provision" of this section, excluding from unemployment benefits those who are subject to school-related seasonal unemployment. In re Huntley, 42 N.C. App. 1, 255 S.E.2d 574, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

Truck Driver. — Where an interstate carrier leased a motor vehicle for a trip under its franchise by agreement stipulating that lessor should furnish the equipment and pay the driver's salary and fully maintain and service the equipment, in consideration of a lump sum payment, the driver of such leased vehicle, whether he be the lessor owner or an employee of the lessor owner, was not an employee of the lessee within the meaning of this section. State ex rel. Employment Security Comm'n v. Hennis Freight Lines, 248 N.C. 496, 103 S.E.2d 829 (1958).

Evidence Showing Workmen Employees and Not Independent Contractors. — See State ex rel. Employment Security Comm'n v. Monsees, 234 N.C. 69, 65 S.E.2d 887 (1951).

§ 96-9. Contributions.

(a) Payment. —

(1) Except as provided in subsection (d) hereof, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Chapter, with respect to wages for employment (as defined in G.S. 96-8(6)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this Chapter will be jeopardized by delay, the Commission may, whether or not the time otherwise prescribed by law for making returns and paying such tax

has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by G.S. 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(3) Benefits paid employees of this State shall be financed and administered in accordance with the provisions and conditions of G.S. 96-9(d) required for nonprofit organizations; except as provided by suitable regulations which may be adopted by the Commission. The Department of Administration shall make an election with respect to financing all such benefits.

(4) Political subdivisions of this State may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(d). Any election made shall be binding upon the political subdivision so electing for a period of four years.

(5) Prior to January 1, 1978, the term "wages" shall not include for the purposes of this section any remuneration in excess of four thousand two hundred dollars ($4,200) paid to any individual in a single calendar year by an employer with respect to employment.

For purposes of this section, the term "wages" shall not include any remuneration paid to any employee in this State in excess of the FUTA tax base paid to an individual by a single employer if the employer of that individual made contributions in another state or states upon the wages paid to such individual during the applicable calendar year, because of work performed in another state or states.

Any successor employer as defined in G.S. 96-8(5)b for the purposes of this section shall pay no contributions on that part of remuneration earned by any individual in the employ of the successor employer which, when added to the remuneration previously paid by the predecessor employer exceeded the FUTA tax base in a single calendar year, provided the individual was an employee of the predecessor and was taken over as an employee by the successor as a part of the organization acquired and, provided further, that the predecessor employer has paid contributions on the wages paid to such individual while in his employ during the year of acquisition and the account of the predecessor is transferred to the successor in accordance with G.S. 96-9(c)(4)a.

Beginning January 1, 1978, and thereafter, the taxable wage base of any employee whose wages are subject to taxation, whether totally or partially, by the State of North Carolina under any provision of this Chapter shall be the federally required tax base.

(b) Rate of Contributions. —

(1) Except as provided in subsection (d) hereof, each employer shall pay contributions with respect to employment during any calendar year prior to January 1, 1955, as required by this Chapter prior to such

January 1, 1955, and each employer shall pay contributions equal to two and seven-tenths percent (2.7%) of wages paid by him during the calendar year 1955 and each year thereafter with respect to employment occurring after December 31, 1954, which shall be deemed the standard rate of contributions payable by each employer except as provided herein.

(2) a. No employer's contribution rate shall be reduced below the standard rate for any calendar year unless and until his account has been chargeable with benefits throughout more than thirteen consecutive calendar months ending July 31 immediately preceding the computation date and his credit reserve ratio meets the requirements of that schedule used in the computation.

b. The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance and has been chargeable with benefits as set forth in G.S. 96-9(b)(2)a of this Chapter. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all past periods.

c. The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all his contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits is less than the total benefits charged to his account for all past periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of such employer's account as of July 31 of each year by the total taxable payroll of such employer for the 36 calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.

For purposes of this subsection, the first date on which an account shall be chargeable with benefits shall be the first date with respect to which a benefit year (as defined in G.S. 96-8(17)) can be established, based solely on wages paid by that employer.

No employer's contribution rate shall be reduced below the standard rate for any calendar year unless his liability extends over a period of all or part of three consecutive calendar years and, as of August 1 of the third year, his credit reserve ratio meets the requirements of that schedule used in computing rates for the following calendar year, unless the employer's liability was established under G.S. 96-8(5)b and his predecessor's account was transferred as provided by G.S. 96-9(c)(4)a.

Whenever contributions are erroneously paid into one account which should have been paid into another account or which should have been paid into a new account, that erroneous payment can be adjusted only by refunding the erroneously paid amounts to the

paying entity. No pro rata adjustment to an existing account may be made, nor can a new account be created by transferring any portion of the erroneously paid amount, notwithstanding that the entities involved may be owned, operated, or controlled by the same person or organization. No adjustment of a contribution rate can be made reducing said rate below the standard rate for any period in which the account was not in actual existence and in which it was not actually chargeable for benefits. Whenever payments are found to have been made to the wrong account, refunds can be made to the entity making the wrongful payment for a period not exceeding five years from the last day of the calendar year in which it is determined that wrongful payments were made. Notwithstanding payment into the wrong account, any entity which is determined to have met the requirements to be a covered employer, whether or not the entity has had paid on the account of its employees any sum into another account, the Commission shall collect contributions at the standard rate or the assigned rate, whichever is higher, for the five years preceding the determination of erroneous payments, said five years to run from the last day of the calendar year in which the determination of liability for contributions or additional contributions is made. This paragraph shall apply to all cases arising hereunder, the question of good faith notwithstanding.

(3) a. Repealed by Session Laws 1977, c. 727, s. 39.

b. Repealed by Session Laws 1977, c. 727, s. 39.

c. Repealed by Session Laws 1977, c. 727, s. 39.

d. The applicable schedule of rates for the calendar year 1972 and thereafter shall be determined by the fund ratio resulting when the total amount available for benefits in the unemployment insurance fund, as of the computation date, August 1, is divided by the total amount of the taxable payroll of all subject employers for the 12-month period ending June 30 preceding such computation date. Schedule A,B,C,D,E,F,G,H, or I appearing on the line opposite such fund ratio in the table below shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date.

FUND RATIO SCHEDULES

When the Fund Ratio Is:		Applicable
As Much As	But Less Than	Schedule
———	2.5%	A
2.5%	3.5%	B
3.5%	4.5%	C
4.5%	5.5%	D
5.5%	6.5%	E
6.5%	7.5%	F
7.5%	8.5%	G
8.5%	9.5%	H
9.5% and in excess thereof		I

Variations from the standard rate of contributions shall be determined and assigned with respect to the calendar year 1972

and thereafter, to employers whose accounts have a credit balance and who are eligible therefor according to each such employer's credit reserve ratio, and each such employer shall be assigned the contribution rate appearing in the applicable Schedule A,B,C,D,E,F,G,H, or I on the line opposite his credit reserve ratio as set forth in the Experience Rating Formula below:

EXPERIENCE RATING FORMULA

When The Credit Reserve Ratio Is:										
As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
——	0.8%	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.5
0.8%	1.0	2.7	2.7	2.7	2.7	2.7	2.7	2.7	2.5	2.3
1.0	1.2	2.7	2.7	2.7	2.7	2.7	2.7	2.5	2.3	2.1
1.2	1.4	2.7	2.7	2.7	2.7	2.7	2.5	2.3	2.1	1.9
1.4	1.6	2.7	2.7	2.7	2.7	2.5	2.3	2.1	1.9	1.7
1.6	1.8	2.7	2.7	2.7	2.5	2.3	2.1	1.9	1.7	1.5
1.8	2.0	2.7	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3
2.0	2.2	2.7	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1
2.2	2.4	2.5	2.3	2.1	1.9	1.7	1.5	1.3	1.1	0.9
2.4	2.6	2.3	2.1	1.9	1.7	1.5	1.3	1.1	0.9	0.7
2.6	2.8	2.1	1.9	1.7	1.5	1.3	1.1	0.9	0.7	0.5
2.8	3.0	1.9	1.7	1.5	1.3	1.1	0.9	0.7	0.5	0.4
3.0	3.2	1.7	1.5	1.3	1.1	0.9	0.7	0.5	0.4	0.3
3.2	3.4	1.5	1.3	1.1	0.9	0.7	0.5	0.4	0.3	0.2
3.4	3.6	1.3	1.1	0.9	0.7	0.5	0.4	0.3	0.2	0.1
3.6	3.8	1.1	0.9	0.7	0.5	0.4	0.3	0.2	0.1	0.1
3.8	4.0	0.9	0.7	0.5	0.4	0.3	0.2	0.1	0.1	0.1
4.0	4.2	0.7	0.5	0.4	0.3	0.2	0.1	0.1	0.1	0.1
4.2	4.4	0.5	0.4	0.3	0.2	0.1	0.1	0.1	0.1	0.1
4.4	4.6	0.4	0.3	0.2	0.1	0.1	0.1	0.1	0.1	0.1
4.6	4.8	0.3	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1
4.8	5.0	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
5.0 and in excess thereof		0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1

New rates shall be assigned to eligible employers effective January 1, 1972, and each January 1 thereafter in accordance with the foregoing Fund Ratio Schedule and Experience Rating Formula.

The Experience Rating Formula table in force in any particular year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

e. Each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite his debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH THE CALENDAR YEAR 1978

When The Debit Ratio Is: As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.9%
0.3	0.6	3.1
0.6	0.9	3.3
0.9	1.2	3.5
1.2	1.5	3.7
1.5	1.8	3.9
1.8	2.1	4.1
2.1	2.4	4.3
2.4	2.7	4.5
2.7	3.0	4.7
3.0	3.3	4.9
3.3	3.6	5.1
3.6	3.9	5.3
3.9	4.2	5.5
4.2 and over		5.7

The Rate Schedule for Overdrawn Accounts Beginning with the Calendar Year 1966 in force in any particular calendar year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

f. The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.

g. Any employer may at any time make a voluntary contribution, additional to the contributions required under this Chapter, to the fund to be credited to his account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as said term is used in G.S. 96-8(8). Any voluntary contributions so made by an employer within 30 days after the date of mailing by the Commission pursuant to G.S. 96-9(c)(3) herein, of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to his account as of the previous July 31. Provided, however, any voluntary contribution made as provided herein after July 31 of any year shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G.S. 96-9(b)(3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of such voluntary contribution by any employer.

h. If, within the calendar month in which the computation date occurs, the Commission finds that any employing unit has failed to file any report required in connection therewith or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or

sufficient report, as the case may be, within 15 days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

(c) (1) Except as provided in subsection (d) hereof, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his own behalf, provided that any voluntary contribution made by an employer under the provisions of G.S. 96-9(b)(3)c(d) [96-9(b)(3)g] and credited to his account, shall be credited to such account in an amount equal to eighty percent (80%) of the amount of such voluntary contribution. The Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all contributions which he has paid or is paid on his own behalf with respect to employment occurring subsequent to June 30, 1965. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(2) Charging of benefit payments. —

a. Benefits paid shall be charged against the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12(e)G. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the voluntary leaving of work by the claimant without good cause attributable to the employer, or (ii) the discharge of claimant for misconduct in connection with his work, shall not be charged to the account of the employer by whom the claimant was employed

at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished part-time work to an individual who, because of the loss of employment with one or more other employers becomes eligible for partial benefits while still being furnished part-time work by such employer on substantially the same basis and substantially the same amount as had been made available to such work during his base period whether the employments were simultaneous or successive.

c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13(3) shall not be charged to the account of the base period employer(s).

d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):

1. The benefits are paid for unemployment due directly to a major natural disaster, and
2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.

e. 1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to the experience rating account of any employer.

2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.

(4) Transfer of account. —

a. Whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires substantially all or a distinct and severable portion of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, the account or that part of the account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the

regulations as prescribed therefor, be transferred as of the date of acquisition of the business to the successor employer for use in the determination of his rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of his right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision.

b. Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this Chapter prior to the date of acquisition of the business, his rate of contribution for the period from such date to the end of the then current contribution year shall be the same as his rate in effect on the date of such acquisition. If the successor was not an employer prior to the date of the acquisition of the business he shall be assigned a standard rate of contribution set forth in G.S. 96-9(b)(1) for the remainder of the year in which he acquired the business of the predecessor; however, if such successor makes application for the transfer of the account within 60 days after notification by the Commission of his right to do so and the account is transferred, he shall be assigned for the remainder of such year the rate applicable to the predecessor employer or employers on the date of acquisition of the business, provided there was only one predecessor or if more than one and the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this Chapter, when an account is transferred in its entirety by an employer to a successor, the transferring employer shall thereafter pay the standard rate of contributions of two and seven-tenths percent (2.7%) and shall continue to pay at such rate until he qualifies for a reduction, reacquires the account he transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3).

c. In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.

(5) In the event any employer subject to this Chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of G.S. 96-9(b)(2) of this Chapter.

(d) Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this paragraph. For the purposes of this paragraph, a nonprofit organization is an organization (or group of organizations) described in section 501(c)(3) of the United States Internal Revenue Code of 1954 which is exempt from income tax under section 501(a) of said Code.

(1) a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.

c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1.

d. Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever.

e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review.

(2) Payments in lieu of contributions shall be made in accordance with the provisions of this subparagraph and shall be processed as provided herein.

a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and 96-10, except that the amount of advance payments shall be computed as one

percent (1%) of taxable wages and entered on such reports; provided that such advance payments shall become effective only with respect to the first four thousand two hundred dollars ($4,200) in wages paid in a calendar year until January 1, 1978. On and after that date advance payments shall be effective with respect to the federally required wage base. Collection of such advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

Beginning January 1, 1978, any employer making quarterly reports of employment to the Commission and if such employer is a newly electing reimbursement employer he shall pay contributions of one percent (1%) of taxable wages entered on such reports.

Any employer paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

b. The Commission shall establish a separate account for each such employer and such account shall be charged, credited, and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full and voluntary contributions are not applicable.

c. Benefits paid shall be charged to the employer's account in accordance with G.S. 96-9(c)(2)a; provided that the noncharging of benefits set forth in G.S. 96-9(c)(2)b shall not apply; provided further, irrespective of any other provisions of this Chapter, all benefits paid shall be charged to the employer's account as provided herein, and no benefits paid shall be noncharged, except an amount equal to fifty percent (50%) of extended benefits paid. Any such benefits paid and later determined to be overpayments shall be credited to the employer's account only if recovered.

d. As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each such employer's account and shall furnish him with a statement of all charges and credits thereto.

As of the second computation date (August 1) following the effective date of liability and as of each computation date thereafter, any credit balance remaining in the employer's account (after all applicable postings) in excess of whichever is the greater (a) benefits charged to such account during the 12 months ending on such computation date, or (b) one percent (1%) of taxable wages for the 12 months ending on June 30 preceding such computation date shall be refunded. Any such refund shall be made prior to February 1 following such computation date.

Should the balance in such account not equal that requiring a refund, the employer shall upon notice and demand for payment mailed to his last known address pay into his account an amount that will bring such balance to the minimum required for a refund. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment. Any such amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid prior to such change in election or termination of coverage have been charged, any credit balance in such account shall be refunded to the employer.

Should there be a debit balance in such account, the employer shall, upon notice and demand for payment, mailed to his last-known address, pay into his account an amount equal to such debit balance. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment.

Any such amount unpaid on the date due shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Beginning January 1, 1978, each employer paying by reimbursement shall have his account computed on computation date (August 1) and if there is a deficit shall be billed for an amount necessary to bring his account to one percent (1%) of his taxable payroll. Any amount of his account in excess of that required to equal one percent (1%) of his payroll shall be refunded. Amounts due from any employer to bring his account to a one percent (1%) balance shall be billed as soon as practical and payment will be due within 25 days from the date of mailing of the statement of amount due.

e. The Commission may make necessary rules and regulations with respect to coverage of a group of nonprofit organizations and with respect to the reimbursement of benefits payments by such group of nonprofit organizations.

(3) a. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to a nonprofit organization which makes payments to the State Unemployment Insurance Fund in lieu of contributions.

b. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(e) In order that the Commission shall be kept informed at all times on the circumstances and conditions of unemployment within the State and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the Commission may deem necessary shall be made.

(f) (1) On and after January 1, 1978, all benefits charged to a State or local governmental employing unit shall be paid to the Commission within 25 days from the date a list of benefit charges is mailed to the State or local governmental employing agency and the appropriate account(s) shall be credited with such payment(s).

(2) In lieu of paying for benefits by reimbursement as provided in subdivision (1) hereof, any State or local governmental employing unit may elect pursuant to rules and regulations established by the Commission to pay contributions on an experience rating basis as provided in G.S. 96-9(a), (b), and (c).

(3) State or local governmental employing units paying for benefits as provided in subdivision (1) herein may establish pool accounts; provided, that such pool accounts are established and maintained according to the rules and regulations of the Commission.

(4) Any governmental entity paying by reimbursement shall not have any benefits paid against its account noncharged or forgiven. (Ex. Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969, c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15.)

Cross References. — For provisions authorizing the State Treasurer to establish a pool account in cooperation with any one or more units of local government for the purpose of reimbursing the Employment Security Commission for unemployment benefits paid by the Commission and chargeable to each local unit of government participating in the pool account, see § 147-86.1.

Editor's Note. — Session Laws 1977, c. 727, s. 58, provides: "If U.S. Public Law 94-566 or the federal acts it amends should be adjudged unconstitutional or invalid in its or their application or stayed pendente lite as to State or local employees by a court of competent jurisdiction, then the coverage of those employees under this act is automatically stayed or repealed to the extent of the adjudged inapplicability. The repeal shall be effective from the date of final disposition upon appeal or from the date of expiration of the right of appeal and shall apply to relevant matters pending at that time. If Public Law 94-566 or those provisions thereof relating to coverage of State and local employees should at any time be repealed by the U.S. Congress, then the provisions of this act relating to coverage of State and local employees shall be automatically repealed."

Effect of Amendments. — The 1979 amendment deleted "Prior to January 1, 1978" at the beginning of the second paragraph of subdivision (a)(5), substituted "the FUTA tax base" for "four thousand two hundred dollars ($4,200)" in the second paragraph of subdivision (a)(5), deleted "Prior to January 1, 1978" at the beginning of the third paragraph of subdivision (a)(5), substituted "the FUTA tax base" for "the sum of four thousand two hundred dollars ($4,200)" in the third paragraph of subdivision (a)(5), substituted "more than thirteen consecutive calendar months" for "the twelve consecutive calendar-month period" in paragraph a of subdivision (b)(2), and added the last three paragraphs of subdivision (b)(2).

Legal Periodicals. — For a survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

CASE NOTES

Editor's Note. — In considering the cases cited below, the many changes made by the amendatory acts should be borne in mind.

Effect of Reinstatement of Liability after Prior Exemption. — Where an employer, otherwise subject to the provisions of this Chapter, is exempted from those provisions by legislative action and by legislative action that exemption is subsequently terminated, and additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under this Chapter that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. State ex rel. Employment Security Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640 (1979).

Contributions Constitute a Tax. — Contributions imposed on employers within the purview of this Chapter are compulsory and therefore constitute a tax, and they are not rendered any less a tax by reason of the provision that they should be segregated in a special fund for distribution in furtherance of the purpose of the Chapter. Prudential Ins. Co. of America v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

A State bank which is a member of the federal reserve system is not exempt from taxation under this Chapter because of its connection with the Federal Deposit Insurance Corporation nor may it claim such exemption because the tax would discriminate against it in favor of national member banks, since to relieve it from such taxation would discriminate in favor of it against nonmember State banks. Unemployment Comp. Comm'n v.

Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E.2d 592 (1939).

Declaratory Judgment as to Inclusion of Certain Salaries Cannot Be Obtained. — An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the Unemployment Compensation Act involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under the Declaratory Judgment Act to determine the question. Prudential Ins. Co. of America v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

Prior to the 1949 amendment, subsection (c)(4) of this section, by its own limitation, restricted the transfer of reserve accounts to those cases where the account was to be transferred in toto; and even then, such reserve account could be transferred only to such employing unit defined in § 96-8(5)(b), as might acquire the organization, trade, or business of another for whom a reserve account had been theretofore established and maintained. State ex rel. Employment Security Comm'n v. News Publishing Co., 228 N.C. 332, 45 S.E.2d 391 (1947).

Transfer of Reserve Credited to Particular Employer through Misapprehension. — Subdivision (4) of subsection (c) authorizes the Commission to transfer a reserve fund only upon the mutual consent of the parties. However, the law does not apply where such reserve was credited to a particular person, firm or corporation under a misapprehension of the facts or the status of the person, firm or corporation making the contribution. State ex rel. Unemployment Comp. Comm'n v. Nissen, 227 N.C. 216, 41 S.E.2d 734 (1947).

Applied in Unemployment Comp. Comm'n v. Jefferson Std. Life Ins. Co., 215 N.C. 479, 2 S.E.2d 584 (1939); State ex rel. Employment Security Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

Cited in State ex rel. Employment Security Comm'n v. Hennis Freight Lines, 248 N.C. 496, 103 S.E.2d 829 (1958); In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

§ 96-10. Collection of contributions.

(a) Interest on Past-Due Contributions. — Contributions unpaid on the date on which they are due and payable, as prescribed by the Commission, shall bear interest at the rate of one half of one percent (0.5%) per month from and after such date until payment plus accrued interest is received by the Commission. An additional penalty in the amount of ten percent (10%) of the taxes due shall be added, but said penalty shall in no event be less than five dollars ($5.00). Penalties and interest collected pursuant to this subsection shall be paid into the Special Employment Security Administration Fund. If any employer, in good faith, pays contributions to another state or to the United States under the Federal Unemployment Tax Act, prior to a determination of liability by this Commission, which contributions were legally payable to this State, such contributions, when paid to this State, shall be deemed to have been paid by the due date under the law of this State if paid by the due date of such other state or the United States.

(b) Collection. —

(1) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the Commission, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date, and shall be entitled to preference upon the calendar of the court over all other civil actions, except petitions for judicial review under this Chapter and cases arising under the Workmen's Compensation Law of this State; or, if any contribution imposed by this Chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within 30 days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the Commission, under the hand of its chairman, may certify the same to the clerk of the superior court of the county in which the delinquent resides or has property, and additional copies

of said certificate for each county in which the Commission has reason to believe such delinquent has property located; such certificate and/or copies thereof so forwarded to the clerk of the superior court shall immediately be docketed and indexed on the cross index of judgment, and from the date of such do·keting shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court. The Commission shall forward a copy of said certificate to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission, and when so forwarded and in the hands of such sheriff or agent of the Commission, shall have all the force and effect of an execution issued to such sheriff or agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, the Commission may in its discretion withhold the issuance of said certificate or execution to the sheriff or agent of the Commission for a period not exceeding 180 days from the date upon which the original certificate is certified to the clerk of superior court. The Commission is further authorized and empowered to issue alias copies of said certificate or execution to the sheriff or sheriffs of such county or counties, or to a duly authorized agent of the Commission in all cases in which the sheriff or duly authorized agent has returned an execution or certificate unsatisfied; when so issued and in the hands of the sheriff or duly authorized agent of the Commission, such alias shall have all the force and effect of an alias execution issued to such sheriff or duly authorized agent of the Commission by the clerk of the superior court upon a judgment of the superior court duly docketed in said county. Provided, however, that notwithstanding any provision of this subsection, upon filing one written notice with the Commission, the sheriff of any county shall have the sole and exclusive right to serve all executions and make all collections mentioned in this subsection and in such case no agent of the Commission shall have the authority to serve any executions or make any collections therein in such county. A return of such execution, or alias execution, shall be made to the Commission, together with all moneys collected thereunder, and when such order, execution, or alias is referred to the agent of the Commission for service the said agent of the Commission shall be vested with all the powers of the sheriff to the extent of serving such order, execution or alias and levying or collecting thereunder. The agent of the Commission to whom such order or execution is referred shall give a bond not to exceed three thousand dollars ($3,000) approved by the Commission for the faithful performance of such duties. The liability of said agent shall be in the same manner and to the same extent as is now imposed on sheriffs in the service of executions. If any sheriff of this State or any agent of the Commission who is charged with the duty of serving executions shall willfully fail, refuse, or neglect to execute any order directed to him by the said Commission and within the time provided by law, the official bond of such sheriff or of such agent of the Commission shall be liable for the contributions, penalty, interest, and costs due by the employer.

(2) Any representative of the Employment Security Commission may examine and copy the county tax listings, detailed inventories, statements of assets or similar information required under General Statutes, Chapter 105, to be filed with the tax supervisor of any county in this State by any person, firm, partnership, or corporation, domestic or foreign, engaged in operating any business enterprise in such county. Any such information obtained by an agent or employee of the

Commission shall not be divulged, published, or open to public inspection other than to the Commission's employees in the performance of their public duties. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars ($20.00), nor more than two hundred dollars ($200.00), or imprisoned for not longer than 90 days, or both.

(3) When the Commission furnishes the clerk of superior court of any county in this State a written statement or certificate to the effect that any judgment docketed by the Commission against any firm or individual has been satisfied and paid in full, and said statement or certificate is signed by the chairman of the Commission and attested by its secretary, with the seal of the Commission affixed, it shall be the duty of the clerk of superior court to file said certificate and enter a notation thereof on the margin of the judgment docket to the effect that said judgment has been paid and satisfied in full, and is in consequence canceled of record. Such cancellation shall have the full force and effect of a cancellation entered by an attorney of record for the Commission. It shall also be the duty of such clerk, when any such certificate is furnished him by the Commission showing that a judgment has been paid in part, to make a notation on the margin of the judgment docket showing the amount of such payment so certified and to file said certificate. This paragraph shall apply to judgments already docketed, as well as to the future judgments docketed by the Commission. For the filing of said statement or certificate and making new notations on the record, the clerk of superior court shall be paid a fee of fifty cents (50¢) by the Commission.

(c) Priorities under Legal Dissolution or Distributions. — In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this State, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes, and claims for remuneration of not more than two hundred and fifty dollars ($250.00) to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Act of 1898, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in section 64(a) of that act (U.S.C., Title 11, section 104(a)), as amended.

A receiver of any covered employer placed into an operating receivership pursuant to an order of any court of this State shall pay to the Commission any contributions, penalties or interest then due out of moneys or assets on hand or coming into his possession before any such moneys or assets may be used in any manner to continue the operation of the business of the employer while it is in receivership.

(d) Collections of Contributions upon Transfer or Cessation of Business. — The contribution or tax imposed by G.S. 96-9, and subsections thereunder, of this Chapter shall be a lien upon the assets of the business of any employer subject to the provisions hereof who shall lease, transfer or sell out his business, or shall cease to do business and such employer shall be required, by the next reporting date as prescribed by the Commission, to file with the Commission all reports and pay all contributions due with respect to wages payable for employment up to the date of such lease, transfer, sale or cessation of the business and such employer's successor in business shall be required to withhold sufficient of the purchase money to cover the amount of said contributions due and unpaid until such time as the former owner or employer shall produce a receipt from the Commission showing that the contributions have been paid, or a certificate that no contributions are due. If the purchaser

of a business or a successor of such employer shall fail to withhold purchase money or any money due to such employer in consideration of a lease or other transfer and the contributions shall be due and unpaid after the next reporting date, as above set forth, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the contributions accrued and unpaid on account of the operation of the business by the former owner or employer.

(e) Refunds. — If not later than five years from the last day of the calendar year with respect to which a payment of any contributions or interest thereon was made, or one year from the date on which such payment was made, whichever shall be the later, an employer or employing unit who has paid such contributions or interest thereon shall make application for an adjustment thereof in connection with subsequent contribution payments, or for a refund, and the Commission shall determine that such contributions or any portion thereof was erroneously collected, the Commission shall allow such employer or employing unit to make an adjustment thereof, without interest, in connection with subsequent contribution payments by him, or if such an adjustment cannot be made in the next succeeding calendar quarter after such application for such refund is received, a cash refund may be made, without interest, from the fund: Provided, that any interest refunded under this subsection, which has been paid into the Special Employment Security Administration Fund established pursuant to G.S. 96-5(c), shall be paid out of such fund. For like cause and within the same period, adjustment or refund may be so made on the Commission's own initiative. Provided further, that nothing in this section or in any other section of this Chapter shall be construed as permitting the refund of moneys due and payable under the law and regulations in effect at the time such moneys were paid. In any case, where the Commission finds that any employing unit has erroneously paid to this State contributions or interest upon wages earned by individuals in employment in another state, refund or adjustment thereof shall be made, without interest, irrespective of any other provisions of this subsection, upon satisfactory proof to the Commission that such other state has determined the employing unit liable under its law for such contributions or interest.

(f) No injunction shall be granted by any court or judge to restrain the collection of any tax or contribution or any part thereof levied under the provisions of this Chapter nor to restrain the sale of any property under writ of execution, judgment, decree or order of court for the nonpayment thereof. Whenever any employer, person, firm or corporation against whom taxes or contributions provided for in this Chapter have been assessed, shall claim to have a valid defense to the enforcement of the tax or contribution so assessed or charged, such employer, person, firm or corporation shall pay the tax or contribution so assessed to the Commission; but if at the time of such payment he shall notify the Commission in writing that the same is paid under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Commission; and if the same shall not be refunded within ninety days thereafter, he may sue the Commission for the amount so demanded; such suit against the Employment Security Commission of North Carolina must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides, or in the county where the taxpayer conducts his principal place of business; and if, upon the trial it shall be determined that such tax or contribution or any part thereof was for any reason invalid, excessive or contrary to the provisions of this Chapter, the amount paid shall be refunded by the Commission accordingly. The remedy provided by this subsection shall be deemed to be cumulative and in addition to such other remedies as are provided by other subsections of this Chapter. No suit, action or proceeding for refund or to recover contributions or payroll taxes

paid under protest according to the provisions of this subsection shall be maintained unless such suit, action or proceeding is commenced within one year after the expiration of the 90 days mentioned in this subsection, or within one year from the date of the refusal of said Commission to make refund should such refusal be made before the expiration of said 90 days above mentioned. The one-year limitation here imposed shall not be retroactive in its effect, shall not apply to pending litigation nor shall the same be construed as repealing, abridging or extending any other limitation or condition imposed by this Chapter.

(g) Any employer refusing to make reports required under this Chapter, after 10 days' written notice sent by the Commission to the employer's last known address by registered mail, may be enjoined from operating in violation of the provisions of this Chapter upon the complaint of the Commission, in any court of competent jurisdiction, until such report shall have been made. When an execution has been returned to the Commission unsatisfied, and the employer, after 10 days' written notice sent by the Commission to the employer's last known address by registered mail, refuses to pay contributions covered by the execution, such employer may be enjoined from operating in violation of the provisions of this Chapter upon motion of the Commission, in any court of competent jurisdiction, until such contributions have been paid.

There shall be added to the amount required to be shown as tax in the reports a penalty of five percent (5%) of the amount of such tax if the failure is not for more than one month with an additional five percent (5%) for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent (25%) of the aggregate or five dollars ($5.00), whichever is greater.

(h) When any uncertified check is tendered in payment of any contributions to the Commission and such check shall have been returned unpaid on account of insufficient funds of the drawer of said check in the bank upon which same is drawn, a penalty shall be payable to the Commission, equal to ten percent (10%) of the amount of said check, and in no case shall such penalty be less than one dollar ($1.00) nor more than two hundred dollars ($200.00).

(i) No suit or proceedings for the collection of unpaid contributions may be begun under this chapter after five years from the date on which such contributions become due, and no suit or proceeding for the purpose of establishing liability and/or status may be begun with respect to any period occurring more than five years prior to the first day of January of the year within which such suit or proceeding is instituted; provided, that this subsection shall not apply in any case of willful attempt in any manner to defeat or evade the payment of any contributions becoming due under this Chapter: Provided, further, that a proceeding shall be deemed to have been instituted or begun upon the date of issuance of an order by the chairman of the Commission directing a hearing to be held to determine liability or nonliability, and/or status under this Chapter of an employing unit, or upon the date notice and demand for payment is mailed by registered mail to the last known address of the employing unit: Provided, further, that the order mentioned herein shall be deemed to have been issued on the date such order is mailed by registered mail to the last known address of the employing unit.

(j) The Commission shall have the power to reduce or waive any penalty provided in G.S. 96-10(a) or 96-10(g). The reason for any such reduction or waiver shall be made a part of the permanent records of the employing unit to which it applies. (Ex. Sess. 1936, c. 1, s. 14; 1939, c. 27, ss. 9, 10; 1941, c. 108, ss. 14-16; 1943, c. 377, ss. 24-28; 1945, c. 221, s. 1; c. 288, s. 1; c. 522, ss. 17-20; 1947, c. 326, ss. 18-20; c. 598, s. 9; 1949, c. 424, ss. 14-16; 1951, c. 332, ss. 8, 20; 1953, c. 401, s. 15; 1959, c. 362, s. 9; 1965, c. 795, s. 11; 1971, c. 673, s. 21; 1973, c. 108, s. 43; c. 172, s. 4; 1977, c. 727, s. 50; 1979, c. 660, s. 16.)

Editor's Note. — Pursuant to § 97-1.1, the reference in (b)(1) to the "Workmen's Compensation Law" is deemed a reference to the "Worker's Compensation Law."

Effect of Amendments. — The 1979 amendment deleted "or if said money which constitutes the overpayment has been in the possession of the Commission for six months or more" preceding "a cash refund may" in the first sentence of subsection (e).

CASE NOTES

Editor's Note. — In considering the cases cited below, the changes made by the amendatory acts should be borne in mind.

This Chapter provides remedies for an employer who claims a valid defense to the enforcement of the tax or to the collection of the contributions assessed. In addition to right of appeal from the decision of the Commission, it is provided that he may pay the tax under protest and sue for its recovery. The remedy provided by this section must be pursued in the manner therein prescribed. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

The remedies provided by this Chapter are adequate and preclude an employer from maintaining suit in the superior court seeking judgment that salaries paid certain of its employees should not be included in computing the amount of contributions it should pay. Prudential Ins. Co. of America v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

Right to Raise Question of Constitutionality. — In an action by the Employment Security Commission to determine liability of defendant for contributions under the act, the defendant may not raise the question of the constitutionality of the statute under which the Commission levied the assessment in question, it being required in order to raise this defense that he pay the contributions under protest and sue for recovery. State ex rel. Employment Security Comm'n v. Kermon, 232 N.C. 342, 60 S.E.2d 580 (1950).

Judgment That Certain Salaries Be Not Included Cannot Be Obtained. — A judgment that salaries paid to certain of plaintiff's employees should not be included in computing the amount of the contributions plaintiff should pay under this Chapter would in effect enjoin the Commission from seeking further to collect the amount of contributions which it contends are justly due, and it being expressly provided that injunction shall not lie to restrain the collection of any tax or contribution levied under the Chapter, the court is without jurisdiction of an action seeking such relief, since it may not do indirectly what it is prohibited from doing directly. Prudential Ins. Co. of America v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

Single Employing Unit. — Where the Commission contended that an employer and another concern controlled by the same interests jointly constituted a single employment unit liable for the payment of unemployment compensation contributions and it wished to have this liability judicially adjudged, it was required to follow the procedure prescribed by this section. In re Mitchell, 220 N.C. 65, 16 S.E.2d 476, 142 A.L.R. 931 (1941). See note to § 96-8.

Subsection (e) relating to refunds is procedural, and limitation it imposes is addressed to the power of the Commission to make a refund and the conditions upon which it may be made rather than to any limitation upon an action for the recovery of money. It is broad enough in its phraseology to cover refund of money paid through mistake, without raising technical distinctions between voluntary and involuntary payments. B-C Remedy Co. v. Unemployment Comp. Comm'n, 226 N.C. 52, 36 S.E.2d 733, 163 A.L.R. 773 (1946).

Retroactive Extension of Time for Applying for Refunds. — While the limitation on the authority of the Commission to make refunds is fatal to a claim, so long as the limitation lasts, a change of law, enlarging time in which refunds may be applied for or made, does not involve any constitutional inhibitions such as apply to ordinary statutes of limitation, and the legislature has the power to apply the extended time retroactively. B-C Remedy Co. v. Unemployment Comp. Comm'n, 226 N.C. 52, 36 S.E.2d 733, 163 A.L.R. 773 (1946), so holding as to the 1943 amendment of subsection (e).

Applied, as to subsection (c), in National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Cited, as to subsection (d), in State ex rel. Employment Security Comm'n v. News Publishing Co., 228 N.C. 332, 45 S.E.2d 391 (1947).

§ 96-11. Period, election, and termination of employer's coverage.

(a) Any employing unit which is or becomes an employer subject to this Chapter within any calendar year shall be subject to this Chapter during the whole of such calendar year except as otherwise provided in G.S. 96-8(5)b; provided, however, that on and after July 1, 1939, this section shall not be construed to apply to any part of the business of an employer as may come within the terms of section one (a) of the Federal Railroad Unemployment Insurance Act.

(b) Prior to January 1, 1972, and except as otherwise provided in subsections (a), (c), and (d) of this section, an employing unit shall cease to be an employer subject to this Chapter only as of the first day of January of any calendar year, if it files with the Commission prior to the first day of March of such calendar year a written application for termination of coverage and the Commission finds that there were no 20 different weeks in the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed four or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week); provided that on and after January 1, 1972, except as otherwise provided in subsections (a), (c), and (d) of this section, an employing unit shall cease to be an employer subject to this Chapter only as of the first day of January in any calendar year, if it files with the Commission prior to the first day of March of such year a written application for termination of coverage and the Commission finds that there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed one or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individual was employed in each such week), and the Commission finds that there was no calendar quarter within the preceding calendar year in which the total wages of its employees were one thousand five hundred dollars ($1,500) or more. Any employing unit, as defined in G.S. 96-8(5)n, shall cease to be an employer only if it files with the Commission by the first day of March of any calendar year an application for termination of coverage, and the Commission finds that there were no 20 different weeks within the preceding calendar year in which such employing unit had at least 10 individuals in employment, and that there was no calendar quarter within the preceding calendar year in which such employing unit paid twenty thousand dollars ($20,000) or more in wages for services in employment. Any employing unit, as defined in G.S. 96-8(5)o, shall cease to be an employer if it files with the Commission by the first day of March of any calendar year an application for termination of coverage and the Commission finds that there was no calendar quarter within the preceding calendar year in which such employing unit paid one thousand dollars ($1,000) or more in wages for services in employment. Provided further, except as otherwise provided in subsections (a), (c), and (d) of this section on and after January 1, 1974, an "employer" as the term is used in G.S. 96-8(5)k shall cease to be an employer subject to this Chapter only as of the first day of January in any calendar year, if it files with the Commission prior to the first day of March of such year a written application for termination of coverage and the Commission finds that there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed four or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week). For the purpose of this subsection, the two or more employing units mentioned in paragraphs b or c of G.S. 96-8, subdivision (5) shall be treated as

a single employing unit: Provided, however, that any employer, as the term is used in G.S. 96-8(5)k, whose liability covers a period of more than two years when first discovered by the Commission, upon filing a written application for termination within 90 days after notification of his liability by the Commission, may be terminated as an employer effective January 1; and for any subsequent year if the Commission finds there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed four or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week). Provided further, any other employer whose liability covers a period of more than two years when first discovered by the Commission, upon filing a written application for termination within 90 days after notification of his liability by the Commission may be terminated as an employer effective January 1, and for any subsequent years if the Commission finds that prior to January 1, 1972, there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed four or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week); and with respect to 1972 and subsequent years, if the Commission finds that there were no 20 different weeks within the preceding calendar year (whether or not such weeks are or were consecutive) within which said employing unit employed one or more individuals in employment (not necessarily simultaneously and irrespective of whether the same individual was employed in each such week), and the Commission finds that there was no calendar quarter within the preceding calendar year in which the total wages of its employees were one thousand five hundred dollars ($1,500) or more. In such cases, a protest of liability shall be considered as an application for termination within the meaning of this provision where the decision with respect to such protest has not become final; provided further, this provision shall not apply in any case of willful attempt in any manner to defeat or evade the payment of contributions becoming due under this Chapter.

(c) (1) An employing unit, not otherwise subject to this Chapter, which files with the Commission its written election to become an employer subject hereto for not less than two calendar years shall, with the written approval of such election by the Commission, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January 1 of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, it has filed with the Commission a written notice to that effect, provided such employing unit may be terminated by the Commission as provided under the provisions of subdivision (3) [(4)] of this subsection.

(2) Any employing unit for which services that do not constitute employment as defined in this Chapter are performed may file with the Commission a written election that all such services performed by individuals in its employ, in one or more distinct establishments or places of business, shall be deemed to constitute employment for all the purposes of this Chapter for not less than two calendar years. Upon the written approval of such election by the Commission such services shall be deemed to constitute employment subject to this Chapter from and after the date stated in such approval. Such services shall cease to be deemed employment, subject hereto as of January one of any calendar year subsequent to such two calendar years only if, prior to the first day of March following such first day of January, such employing unit has filed with the Commission a written notice to that

effect, provided such employing unit may be terminated by the Commission as provided under the provisions of subdivision (3) [(4)] of this subsection.

(3) a. On and after January 1, 1972, through December 31, 1977, any political subdivision of this State may elect, for a period of not less than two calendar years, to cover under this Chapter service performed by employees in all of the hospitals and institutions of higher education, as defined in G.S. 96-8(5)*l*, operated by such political subdivisions. Any election is to be made by filing with the Commission a notice of such election at least 30 days prior to January 1, the effective date of such election. Any political subdivision electing coverage under this subsection shall make payments in lieu of contributions with respect to benefits attributable to such employment as provided with respect to nonprofit organizations in G.S. 96-9(d).

b. The provisions in G.S. 96-13(4) with respect to benefit rights based on service for State and nonprofit institutions of higher education shall be applicable also to service covered by an election under this section.

c. The amounts required to be paid in lieu of contributions by any political subdivision under this section shall be as provided in G.S. 96-9(d), with respect to similar payments by nonprofit organization.

d. An election under this section may be terminated as of January 1 of any calendar year subsequent to such two calendar years only if 30 days prior to such January 1, such employer has filed with the Commission a written notice to that effect.

(4) On and after July 1, 1965, the Commission on its own motion and in its discretion, upon 30 days' written notice mailed to the last known address of such employer, may terminate coverage of any employer which has become subject to this Chapter solely by electing coverage under the provisions of this subsection.

(d) An employer who has not had any individuals in employment for a period of two consecutive calendar years shall cease to be an employer subject to this Chapter. An employer who has not had individuals in employment and who has made due application for exemption from filing contributions and wage reports required under this Chapter and has been so exempted may be terminated from liability upon written application within 120 days after notification of the reactivation of his account. Such termination shall be effective January 1 of any calendar year only if the Commission finds there were no 20 different weeks within the preceding calendar year, whether or not such weeks are or were consecutive, within which said employer employed one or more individuals in employment (four or more prior to January 1, 1972), not necessarily simultaneously and irrespective of whether the same individuals were employed in each such week, and the Commission finds that there was no calendar quarter within the preceding calendar year in which the total wages of its employees were one thousand five hundred dollars ($1,500) or more, except as otherwise provided. Provided further, an employer, as the term is used in G.S. 96-8(5)k, who has not had individuals in employment and who has made due application for exemption from filing contributions and wage reports required under this Chapter and has been so exempted may be terminated from liability upon written application within 120 days after notification of the reactivation of its account. Such termination shall be effective January 1 of any calendar year only if the Commission finds that there were no 20 different weeks within the preceding calendar year, whether or not such weeks are or were consecutive, within which said employer employed four or more individuals in employment, not necessarily simultaneously and irrespective of

whether the same individuals were employed in each such week. In such cases a protest of liability shall be considered as an application for termination within the meaning of this provision where the decision with respect to such protest has not become final. (Ex. Sess. 1936, c. 1, s. 8; 1939, c. 52, ss. 2, 3; 1941, c. 108, s. 9; 1945, c. 522, ss. 21-23; 1949, c. 424, ss. 17, 18; c. 522; 1951, c. 332, s. 9; c. 1147; 1953, c. 401, s. 16; 1955, c. 385, s. 10; 1959, c. 362, ss. 10, 11; 1961, c. 454, s. 16; 1965, c. 795, ss. 12-14; 1971, c. 673, ss. 22-24; 1973, c. 172, s. 5; 1977, c. 727, s. 51; 1979, c. 660, s. 17.)

Effect of Amendments. — The 1979 amendment added the second and third sentences of subsection (b).

CASE NOTES

Employer Remains Covered Until Coverage Is Terminated as Provided by This Section. — Where employment within the meaning of the Employment Security Law is once established and the employer becomes covered thereunder, he remains so until coverage is terminated as provided by this section. State ex rel. Employment Security Comm'n v. Coe, 239 N.C. 84, 79 S.E.2d 177 (1953).

Effect of Reinstatement of Liability after Prior Exemption. — Where an employer, otherwise subject to the provisions of this Chapter, is exempted from those provisions by legislative action and by legislative action that exemption is subsequently terminated, and additionally, where there have been no changes in the circumstances or activities of the employer, upon reinstatement of liability under this Chapter that employer is entitled to credit for its prior account balance, and that employer's contribution rate should be determined primarily by reference to its former experience rating at the time of its exemption. The burden will be upon the commission to show what, if any, changes in circumstances have come about which would justify an upward revision of that employer's rate of contribution. State ex rel. Employment Security Comm'n v. Blue Ridge Broadcasting Corp., 42 N.C. App. 702, 257 S.E.2d 640 (1979).

Cited, as to subsection (a), in State ex rel. Employment Security Comm'n v. Skyland Crafts, Inc., 240 N.C. 727, 83 S.E.2d 893 (1954).

§ 96-12. Benefits.

(a) Payment of Benefits. — Twenty-four months after the date when contributions first accrue under this Chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the Commission may prescribe.

(b) (1) a. Repealed by Session Laws 1977, c. 727, s. 52.

b. Each eligible individual whose benefit year begins on or after the first day of October, 1974, who is totally unemployed as defined by G.S. 96-8(10)a, and who files a valid claim, shall be paid benefits with respect to such week or weeks at a rate per week equal to the amount obtained by dividing such individual's high-quarter wages paid during his base period by 26, rounded to the nearest dollar, but shall not be less than fifteen dollars ($15.00).

c. Each eligible individual whose benefit year begins on or after the first day of October, 1974, who is "partially unemployed" or "part totally unemployed" as defined in G.S. 96-8(10)b and c, respectively, and who files a valid claim, shall be paid benefits with respect to such week or weeks in an amount figured to the nearest multiple of one dollar ($1.00) which is equal to the difference between his weekly benefit amount and that part of the remuneration payable to him for such week which is in excess of one half of his weekly benefit amount. Provided, for all benefit years

beginning after December 31, 1977, the allowable excess shall be ten percent (10%) of the average weekly wage in the high quarter of his base period.

(2) Each August 1, a maximum weekly benefit amount available to an eligible individual whose benefit year begins on October 1, 1974, or thereafter, shall be determined by multiplying the average weekly insured wage, obtained in accordance with G.S. 96-8(22), by two thirds rounded to the nearest dollar. The maximum rate applicable to each claimant shall be that rate in effect during the time the claimant's benefit year is established.

(3) Qualifying Wages for Exhaustees. — An individual who has exhausted his maximum benefit entitlement in his last previous benefit year who files a claim for benefits shall not be entitled to benefits unless he has been paid qualifying wages required in G.S. 96-12(b)(1), and since the beginning date of his last established previous benefit year and before the date upon which he files his new benefit claim has been paid wages equal to at least 10 times the weekly benefit amount of the new benefit year claim. Such wages must have been earned with an employer subject to the provisions of this Chapter or some other state employment security law or in federal service as defined in Chapter 85, Title 5, United States Code.

(4) Qualifying Wages for Second Benefit Year. — Any individual whose prior benefit year has expired and who files a claim for benefits on and after January 1, 1972, shall not be entitled to benefits unless he has been paid qualifying wages required by G.S. 96-12(b)(1), and since the beginning date of his last established previous benefit year and before the date upon which he files his new benefit claim has been paid wages equal to at least 10 times the weekly benefit amount of the new benefit year claim. Such wages must have been earned with an employer subject to the provisions of this Chapter or some other state employment security law or in federal service as defined in Chapter 85, Title 5, United States Code.

(c) Partial Weekly Benefit. — Each eligible individual who is either partially unemployed or part totally unemployed (as defined in G.S. 96-8(10)b and c) in any week shall be paid with respect to such week a partial benefit. Such partial benefit shall be an amount figured to the nearest multiple of one dollar ($1.00) which is equal to the difference between his weekly benefit amount and that part of the remuneration payable to him for such week which is in excess of one half of his weekly benefit amount.

(d) Duration of Benefits. — The maximum amount of benefits payable to any eligible individual, whose benefit year begins on and after March 22, 1951, shall be 26 times his weekly benefit amount during any benefit year, except as such benefits may be further extended by G.S. 96-12(e) of this Chapter. On and after October 1, 1974, the maximum benefit amount available to eligible individuals shall be determined by dividing the individual's base-period wages by his high-quarter wages and multiplying that quotient by eight and two thirds, rounding the result to the nearest whole number, and then multiplying the figure so derived by the weekly benefit amount available to that individual; provided the minimum total amount of benefits available to eligible individuals shall not be less than 13 times his weekly benefit amount, nor shall any eligible individual be entitled to more than 26 times his weekly benefit amount during any benefit year, except that such benefits may be extended further in accordance with the provisions of G.S. 96-12(e). The Commission shall establish and maintain individual wage record accounts for each individual who earns wages in covered employment, until such time as such wages would not be necessary for benefit purposes.

(e) Extended Benefits. — Effective January 1, 1972, extended benefits shall be paid under this Chapter as herein specified:

A. Definitions. — As used in this subsection, unless the context clearly requires otherwise —

(1) "Extended benefit period" means a period which

(a) Begins with the third week after whichever of the following weeks occurs first:

(I) A week for which there is a national "on" indicator, or

(II) A week for which there is a State "on" indicator; and

(b) Ends with either of the following weeks, whichever occurs later:

(I) The third week after the first week for which there is both a national "off" indicator and a State "off" indicator; or

(II) The thirteenth consecutive week of such period.

Provided, that no extended benefit period may begin by reason of a State "on" indicator before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this State.

(2) Beginning January 1, 1975, through December 31, 1976, there is a "national 'on' indicator" for a week if the United States Secretary of Labor determines that for each of the three most recent completed calendar months ending before such week, the rate of insured unemployment (seasonally adjusted) for all states equalled or exceeded four percent (4%). On and after January 1, 1977, there is a national "on" indicator for a week if, for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (seasonally adjusted) for all states equalled or exceeded four and five-tenths per centum (4.5%). The rate of insured unemployment, for purposes of this paragraph, shall be determined by the Secretary of Labor by reference to the average monthly covered employment for the first four of the most recent six calendar quarters ending before the close of such period.

(3) Beginning January 1, 1975, through December 31, 1976, there is a "national 'off' indicator" for a week if the United States Secretary of Labor determines that for each of the three most recent completed calendar months ending before such week, the rate of insured unemployment (seasonally adjusted) for all states was less than four percent (4%). On and after January 1, 1977, there is a national "off" indicator for a week if, for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (seasonally adjusted) for all states was less than four and five-tenths per centum (4.5%). The rate of insured unemployment, for purposes of this paragraph, shall be determined by the Secretary of Labor by reference to the average monthly covered employment for the first four of the most recent six calendar quarters ending before the close of such period.

(4) There is a "State 'on' indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter —

a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and equalled or exceeded four percent (4%), or

b. Equalled or exceeded five percent (5%).

G.S. 96-12(e)A(4)a is hereby inoperative for the period between January 1, 1975 through December 31, 1976.

(5) There is a "State 'off' indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter —

a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, or was less than four percent (4%), or

b. Was less than five percent (5%).

G.S. 96-12(e)A(5)a is hereby inoperative for the period between January 1, 1975 through December 31, 1976.

(6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing

a. The average weekly number of individuals filing claims in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by

b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.

(7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.

(8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.

(9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:

a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;

Provided, that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or

b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and

c. (1) Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

(2) Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

(11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code of 1954.

B. Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

C. Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:

1. He is an "exhaustee" as defined in subsection A(10).
2. He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits.

D. Weekly Extended Benefit Amount. — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts.

E. Total Extended Benefit Amount. — The total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

1. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or
2. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

F. Beginning and Termination of Extended Benefit Period. —

1. Whenever an extended benefit period is to become effective in this State (or in all states) as a result of a State or a national "on" indicator, or an extended benefit period is to be terminated in this State as a result of State and national "off" indicators, the Commission shall make an appropriate public announcement.
2. Computations required by the provisions of subsection A(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

G. Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12(e) shall not be charged to the account of the base period employer(s) who pay contributions as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2)a (except that G.S. 96-9(c)(2)b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of contributions.

On and after January 1, 1978, the federal portion of any extended benefit shall not be charged to the account of any base period employer who pays contributions as required by this Chapter. All State portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

H. Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)c, 96-12(e)G, or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.

(f) Any amount payable under any provision of this Chapter when applicable is subject to the retirement reduction required by G.S. 96-14(9). (Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19.)

Effect of Amendments. — The 1979 amendment deleted the former first four sentences of subdivision (b)(2), providing for the computation of a maximum weekly benefit, substituted "Each August 1" for "Beginning October 1, 1974, and each August 1 thereafter" at the beginning of the present first sentence of subdivision (b)(2), and deleted "of the Virgin Islands or" preceding "of Canada" in subdivision (e)A(10)c(2).

CASE NOTES

Cited in In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

§ 96-13. Benefit eligibility conditions.

(a) An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that —

(1) He has registered for work at and thereafter has continued to report at an employment office in accordance with such regulations as the Commission may prescribe;

(2) He has made a claim for benefits in accordance with the provisions of G.S. 96-15 (a);

(3) He is able to work, and is available for work: Provided that no individual shall be deemed available for work unless he establishes to the satisfaction of the Commission that he is actively seeking work: Provided further, that an individual customarily employed in seasonal employment shall, during the period of nonseasonal operations, show to the satisfaction of the Commission that such individual is actively seeking employment which such individual is qualified to perform by past experience or training during such nonseasonal period: Provided further, however, that no individual shall be considered available for

work for any week not to exceed two in any calendar year in which the Commission finds that his unemployment is due to a vacation. In administering this proviso, benefits shall be paid or denied on a payroll-week basis as established by the employing unit. A week of unemployment due to a vacation as provided herein means any payroll week within which the equivalent of three customary full-time working days consist of a vacation period. For the purpose of this subdivision, any unemployment which is caused by a vacation period and which occurs in the calendar year following that within which the vacation period begins shall be deemed to have occurred in the calendar year within which such vacation period begins. Provided further, any employee of a secondary school system or subdivision of a secondary school system now covered for unemployment insurance purposes by federal law, State law, or contract shall be considered available for work during any week such individual is on vacation between successive terms, quarters, academic years, or similar periods between two regular terms, whether or not successive, only if the individual does not have a contract or contracts, written, oral, or implied, to perform services in any capacity for a secondary school system or subdivision of a secondary school system for both such academic years or both such terms. For the purposes of this subdivision, no individual shall be deemed available for work during any week in which he is registered at and attending an established school, or is on vacation during or between successive quarters or semesters of such school attendance, or on vacation between yearly terms of such school attendance. Except: (i) Any person who was engaged in full-time employment concurrent with his school attendance, who is otherwise eligible, shall not be denied benefits because of school enrollment and attendance. (ii) An unemployed individual who is attending a vocational school or training program which has been approved by the Commission for such individual shall be deemed available for work. However, any unemployment insurance benefits payable with respect to any week for which a training allowance is payable pursuant to the provisions of a federal or State law, shall be reduced by the amount of such allowance. The Commission may approve such training course for an individual only if:

a. Reasonable employment opportunities for which the individual is fitted by training and experience do not exist in the locality or are severely curtailed;
b. The training course relates to an occupation or skill for which there are expected to be reasonable opportunities for employment; and
c. The individual, within the judgment of the Commission, has the required qualifications and the aptitude to complete the course successfully.

(b) (1) The payment of benefits to any individual based on services for nonprofit organizations, hospitals, or State hospitals and State institutions of higher education and other institutions of higher education subject to this Chapter shall be in the same manner and under the same conditions of the laws of this Chapter as applied to individuals whose benefit rights are based on other services subject to this Chapter. Except that with respect to services in instructional, research, or principal administrative capacity in an institution of higher education which meets the requirements of G.S. 96-8(5)l, shall not be payable based on such services for any week commencing during the period between two successive academic years, or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's

contract, if the individual has a contract or contracts or a reasonable assurance to perform services in any such capacity for any institution or institutions of higher education for both such academic years or both such terms.

(2) The payment of benefits to any individual based on services for secondary schools, or subdivisions of said secondary schools, subject to this Chapter, or administered under the provisions of this Chapter, shall be in the same manner and under the same conditions of the laws of the Chapter as apply to individuals whose benefit rights are based on other services subject to this Chapter. Except that with respect to services in instructional, research or principal administrative capacity in a secondary school, or subdivision thereof, benefits shall be payable based on such services for any week commencing during the period between two successive academic years or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, only if the individual does not have a contract or contracts, written, oral, or implied, to perform services in any such capacity for any secondary school for both such academic years or both such terms. Except with respect to services in a secondary school or subdivision thereof, in any capacity other than instructional, research or principal administrative, benefits shall be payable based on such services for any week commencing during the period between two successive academic years or during a similar period between two regular terms, only if the individual does not have a contract or contracts, written, oral, or implied or a reasonable assurance to perform services in any such capacity for any secondary school for both such academic years or both such terms.

(c) From January 29, 1975, through February 15, 1977, no week of unemployment for waiting-period credit shall be required of any claimant. Beginning February 16, 1977, an unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that he has been totally, partially, or part-totally unemployed for a waiting period of one week with respect to each benefit year. No week shall be counted as a week of unemployment for waiting-period credit under this provision unless the claimant except for the provisions of this subdivision was otherwise eligible for benefits.

(d) Benefit entitlement based on services for governmental entities that become subject to Employment Security Commission law effective January 1, 1978, will be administered in the same manner and under the same conditions of the laws of this Chapter as are applicable to individuals whose benefit rights are based on other service subject to this Chapter.

(e) Benefits shall not be payable to any individual on the basis of any services, substantially all of which consist of participating in sports or athletic events or training or preparing to so participate, for any week which commences during the period between two successive sport seasons (or similar periods) if such individual performs such services in the first of such seasons (or similar periods) and there is a reasonable assurance that such individual will perform such services in the latter of such seasons (or similar periods).

(f) Benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who has been lawfully admitted for permanent residence or otherwise is permanently residing in the United States under color of law or was lawfully present for purposes of performing such services (including an alien who is lawfully present in the United States as a result of the application of the provisions of section 203 (a)(7) or section 212 (d)(5) of the Immigration and Nationality Act). Any data or information required of individuals applying for benefits to determine whether benefits are

not payable to them because of their alien status shall be uniformly required from all applicants for benefits. In the case of an individual whose application for benefits would otherwise be approved, no determination that compensation to such individual is not payable because of his alien status shall be made except upon a preponderance of the evidence. (Ex. Sess. 1936, c. 1, s. 4; 1939, c. 27, ss. 4, 5; c. 141; 1941, c. 108, s. 2; 1943, c. 377, s. 5; 1945, c. 522, ss. 27-28; 1947, c. 326, s. 22; 1949, c. 424, s. 22; 1951, c. 332, s. 13; 1961, c. 454, s. 19; 1965, c. 795, ss. 17, 18; 1969, c. 575, ss. 10, 11; 1971, c. 673, ss. 27, 28; 1973, c. 172, s. 6; 1975, c. 2, s. 6; c. 8, ss. 1, 2; c. 226, ss. 1, 2; 1977, c. 727, s. 53; 1979, c. 660, ss. 20, 21, 29-31.)

Effect of Amendments. — The 1979 amendment inserted "or a reasonable assurance" near the end of the second sentence of subdivision (b)(1), inserted "in instructional, research or principal administrative capacity" near the beginning of the second sentence of subdivision (b)(2), added the last sentence of subdivision (b)(2), substituted "based on services for" for "of" in subsection (d), and inserted "or was lawfully present for purposes of performing such services" in the first sentence of subsection (f).

Legal Periodicals. — For note on availability for suitable work, see 34 N.C.L. Rev. 591 (1956).

For survey of 1972 case law on the applicability of the "available for work" requirement to voluntary retirees, see 51 N.C.L. Rev. 1205 (1973).

CASE NOTES

Design of Employment Security Law. — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

Construed with § 96-14. — This section and § 96-14 as cognate statutes provide the overall formula governing the right to unemployment compensation benefits. Being thus in pari materia, they are to be construed together. In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956); In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

"Able to Work". — The terms "able to work," "available for work" and "suitable employment" are not precise terms capable of application with mathematical precision. In re Thomas, 13 N.C. App. 513, 186 S.E.2d 623, rev'd on other grounds, 281 N.C. 598, 189 S.E.2d 245 (1972); In re Beatty, 22 N.C. App. 563, 207 S.E.2d 321, aff'd, 286 N.C. 226, 210 S.E.2d 193 (1974).

See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

The words "available for work" in this section mean "available for suitable work" in the same sense as the words "suitable work" are used in § 96-14. In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956); In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

The phrase "available for work" is not susceptible of precise definition, and whether a person is available for work differs according to the facts of each individual case. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

Availability requirement is said to be satisfied when an individual is willing, able and ready to accept suitable work which he does not have good cause to refuse, that is, when he is generally attached to the labor market. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

To be available for work a person must be in a position so that prospective employers will hire him for work of which he is capable of performing. In re Yarboro, 42 N.C. App. 684, 257 S.E.2d 658 (1979).

For meaning of "available for work," see In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

A claimant refusing to consider employment during her Sabbath did not render herself unavailable for work within the meaning of this section. In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956).

Large measure of administrative discretion must be granted to the Employment Security Commission in the application to the terms "able to work," "available for work" and "suitable employment" to specific cases. In re Beatty, 22 N.C. App. 563, 207 S.E.2d 321, aff'd, 286 N.C. 226, 210 S.E.2d 193 (1974).

Restrictions Claimant Places on His Employment. — It is essentially a matter of degree to ascertain to what extent a claimant can impose restrictions and on what these restrictions must be based. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

The problem is whether or not the restrictions which the claimant places on his employment serve to limit the work which a claimant can accept to such a degree that he is no longer genuinely attached to the labor force. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

Labor Market to Be Described in Terms of Individual. — Since, under unemployment compensation laws, it is the availability of an

individual that is required to be tested, the labor market must be described in terms of the individual. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

Significance of Claimant's Age in Determining Labor Market. — For a case discussing the significance of the fact that employers in a locality do not customarily employ persons of claimant's advanced age, see In re Thomas, 13 N.C. App. 513, 186 S.E.2d 623, rev'd on other grounds, 281 N.C. 598, 189 S.E.2d 245 (1972).

Quantum of Proof of Availability for Work. — The Commission erred in requiring a 70-year-old claimant to show by clear, cogent and convincing evidence that she had reentered the labor force after having voluntarily retired from her job as a laundry worker. Under former § 143-318(1), the claimant had the burden to show that she was "available for work" only by the greater weight of the evidence. In re Thomas, 281 N.C. 598, 189 S.E.2d 245 (1972).

Where the Commission's findings of fact are amply supported by the evidence in the record, the Supreme Court is bound by the Commission's findings of fact. In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

Evidence Showing Failure Actively to Seek Work. — Evidence that during a period of six months claimant's efforts to obtain employment, in addition to reporting to the employment service office, were limited to two occasions at one mill and one occasion at each of three other mills, is sufficient to sustain the Commission's finding that he had failed to show that he had been actively seeking work within the purview of subdivision (3) of this section. State ex rel. Employment Security Comm'n v. Roberts, 230 N.C. 262, 52 S.E.2d 890 (1949).

Vacation Periods. — The statute does not prescribe; it merely limits the total vacation period for which an employee is ineligible for compensation to a total of two weeks. In re Southern, 247 N.C. 544, 101 S.E.2d 327 (1958).

Plant Shut Down for an Additional Week of Vacation. — Where an employer, in addition to one week paid vacation provided for in the contract, shuts down its plant for an additional week of vacation during the Christmas period, its employees are not entitled to unemployment compensation for the additional week under this section. In re Southern, 247 N.C. 544, 101 S.E.2d 327 (1958).

By their adherence to the terms of the guaranteed annual income provisions of their collective bargaining agreement, claimants placed themselves in a position which, for all practical purposes, eliminated their availability for work in contravention of the requirements of subdivision (3). In re Beatty, 286 N.C. 226, 210 S.E.2d 193 (1974).

Commission erred in awarding unemployment benefits without making finding as required by subdivisions (a)(1) and (2) that claimant has registered for work and continued to report to an employment office and that he has made a claim for benefits in accordance with § 96-15(a). The commission's finding that three separate claim series were started for claimant was insufficient to meet the statutory requirements. In re George, 42 N.C. App. 490, 256 S.E.2d 826 (1979).

Claimant Not Available While Awaiting Sentencing. — Where a claimant for unemployment compensation pleaded guilty to a charge of selling a controlled substance and testified that he was not hired because prospective employers were "waiting to see what my sentence will be," the Commission could conclude from this that claimant was not in a position that prospective employers would hire him and he was not "available for work." In re Yarboro, 42 N.C. App. 684, 257 S.E.2d 658 (1979).

Employee of Project Headstart. — Project Headstart is a school within the ordinary meaning of the term, and the situation of an employee of Project Headstart is one of those addressed by the "secondary school provision" of this section, excluding from unemployment benefits those who are subject to school-related seasonal unemployment. In re Huntley, 42 N.C. App. 1, 255 S.E.2d 574, cert. denied, 298 N.C. 297, 259 S.E.2d 913 (1979).

Stated in Textile Workers Union v. Cone Mills Corp., 268 F.2d 920 (4th Cir. 1959).

Cited in Textile Workers Union v. Cone Mills Corp., 188 F. Supp. 728 (M.D.N.C. 1960); In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

§ 96-14. Disqualification for benefits.

An individual shall be disqualified for benefits:

(1) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer.

(2) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work.

(3) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that such individual has failed without good cause (i) to apply for available suitable work when so directed by the employment office of the Commission; or (ii) to accept suitable work when offered him; or (iii) to return to his customary self-employment (if any) when so directed by the Commission. Provided further, an otherwise eligible individual who is attending a vocational school or training program which has been approved by the Commission for such individual shall not be denied benefits because he refuses to apply for or accept suitable work during such period of training.

In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence.

Notwithstanding any other provisions of this Chapter, no work shall be deemed suitable and benefits shall not be denied under this Chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

a. If the position offered is vacant due directly to a strike, lockout, or other labor dispute;

b. If the remuneration, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

c. If as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

(4) For the duration of his unemployment beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits if it is determined by the Commission that:

a. Such individual has failed without good cause to attend a vocational school or training program when so directed by the Commission;

b. Such individual has discontinued his training course without good cause; or

c. If the individual is separated from his training course or vocational school due to misconduct.

(5) For any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress on or after July 1, 1961, at the factory, establishment, or other premises at which he is or was last employed or caused after such date by a labor dispute at another place, either within or without this State, which is owned or operated by the same employing unit which owns or operates the factory, establishment, or other premises at which he is or was last employed and which supplies materials or services necessary to the continued and usual operation of the premises at which he is or was last employed. Provided, that an individual

disqualified under the provisions of this subdivision shall continue to be disqualified thereunder after the labor dispute has ceased to be in active progress for such period of time as is reasonably necessary and required to physically resume operations in the method of operating in use at the plant, factory, or establishment of the employing unit.

(6) If the Commission finds he is customarily self-employed and can reasonably return to self-employment.

(7) For any week after June 30, 1939, with respect to which he shall have and assert any right to unemployment benefits under an employment security law of either the federal or a state government, other than the State of North Carolina.

(8) For any week with respect to which he has received any sum from the employer pursuant to an order of the National Labor Relations Board or by private agreement, consent or arbitration for loss of pay by reason of discharge. When the amount so paid by the employer is in a lump sum and covers a period of more than one week, such amount shall be allocated to the weeks in the period on a pro rata basis; provided further that if the amount so prorated to a particular week is less than the benefits which would otherwise be due under this Chapter, he shall be entitled to receive for such week, if otherwise eligible, benefits as provided under G.S. 96-12 of this Chapter.

(9) The amount of compensation payable to an individual for any week which begins after July 2, 1977, and which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount rounded to the nearest dollar equal to the amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week.

(10) Any employee disqualified for the duration of his unemployment due to the provisions of (1), (2), (3) or (4) above may have that permanent disqualification removed if he meets the following three conditions:

a. Returns to work for at least five weeks and is paid cumulative wages of at least 10 times his weekly benefit amount;

b. Subsequently becomes unemployed through no fault of his own; and

c. Meets the availability requirements of the law.

Provided for good cause shown the Commission in its discretion may as to any permanent disqualification provided in this Chapter reduce the disqualification period to a time certain but not less than five weeks. The maximum amount of benefits due any individual whose permanent disqualification is changed to a time certain shall be reduced by an amount determined by multiplying the number of weeks of disqualification by the weekly benefit amount. (Ex. Sess. 1936, c. 1, s. 5; 1937, c. 448, ss. 2, 3; 1939, c. 52, s. 1; 1941, c. 108, ss. 3, 4; 1943, c. 377, ss. 7, 8; 1945, c. 522, s. 29; 1947, c. 598, s. 10; c. 881, ss. 1, 2; 1949, c. 424, ss. 23-25; 1951, c. 332, s. 14; 1955, c. 385, ss. 7, 8; 1961, c. 454, s. 20; 1965, c. 795, s. 19; 1969, c. 575, s. 12; 1971, c. 673, s. 29; 1977, c. 26.)

Legal Periodicals. — For note on the geographical scope of the labor dispute disqualification under subdivision (4), see 29 N.C.L. Rev. 472.

For note on availability for suitable work, see 34 N.C.L. Rev. 591 (1956).

For survey of 1972 case law on the applicability of the "available for work" requirement to voluntary retirees, see 51 N.C.L. Rev. 1205 (1973).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

I. General Consideration.
II. Leaving Work Voluntarily Without Good Cause.
III. Misconduct.
IV. Suitable Work.
V. Labor Disputes.

I. GENERAL CONSIDERATION.

Design of Employment Security Law. — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

Strict Construction. — Sections of this Chapter imposing disqualifications for its benefits should be strictly construed in favor of the claimant and should not be enlarged by implication or by adding to one disqualifying provision words found only in another. In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968); In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

This section prevails over the provision of § 96-2 stating the general policy of the statute to provide for benefits to workers who are "unemployed through no fault of their own." In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941); In re Usery, 31 N.C. App. 703, 230 S.E.2d 585 (1976); In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

Section Construed with § 96-13. — See note to § 96-13.

Burden of Proof. — Each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under this section. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941); State ex rel. Employment Security Comm'n v. Jarrell, 231 N.C. 381, 57 S.E.2d 403 (1950).

Applied in In re Stutts, 245 N.C. 405, 95 S.E.2d 919 (1957); Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 275 N.C. 503, 169 S.E.2d 867 (1969); In re Thomas, 13 N.C. App. 513, 186 S.E.2d 623, rev'd, 281 N.C. 598, 189 S.E.2d 245 (1972); In re Vinson, 42 N.C. App. 28, 255 S.E.2d 644 (1979).

Quoted in In re Tyson, 253 N.C. 662, 117 S.E.2d 854 (1961).

II. LEAVING WORK VOLUNTARILY WITHOUT GOOD CAUSE.

"Work". — The labor, task, or duty that affords one his accustomed means of livelihood is the type of "work" to which subdivision (1) of this section applies. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

Student's Services as Research Assistant Are Not Work. — The claimant's services as a research assistant under a fellowship granted to students by the University of North Carolina are not "employment" within the meaning of the act, nor did they constitute "work" within the meaning of subdivision (1) of this section. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

"Voluntary". — The termination of the claimant's studies at the University of North Carolina and subsequently his research assistantship, which was part of a fellowship granted to students, did not constitute a voluntary abandonment of work within the meaning of subdivision (1) of this section. In re Scaringelli, 39 N.C. App. 648, 251 S.E.2d 728 (1979).

When Resignation Involuntary. — Employees who quit or resign employment because they are asked to do so by their employer do not leave "voluntarily" within the meaning of subdivision (1) of this section. Where the employer recommended that the employee resign, and clearly implied that the employee would be discharged if she failed to offer her resignation, this would constitute an involuntary separation. In re Werner, 44 N.C. App. 723, 263 S.E.2d 4 (1980).

"Without Good Cause". — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

III. MISCONDUCT.

The term "misconduct" within the meaning of subdivision (2) is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. In re Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973).

Discharge under Occupational Safety and Health Act Held Discharge for Misconduct. — Claimant's discharge for willful refusal to wear ear protective devices as required by employer policy made mandatory by the Occupational Safety and Health Act of 1970 constituted a discharge for misconduct connected with his employment within the meaning of subdivision (2). In re Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973).

Refusal to Report to Work Held Misconduct. — A claimant's deliberate and unjustifiable refusal to report to work, when the

employer has the right to insist on the employee's presence and when the claimant knows that his refusal would cause logistical problems for the employer, constitutes misconduct sufficient to disqualify claimant from receiving benefits under subdivision (2) of this section. In re Cantrell, 44 N.C. App. 718, 263 S.E.2d 1 (1980).

IV. SUITABLE WORK.

Generally. — See In re Watson, 273 N.C. 629, 161 S.E.2d 1 (1968).

Suitability is not a matter of rigid fixation. It depends upon circumstances and may change with changing circumstances. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

And "Unsuitable" Work May Become "Suitable". — Work which may be deemed "unsuitable" at the inception of the claimant's unemployment and for a reasonable time thereafter, because it pays less than his prior earning capacity, may thereafter become "suitable" work when consideration is given to the length of unemployment and the prospects for obtaining customary work at his prior earning capacity. What is a "reasonable time" is not rigid and inflexible and it must initially be determined as a question of fact under the peculiar circumstances of each individual case. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Employment which may not be suitable while there is still a good present expectancy of obtaining other employment more nearly proportionate to the ability of the worker, may become suitable if that expectancy is not realized within a reasonable time. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

A claimant is entitled to a reasonable length of time within which to find work at his higher skill before work calling for less competence and lower remuneration can be found to be suitable. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

But the longer a claimant is unemployed, the more he is obligated to take less desirable work and to make himself available to take it. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Elements Which Must be Considered in Determining "Suitable Work". — The skill and capacity of the worker, his accustomed remuneration, his expectancy of obtaining equivalent employment, and the time which he had had to obtain it may be taken into account in determining "suitable work." In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

It may reasonably be thought that employment which requires a highly trained and skilled worker, who still has a fair prospect of securing work in his own line to step down into work of a substantially lower grade, at substantially less pay, before he has had a chance to look about him, is not truly "suitable." Acceptance of such employment might conceivably condemn the worker permanently to a scale of employment lower than that to which his training, skill, and industry fairly entitled him. In re Troutman, 264 N.C. 289, 141 S.E.2d 613 (1965).

Work which requires one to violate his moral standards is not ordinarily "suitable work" within the meaning of this section. In re Miller, 243 N.C. 509, 91 S.E.2d 241 (1956).

V. LABOR DISPUTES.

In passing the 1961 amendment to present subdivision (5) the General Assembly acted within its constitutional powers. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292 (1963), cert. den., Abernathy v. Eastern Air Lines, Inc., 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963).

Present subdivision (5) of this section is in plain and unambiguous language, and needs only a literal interpretation to ascertain the legislative intent as expressed therein. In re Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953).

The effect of the 1961 amendment was to eliminate from present subdivision (5) the means therein provided by which an employee might escape disqualification. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292 (1963), cert. den., Abernathy v. Eastern Air Lines, Inc., 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963).

Present subdivision (5) extends the disqualification to workers at a factory, establishment, or other premise which supplies necessary materials or services to the plant where the claimants were last employed. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292 (1963), cert. den., Abernathy v. Eastern Air Lines, Inc., 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963).

The disqualification contained in the 1961 amendment to present subdivision (5) involves a question of degree and not of principle. In re Abernathy, 259 N.C. 190, 130 S.E.2d 292 (1963).

Employees who participate in, finance or who are directly interested in a labor dispute which results in stoppage of work, or who are members of a grade or class of workers which has members employed at the premises at which the stoppage occurs, any of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute, are not entitled to unemployment compensation benefits during the stoppage of work, and each employee-claimant is required to show to the satisfaction of the Commission that he is not disqualified under the terms of this section. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941).

Employees Need Not Support Dispute to be Disqualified. — Employee-claimants who are not directly interested in the labor dispute which brings about the stoppage of work, and who do not participate in, help finance or benefit from the dispute, are nevertheless disqualified from unemployment compensation benefits if they belong to a grade or class of workers employed at the premises immediately before the commencement of the stoppage, some of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute. State ex rel. Unemployment Comp. Comm'n v. Martin, 228 N.C. 277, 45 S.E.2d 385 (1947).

Present subdivision (5) of this section disqualifies for unemployment compensation benefits employees belonging to a grade or class of workers some of whom participated in and were directly interested in the strike which brought about a stoppage of work, notwithstanding the fact that the employee-claimants were not members of the union and did not participate in, or help finance, the strike, especially where the strike involved, in addition to a maintenance of membership clause in the contract of employment, a general increase in wages, from which the employee-claimants stood to benefit. State ex rel. Unemployment Comp. Comm'n v. Lunceford, 229 N.C. 570, 50 S.E.2d 497 (1948).

Whether the unemployment is due to a labor dispute, or whether it is not, is a question to be determined in each case. The line of demarcation is not the end of the strike but the end of work stoppage due to the strike. That test is applied to all alike, and there is no discrimination. In re Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953).

For the disqualification provisions of subdivision (5) of this section to apply, the Employment Security Commission must find that "total or partial unemployment is caused by a labor dispute in active progress." Thus, the only type of active labor dispute which keeps the idle worker disqualified for benefits is one which causes unemployment. In re Sarvis, 296 N.C. 475, 251 S.E.2d 434 (1979).

When Stoppage of Work Caused by Labor Dispute Begins and Ends. — A stoppage of work commences at the plant of the employer when a definite check in production operations occurs, and a stoppage of work ceases when operations are resumed on a normal basis; but the stoppage of work caused by a labor dispute must not exceed the time which is reasonably necessary and required to physically resume normal operations in such plant or establishment. In re Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953).

An abandonment of the strike and unconditional offer to return to work by employees who were replaced during the pendency of the strike lifts the labor dispute disqualification. In re Sarvis, 296 N.C. 475, 251 S.E.2d 434 (1979).

An employer's inability to reinstate previously replaced employees after they abandoned their strike and unconditionally offered to return to work changed the cause of unemployment and lifted the disqualification for benefits under subdivision (5) of this section. In re Sarvis, 296 N.C. 475, 251 S.E.2d 434 (1979).

Effect of NLRB Proceedings on Labor Dispute Disqualification. — An election petition and an unfair labor practice charge pending before the National Labor Relations Board after the end of employees' strike did not keep the labor dispute disqualification under subdivision (5) of this section in effect after the conclusion of the strike. In re Sarvis, 296 N.C. 475, 251 S.E.2d 434 (1979).

A "labor dispute" as used in subsection (5) includes work stoppage caused by management lockouts. In re Usery, 31 N.C. App. 703, 230 S.E.2d 585 (1976).

Burden of Proof. — Where the employer resists recovery of unemployment compensation on the ground that claimants' unemployment was due to a work stoppage resulting from a labor dispute, each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under present subdivision (5) of this section. State ex rel. Employment Security Comm'n v. Jarrell, 231 N.C. 381, 57 S.E.2d 403 (1950).

Failure to Resume Work after Dispute. — The evidence tended to show that employee-claimants not only did not work during the period of stoppage of work at the employer's plant caused by a labor dispute but also that they did not resume work after operations at the plant were resumed, and after notification by the employer that jobs were available. There was also evidence on behalf of claimants that they did not return to their jobs because of the labor dispute. The Commission ruled that claimants were not entitled to benefits during the stoppage of work. It was held that the employer is not prejudiced by the further order of the Commission that the eligibility of claimants to benefits subsequent to the resumption of operations at the plant should be determined, since it must be presumed the Commission will determine eligibility of each claimant for such benefits in accordance with objective standards or criteria set up in the Chapter, but the existence and effect of a labor dispute may have an essential bearing upon the eligibility of claimants, the suitableness of work offered, and the disqualifications for benefits. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941).

Notice That Due to Labor Dispute Employees Might Seek Other Employment. — A finding that after a strike which closed the

plant and after the employer's attempt to resume operations had proved futile, the employer posted a notice stating that all operations at the mill would cease for an indefinite period and that employees were free to seek employment elsewhere, was held insufficient to support a conclusion of law by the Commission that subsequent to the posting of the notice the unemployment of claimants was not due to stoppage of work because of a labor dispute, since the notice merely signified the willingness of the employer to terminate its employment relationship with any worker who elected to withdraw from the existing labor dispute and seek work elsewhere, but did not alter the status of any employee who refrained from exercising this option. State ex rel. Employment Security Comm'n v. Jarrell, 231 N.C. 381, 57 S.E.2d 403 (1950).

§ 96-15. Claims for benefits.

(a) Filing. — Claims for benefits shall be made in accordance with such regulations as the Commission may prescribe. Each employing unit shall post and maintain in places readily accessible to individuals performing services for it printed statements, concerning benefit rights, claims for benefits, and such other matters relating to the administration of this Chapter as the Commission may direct. Each employing unit shall supply to such individuals copies of such printed statements or other materials relating to claims for benefits as the Commission may direct. Such printed statements and other materials shall be supplied by the Commission to each employing unit without cost to the employing unit.

(b) (1) Initial Determination. — A representative designated by the Commission shall promptly examine the claim and shall determine whether or not the claim is valid, and if valid, the week with respect to when benefits shall commence, the weekly benefit amount payable, and the potential maximum duration thereof. The claimant shall be furnished a copy of such initial or monetary determination showing the amount of wages paid him by each employer during his base period and the employers by whom such wages were paid, his benefit year, weekly benefit amount, and the maximum amount of benefits that may be paid to him for unemployment during the benefit year. When a claimant is ineligible due to lack of earnings in his base period, the determination shall so designate. The claimant shall be allowed 10 days from the delivery of his initial determination to him within which to protest his initial or monetary determination and upon the filing of such protest, unless said protest be satisfactorily resolved, the claim shall be referred to an adjudicator for a decision as to the issues presented. All base period employers, as well as the most recent employer of a claimant on a temporary layoff, shall be notified upon the filing of a claim which establishes a benefit year or an ineligible amount.

At any time within one year from the date of the making of an initial determination, the Commission on its own initiative may reconsider such determination if it finds that an error in computation or identity has occurred in connection therewith or that additional wages pertinent to the claimant's benefit status have become available, or if such determination of benefit status was made as a result of a nondisclosure or misrepresentation of a material fact.

(2) Hearings before Adjudicator. — When a protest is made by the claimant to his initial determination or a question or issue is presented or raised as to the eligibility of a claimant for benefits under G.S. 96-13 herein, or whether any disqualification shall be imposed by virtue of G.S. 96-14 of this Chapter, or benefits denied, or his account adjusted pursuant to G.S. 96-18 of this Chapter, the claim shall be referred to an adjudicator who shall afford the parties an opportunity

to present their positions at an informal conference. The adjudicator can consider any matter, material or statement deemed to be pertinent to the issues, including telephone inquiries when desirable and, after consideration, shall render a conclusion as to the benefit entitlements of the claimant involved. The adjudicator shall notify the claimant and any other interested party of the conclusion reached. Unless the claimant or any other interested party within 10 days after notification of the conclusion of the adjudicator, whether the conclusion be delivered manually or mailed, files an appeal to such conclusion, the conclusion shall be final and benefits paid or denied in accordance therewith.

The Commission shall be deemed an interested party.

The Commission may remove unto itself or transfer it to an appeals referee the proceedings of any claim pending before an adjudicator.

On out-of-state claims filed by a claimant in another state against this State or in cases involving the failure of the claimant to meet any procedural requirement pertaining to the filing of the claimant or denial or adjustment of the account under G.S. 96-18, the adjudicator will not be required to give notice of the time of consideration.

(c) Appeals. — Unless an appeal from the adjudicator is withdrawn, an appeals referee shall set a hearing in which the parties are given reasonable opportunity to be heard. The appeals referee may affirm or modify the conclusion of the adjudicator or issue a new decision in which findings of fact and conclusions of law will be set out. The evidence taken at the hearings before the appeals referee shall be recorded and the decision of the appeals referee shall be deemed to be the final decision of the Commission unless within 10 days after the date of notification of, or mailing of the decision, further appeal is initiated. Should the appeals referee uphold the conclusion of the adjudicator, any benefits paid as the result of that decision shall not be charged to any employer's account if that decision is finally reversed. Any reference to "appeals deputy" or "appeals tribunal" in this Chapter shall be deemed to mean "appeals referee."

(d) Repealed by Session Laws 1977, c. 727, s. 54.

(e) Review by the Commission. — The Commission or Deputy Commissioner may on its own motion affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it, or may provide for group hearings in such cases as the Commission or Deputy Commissioner may deem proper. The Commission or Deputy Commissioner may remove to itself or transfer to another appeals referee the proceedings on any claim pending before an appeals referee. The Commission shall promptly notify the interested parties of its findings and the decision. In all Commission matters heard by a Deputy Commissioner, the decision of the Deputy Commissioner shall constitute the decision of the Commission; except, the Commission may remove unto itself, upon its own motion, any claim pending for rehearing and redetermination, provided such removal is done prior to the expiration of appeal period applicable to the decision of the Deputy Commissioner.

(f) Procedure. — The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals shall be in accordance with rules prescribed by the Commission for determining the rights of the parties, whether or not such rules conform to common-law or statutory rules of evidence and other technical rules of procedure. All testimony at any hearing before an appeals tribunal upon a disputed claim shall be recorded unless the recording is waived by all interested parties, but need not be transcribed unless the disputed claim is further appealed.

(g) Witness Fees. — Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the Commission. Such fees and all expenses of proceedings involving disputed claims shall be deemed a part of the expense of administering this Chapter.

(h) Appeal to Courts. — Any decision of the Commission, in the absence of an appeal therefrom as herein provided, shall become final 10 days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has filed notice of appeal with the Commission within such 10-day period and exhausted his remedies before the Commission as provided by this Chapter. The Commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney who has been designated by it for that purpose.

(i) Appeal Proceedings. — The decision of the Commission shall be final, subject to appeal as herein provided. Within 10 days after the decision of the Commission has become final, any party aggrieved thereby who has filed notice of appeal within the 10-day period as provided by G.S. 96-15(h) may appeal to the superior court of the county of his residence. Unless the claimant objects, after being afforded reasonable opportunity to do so, to the Superior Court of Wake County. In case of such appeal, the court shall have power to make party-defendant any other party which it may deem necessary or proper to a just and fair determination of the case. In every case in which appeal is demanded, the appealing party shall file a statement with the Commission within the time allowed for appeal, in which shall be plainly stated the grounds upon which a review is sought and the particulars in which it is claimed the Commission is in error with respect to its decision. The Commission shall make a return to the notice of appeal, which shall consist of all documents and papers necessary to an understanding of the appeal, and a transcript of all testimony taken in the matter, together with its findings of fact and decision thereon, which shall be certified and filed with the superior court to which appeal is taken within 30 days of said notice of appeal. The Commission may also, in its discretion, certify to such court questions of law involved in any decision by it. In any judicial proceeding under this section the findings of the Commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law. Such actions and the questions so certified shall be heard in a summary manner, and shall be given precedence over all civil cases, except cases arising under the Workmen's Compensation Law of this State. An appeal may be taken from the judgment of the superior court, as provided in civil cases. The Commission shall have the right of appeal to the appellate division from a decision or judgment of the superior court and for such purpose shall be deemed to be an aggrieved party. No bond shall be required upon such appeal. Upon the final determination of the case or proceeding the Commission shall enter an order in accordance with such determination. When an appeal has been entered to any judgment, order, or decision of the court below, no benefits shall be paid pending a final determination of the cause, except in those cases in which the court below has affirmed a decision of the Commission allowing benefits or benefits are payable under the provisions of G.S. 96-15(b)(2).

(j) Information obtained by any employee of the Commission from an employer or the claimant with respect to a claim for benefits shall not be published or opened to public inspection (other than to public employees in the performance of their public duties) in any manner revealing the claimant's identity or his rights to potential benefits or the amount of benefits paid except as provided below. Any individual, as well as any interested employer(s) may be supplied with information as to his potential benefit rights from such claim records. Any claimant at a hearing before a claims deputy or an appeals tribunal or the Commission shall be supplied with information from such

records to the extent necessary for the proper presentation of his claims. All reports, statements, information, and communications of every character with respect to a claim for benefits so made or given to the Commission, its deputies, agents, examiners and employees, whether same be written, oral or in the form of testimony at any hearing, or whether obtained by the Commission from the claimant or the employer or the employer's books and records, shall be absolute privileged communications in any civil or criminal proceedings except proceedings involving the administration of this Chapter: Provided, nothing herein contained shall operate to relieve any claimant or employing unit from disclosing any information required by this Chapter or as prescribed by the Commission involving the administration of this Chapter. Any employee or member of the Commission who violates any provision of this section shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00), or imprisoned for not longer than 90 days, or both.

(k) Irrespective of any other provision of this Chapter, the Commission may adopt minimum regulations necessary to provide for the payment of benefits to individuals promptly when due as required by section 303(a)(1) of the Social Security Act as amended (42 U.S.C.A., section 503(a)(1)). (Ex. Sess. 1936, c. 1, s. 6; 1937, c. 150; c. 448, s. 4; 1941, c. 108, s. 5; 1943, c. 377, ss. 9, 10; 1945, c. 522, ss. 30-32; 1947, c. 326, s. 23; 1951, c. 332, s. 15; 1953, c. 401, s. 19; 1959, c. 362, ss. 16, 17; 1961, c. 454, s. 21; 1965, c. 795, ss. 20-22; 1969, c. 575, ss. 13, 14; 1971, c. 673, ss. 30, 30.1; 1977, c. 727, s. 54.)

Editor's Note. — Pursuant to § 97-1.1, the reference in (i) to the "Workmen's Compensation Law" is deemed a reference to the "Worker's Compensation Law."

Legal Periodicals. — For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For a survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

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The requirements of this section are mandatory and not directory. They are conditions precedent to obtaining a review by the courts and must be observed. Noncompliance therewith requires dismissal. In re Employment Security Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951).

Appeal to Superior Court. — Under subsection (a) of § 96-4 the chairman of the Employment Security Commission is vested with all authority of the Commission, and where it appears that a claim was heard on appeal by the chairman, and that claimant appealed therefrom "to the full Commission or to the superior court," the hearing of the appeal by the superior court was in accordance with the statute. State ex rel. Employment Security Comm'n v. Roberts, 230 N.C. 262, 52 S.E.2d 890 (1949).

Appeal by Commission. — Under this section the exact status of the Commission as a party to an action is not defined and the part it is to play as such is left somewhat in the realm of speculation, and there is nothing in the provision which constitutes the Commission guardian or trustee for a claimant or which would warrant the conclusion that it is authorized to prosecute an appeal from a judgment against a claimant when the claimant is content. Nor may it do so for the purpose of adjudicating issues which are merely incidental to the claimant's cause of action. In re Mitchell, 220 N.C. 65, 16 S.E.2d 476, 142 A.L.R. 931 (1941).

Scope of Superior Court's Jurisdiction. — The superior court's jurisdiction in reviewing the Commission's decisions is severely limited. In re Enoch, 36 N.C. App. 255, 243 S.E.2d 388 (1978).

The function of the superior court in reviewing a decision of the Employment Security Commission is twofold: (1) To determine whether there was evidence before the Commission to support its findings of fact; and (2) to decide whether the facts found sustain the conclusions of law and the resultant decision of the Commission. In re Enoch, 36 N.C. App. 255, 243 S.E.2d 388 (1978).

The legislature, in granting jurisdiction under subsection (i) of this section to the superior court, intended the superior court to function as an appellate court. In re Enoch, 36 N.C. App. 255, 243 S.E.2d 388 (1978).

The fact that the superior court accepted additional evidence in hearing claimant's appeal from the decision of the Commission required a reversal of its decision. In re Enoch, 36 N.C. App. 255, 243 S.E.2d 388 (1978).

The statement of the grounds of the appeal required by subsection (i) must be filed within the time allowed for appeal. Its purpose is to give notice to the Commission and adverse parties of the alleged errors committed by the Commission and limit the scope of the hearing in the superior court to the specific questions of law raised by the errors assigned it. It was intended, and must be construed, as a condition precedent to the right of appeal. Noncompliance therewith is fatal. In re Employment Security Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951).

Conclusiveness of Findings of Fact on Appeal. — Upon appeal to the superior court from any final decision of the Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, the jurisdiction of the superior court on appeal being limited to questions of law. In re Steelman, 219 N.C. 306, 13 S.E.2d 544, 135 A.L.R. 929 (1941); State ex rel. Employment Security Comm'n v. Jarrell, 231 N.C. 381, 57 S.E.2d 403 (1950); In re Abernathy, 259 N.C. 190, 130 S.E.2d 292, cert. denied, 375 U.S. 161, 84 S. Ct. 274, 11 L. Ed. 2d 261 (1963); In re Southern, 247 N.C. 544, 101 S.E.2d 327 (1958).

The finding of the Commission that employee-claimants belong to the same grade or class of workers as other employees, some of whom, immediately before the stoppage occurred, participated in and were directly interested in the labor dispute causing the stoppage, was supported by ample evidence and was therefore conclusive, there being no allegation or evidence of fraud. State ex rel. Unemployment Comp. Comm'n v. Martin, 228 N.C. 277, 45 S.E.2d 385 (1947).

As the findings of fact made by the Commission, when supported by competent evidence, are conclusive and binding on the reviewing courts, which are to hear the appeal on questions of law only, the dismissal of the appeal in the court below for failure to file a statement of grounds as required by subsection (i) deprived the claimants of no substantial right to which, otherwise, they might have been entitled. In re Employment Security Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951).

Applied in In re Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953); In re Collingsworth, 17 N.C. App. 340, 194 S.E.2d 210 (1973).

Cited in State ex rel. Unemployment Comp. Comm'n v. National Life Ins. Co., 219 N.C. 576, 14 S.E.2d 689, 139 A.L.R. 895 (1941); State ex rel. Employment Security Comm'n v. Smith, 235 N.C. 104, 69 S.E.2d 32 (1952); In re George, 42 N.C. App. 490, 256 S.E.2d 826 (1979).

§ 96-16. Seasonal pursuits.

(a) A seasonal pursuit is one which, because of seasonal conditions making it impracticable or impossible to do otherwise, customarily carries on production operations only within a regularly recurring active period or periods of less than an aggregate of 36 weeks in a calendar year. No pursuit shall be deemed seasonal unless and until so found by the Commission: Provided, however, that from March 27, 1953, any successor under G.S. 96-8(5)b to a seasonal pursuit shall be deemed seasonal unless such successor shall within 120 days after the acquisition request cancellation of the determination of status of such seasonal pursuit; provided further that this provision shall not be applicable to pending cases nor retroactive in effect.

(b) Upon application therefor by a pursuit, the Commission shall determine or redetermine whether such pursuit is seasonal and, if seasonal, the active period or periods thereof. The Commission may, on its own motion, redetermine the active period or periods of a seasonal pursuit. An application for a seasonal determination must be made on forms prescribed by the Commission and must be made at least 20 days prior to the beginning date of the period of production operations for which a determination is requested.

(c) Whenever the Commission has determined or redetermined a pursuit to be seasonal, such pursuit shall be notified immediately, and such notice shall contain the beginning and ending dates of the pursuit's active period or periods. Such pursuits shall display notices of its seasonal determination conspicuously on its premises in a sufficient number of places to be available for inspection by its workers. Such notices shall be furnished by the Commission.

(d) A seasonal determination shall become effective unless an interested party files an application for review within 10 days after the beginning date of the first period of production operations to which it applies. Such an applica-

tion for review shall be deemed to be an application for a determination of status, as provided in G.S. 96-4, subsections (m) through (q), of this Chapter, and shall be heard and determined in accordance with the provisions thereof.

(e) All wages paid to a seasonal worker during his base period shall be used in determining his weekly benefit amount.

(f) (1) A seasonal worker shall be eligible to receive benefits based on seasonal wages only for a week of unemployment which occurs, or the greater part of which occurs within the active period or periods of the seasonal pursuit or pursuits in which he earned base period wages.

(2) A seasonal worker shall be eligible to receive benefits based on nonseasonal wages for any week of unemployment which occurs during any active period or periods of the seasonal pursuit in which he has earned base period wages provided he has exhausted benefits based on seasonal wages. Such worker shall also be eligible to receive benefits based on nonseasonal wages for any week of unemployment which occurs during the inactive period or periods of the seasonal pursuit in which he earned base period wages irrespective as to whether he has exhausted benefits based on seasonal wages.

(3) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on seasonal wages shall be an amount, adjusted to the nearest multiple of one dollar ($1.00), determined by multiplying the maximum benefits payable in his benefit year, as provided in G.S. 96-12(d) of this Chapter, by the percentage obtained by dividing the seasonal wages in his base period by all of his base period wages.

(4) The maximum amount of benefits which a seasonal worker shall be eligible to receive based on nonseasonal wages shall be an amount, adjusted to the nearest multiple of one dollar ($1.00), determined by multiplying the maximum benefits payable in his benefit year, as provided in G.S. 96-12(d) of this Chapter, by the percentage obtained by dividing the nonseasonal wages in his base period by all of his base period wages.

(5) In no case shall a seasonal worker be eligible to receive a total amount of benefits in a benefit year in excess of the maximum benefits payable for such benefit year, as provided in G.S. 96-12(d) of this Chapter.

(g) (1) All benefits paid to a seasonal worker based on seasonal wages shall be charged, as prescribed in G.S. 96-9(c)(2) of this Chapter, against the account of his base period employer or employers who paid him such seasonal wages, and for the purpose of this paragraph such seasonal wages shall be deemed to constitute all of his base period wages.

(2) All benefits paid to a seasonal worker based on nonseasonal wages shall be charged, as prescribed in G.S. 96-9(c)(2) of this Chapter, against the account of his base period employer or employers who paid him such nonseasonal wages, and for the purpose of this paragraph such nonseasonal wages shall be deemed to constitute all of his base period wages.

(h) The benefits payable to any otherwise eligible individual shall be calculated in accordance with this section for any benefit year which is established on or after the beginning date of a seasonal determination applying to a pursuit by which such individual was employed during the base period applicable to such benefit year, as if such determination had been effective in such base period.

(i) Nothing in this section shall be construed to limit the right of any individual whose claim for benefits is determined in accordance herewith to appeal from such determination as provided in G.S. 96-15 of this Chapter.

(j) As used in this section:

(1) "Pursuit" means an employer or branch of an employer.
(2) "Branch of an employer" means a part of an employer's activities which is carried on or is capable of being carried on as a separate enterprise.
(3) "Production operations" mean all the activities of a pursuit which are primarily related to the production of its characteristic goods or services.
(4) "Active period or periods" of a seasonal pursuit means the longest regularly recurring period or periods within which production operations of the pursuit are customarily carried on.
(5) "Seasonal wages" mean the wages earned in a seasonal pursuit within its active period or periods. The Commission may prescribe by regulation the manner in which seasonal wages shall be reported.
(6) "Seasonal worker" means a worker at least twenty-five percent (25%) of whose base period wages are seasonal wages.
(7) "Interested party" means any individual affected by a seasonal determination.
(8) "Inactive period or periods" of a seasonal pursuit means that part of a calendar year which is not included in the active period or periods of such pursuit.
(9) "Nonseasonal wages" mean the wages earned in a seasonal pursuit within the inactive period or periods of such pursuit, or wages earned at any time in a nonseasonal pursuit.
(10) "Wages" mean remuneration for employment. (1939, c. 28; 1941, c. 108, s. 7; 1943, c. 377, s. 14½; 1945, c. 522, s. 33; 1953, c. 401, ss. 20, 21; 1957, c. 1059, s. 14; 1959, c. 362, s. 18.)

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Cited in In re Employment Security Comm'n, 234 N.C. 651, 68 S.E.2d 311 (1951).

§ 96-17. Protection of rights and benefits.

(a) Waiver of Rights Void. — Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this Chapter shall be void. Any agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions, required under this Chapter from such employer, shall be void. No employer shall directly or indirectly make or require or accept any deduction from the remuneration of individuals in his employ to finance the employer's contributions required from him, or require or accept any waiver of any right hereunder by any individual in his employ. Any employer or officer or agent of an employer who violates any provision of this subsection shall, for each offense, be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) or be imprisoned for not more than six months, or both.

(b) Limitation of Fees. — No individual claiming benefits shall be charged fees of any kind in any proceeding under this Chapter by the Commission or its representative or by any court or any officer thereof. Any individual claiming benefits in any proceeding before the Commission or a court may be represented by counsel. Any person who violates any provision of this subsection shall, for each such offense, be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) or imprisoned for not more than six months, or both.

(c) No Assignment of Benefits; Exemptions. — Any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this Chapter shall be void; and such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt; and benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessaries furnished to such individual or his spouse or dependents during the time when such individual was unemployed. Any waiver of any exemption provided for in this subsection shall be void. (Ex. Sess. 1936, c. 1, s. 15; 1937, c. 150; 1979, c. 660, s. 22.)

Effect of Amendments. — The 1979 amendment deleted "but no such counsel shall either charge or receive for such services more than an amount approved by the Commission" at the end of the second sentence of subsection (b).

§ 96-18. Penalties.

(a) Any person who makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact to obtain or increase any benefit under this Chapter or under an employment security law of any other state, the federal government, or of a foreign government, either for himself or any other person, shall be guilty of a misdemeanor, and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense.

Records, with any necessary authentication thereof, required in the prosecution of any criminal action brought by another state or foreign government for misrepresentation to obtain benefits under the law of this State shall be made available to the agency administering the employment security law of any such state or foreign government for the purpose of such prosecution. Photostatic copies of all records of agencies of other states or foreign governments required in the prosecution of any criminal action under this section shall be as competent evidence as the originals when certified under the seal of such agency, or when there is no seal, under the hand of the keeper of such records.

(b) Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contributions or other payment required from an employing unit under this Chapter, or who willfully fails or refuses to furnish any reports required hereunder, or to produce or permit the inspection or copying of records as required hereunder, shall be guilty of a misdemeanor; and each such false statement or representation or failure to disclose a material fact, and each day of such failure or refusal shall constitute a separate offense.

(c) Any person who shall willfully violate any provisions of this Chapter or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this Chapter, or for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be guilty of a misdemeanor, and each day such violation continues shall be deemed to be a separate offense.

(d) Any person who, by reason of the nondisclosure or misrepresentation by him or by another of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent), has received any sum as benefits under this Chapter while any conditions for the receipt of benefits imposed by this Chapter were not fulfilled in his case, or while he was disqualified from

receiving benefits, shall, in the discretion of the Commission, either be liable to have such sum deducted from any future benefits payable to him under this Chapter, or shall be liable to repay to the Commission for the Unemployment Insurance Fund a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in G.S. 96-10(b) for the collection of past-due contributions; provided "this Chapter" and "Unemployment Insurance Fund" shall also be deemed to mean the employment security law and the unemployment insurance fund of any other state or the federal government, or a foreign government for purposes of this subsection, when an interstate claim is involved.

(e) An individual shall not be entitled to receive benefits for one year beginning with the first day following the last benefit week for which he received benefits, or one year from the date upon which the act was committed, whichever is the later, if he, or another in his behalf with his knowledge, has been found to have knowingly made a false statement or misrepresentation, or who has knowingly failed to disclose a material fact to obtain or increase any benefit or other payment under this Chapter.

(f) Any individual who has received any sum as benefits to which he was not entitled, such sum having been paid to him as the result of error on the part of any representative of the Commission, shall be liable to have such sum deducted from any future benefits payable to him under this Chapter, or shall be liable to repay to the Commission for the Unemployment Insurance Fund a sum equal to the amount so received by him, and such sum shall be collectible in the manner provided in G.S. 96-10(b) for the collection of past-due contributions; provided, this "Chapter" and "Unemployment Insurance Fund" shall also be deemed to mean the employment security law and the unemployment insurance fund of any other state or the federal government, or a foreign government for the purposes of this subsection, when an interstate claim is involved.

(g) (1) Any person who, by reason of his fraud, has received any sum as benefits under this Chapter to which he was not entitled shall be liable to repay such sum to the Commission for and on behalf of the trust fund, or, in the discretion of the Commission, to have such sum deducted from future benefits payable to him under this Chapter, provided a finding of the existence of such fraud has been made by a decision pursuant to this Chapter within two years from the commission of such fraud.

(2) If any person, other than by reason of his fraud, has received any sum as benefits under this Chapter to which he has been found not entitled, he shall be liable to repay such sum to the Commission for and on behalf of the trust fund or, in the discretion of the Commission, shall have such sum deducted from any future benefits payable to him under this Chapter. No such recovery or recoupment of such sum may be effected after 10 years from the last day of the year in which the overpayment occurred. (Ex. Sess. 1936, c. 1, s. 16; 1943, c. 319; c. 377, ss. 29, 30; 1945, c. 552, s. 34; 1949, c. 424, s. 26; 1951, c. 332, s. 16; 1953, c. 401, ss. 1, 22; 1955, c. 385, s. 9; 1959, c. 362, ss. 19, 20; 1965, c. 795, ss. 23, 24; 1971, c. 673, s. 31; 1977, c. 727, s. 55; 1979, c. 660, ss. 23-25.)

Effect of Amendments. — The 1979 amendment substituted "guilty of a misdemeanor" for "punished by a fine of not less than twenty dollars ($20.00) nor more than fifty dollars ($50.00) or by imprisonment for not longer than 30 days" in each place where the words appear in the first paragraph of subsection (a), and in subsections (b) and (c).

§ 96-19. Enforcement of Employment Security Law discontinued upon repeal or invalidation of federal acts; suspension of enforcement provisions contested.

(a) It is the purpose of this Chapter to secure for employers and employees the benefits of Title III and Title IX of the Federal Social Security Act, approved August 14, 1935, as to credit on payment of federal taxes, of State contributions, the receipt of federal grants for administrative purposes, and all other provisions of the said Federal Social Security Act; and it is intended as a policy of the State that this Chapter and its requirements for contributions by employers shall continue in force only so long as such employers are required to pay the federal taxes imposed in said Federal Social Security Act by a valid act of Congress. Therefore, if Title III and Title IX of the said Federal Social Security Act shall be declared invalid by the United States Supreme Court, or if such law be repealed by congressional action so that the federal tax cannot be further levied, from and after the declaration of such invalidity by the United States Supreme Court, or the repeal of said law by congressional action, as the case may be, no further levy or collection of contributions shall be made hereunder. The enactment by the Congress of the United States of the Railroad Retirement Act and the Railroad Unemployment Insurance Act shall in no way affect the administration of this law except as herein expressly provided.

All federal grants and all contributions theretofore collected, and all funds in the treasury by virtue of this Chapter, shall, nevertheless, be disbursed and expended, as far as may be possible, under the terms of this Chapter: Provided, however, that contributions already due from any employer shall be collected and paid into the said fund, subject to such distribution; and provided further, that the personnel of the State Employment Security Commission shall be reduced as rapidly as possible.

The funds remaining available for use by the North Carolina Employment Security Commission shall be expended, as necessary, in making payment of all such awards as have been made and are fully approved at the date aforesaid, and the payment of the necessary costs for the further administration of this Chapter, and the final settlement of all affairs connected with same. After complete payment of all administrative costs and full payment of all awards made as aforesaid, any and all moneys remaining to the credit of any employer shall be refunded to such employer, or his duly authorized assignee: Provided, that the State employment service, created by Chapter 106, Public Laws of 1935, and transferred by Chapter 1, Public Laws of 1936, Extra Session, and made a part of the Employment Security Commission of North Carolina, shall in such event return to and have the same status as it had prior to enactment of Chapter 1, Public Laws of 1936, Extra Session, and under authority of Chapter 106, Public Laws of 1935, shall carry on the duties therein prescribed; but, pending a final settlement of the affairs of the Employment Security Commission of North Carolina, the said State employment service shall render such service in connection therewith as shall be demanded or required under the provisions of this Chapter or the provisions of Chapter 1, Public Laws of 1936, Extra Session.

(b) The Employment Security Commission may, upon receiving notification from the U.S. Department of Labor that any provision of this Chapter is out of conformity with the requirements of the federal law or of the U.S. Department of Labor, suspend the enforcement of the contested section or provision until the North Carolina Legislature next has an opportunity to make changes in the North Carolina law. The Employment Security Commission shall, in order to implement the above suspension:

(1) Notify the Governor's office and provide that office with a copy of the determination or notification of the U.S. Department of Labor;
(2) Advise the Governor's office as to whether the contested portion or provision of the law would, if not enforced, so seriously hamper the operations of the agency as to make it advisable that a special session of the legislature be called;
(3) Take all reasonable steps available to obtain a reprieval from the implementation of any federal conformity failure sanctions until the State legislature has been afforded an opportunity to consider the existing conflict. (1937, c. 363; 1939, c. 52, s. 8; 1947, c. 598, s. 1; 1977, c. 727, s. 56.)

Legal Periodicals. — For a survey of 1977 law on employment regulation, see 56 N.C.L. Rev. 854 (1978).

Article 3.

Employment Service Division.

§ 96-20. Duties of Division; conformance to Wagner-Peyser Act; organization; director; employees.

The Employment Service Division of the Employment Security Commission shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this Chapter, and for the purpose of performing such duties as are within the purview of the act of Congress entitled "An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system and for other purposes," approved June 6, 1933, (48 Stat., 113; U.S.C., Title 29, section 49(c), as amended). The said Division shall be administered by a full-time salaried director. The Employment Security Commission shall be charged with the duty to cooperate with any official or agency of the United States having powers or duties under the provisions of the said act of Congress, as amended, and to do and perform all things necessary to secure to this State the benefits of the said act of Congress, as amended, in the promotion and maintenance of a system of public employment offices. The provisions of the said act of Congress, as amended, are hereby accepted by this State, in conformity with section 4 of said act, and this State will observe and comply with the requirements thereof. The Employment Security Commission is hereby designated and constituted the agency of this State for the purpose of said act. The Commission is directed to appoint the director, other officers, and employees of the Employment Service Division. (Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 326, s. 24.)

§ 96-21. Cooperation with State and federal agencies.

The Employment Service Division shall cooperate with all State and federal agencies in attempting to secure suitable employment and fair treatment for military veterans and disabled veterans. (1921, c. 131, s. 3; C.S., s. 7312(c); Ex. Sess. 1936, c. 1, s. 12; 1979, c. 660, s. 26.)

Effect of Amendments. — The 1979 amendment rewrote this section, which formerly read: "The Employment Service Division shall cooperate with the Federal Board for Vocational Education, division for rehabilitation of crippled soldiers and sailors, in endeavoring to secure suitable employment and fair treatment of the veterans of the World War."

§ 96-22. Employment of and assistance to minors.

The Employment Service Division shall have jurisdiction over all matters contemplated in this Article pertaining to securing employment for all minors who avail themselves of the free employment service. The Employment Service Division shall have power to so conduct its affairs that at all times it shall be in harmony with laws relating to child labor and compulsory education; to aid in inducing minors over 16, who cannot or do not for various reasons attend day school, to undertake promising skilled employment; to aid in influencing minors who do not come within the purview of compulsory education laws, and who do not attend day school, to avail themselves of continuation or special courses in existing night schools, vocational schools, part-time schools, trade schools, business schools, library schools, university extension courses, etc., so as to become more skilled in such occupation or vocation to which they are respectively inclined or particularly adapted, including assisting those minors who are interested in securing vocational employment in agriculture and to aid in the development of good citizenship and in the study and development of vocational rehabilitation capabilities for handicapped minors. (1921, c. 131, s. 4; C.S., s. 7312(d); Ex. Sess. 1936, c. 1, s. 12; 1979, c. 660, s. 27.)

Effect of Amendments. — The 1979 amendment in the second sentence substituted "including assisting those minors who are interested in securing vocational employment in agriculture and to aid in the development of good citizenship and in the study and development of vocational rehabilitation capabilities for handicapped minors" for "to aid in securing vocational employment on farms for town and city boys who are interested in agricultural work, and particularly town and city high school boys who include agriculture as an elective study; to cooperate with various social agencies, schools, etc., in group organization of employed minors, particularly those of foreign parentage, in order to promote the development of real, practical Americanism through a broader knowledge of the duties of citizenship; to investigate methods of vocational rehabilitation of boys and girls who are lamed or crippled and ways and means for minimizing such handicap."

§ 96-23. Job placement; information; research and reports.

The Employment Service Division shall make public, through the newspapers and other media, information as to situations it may have applicants to fill, and establish relations with employers for the purpose of supplying demands for labor. The Division shall collect, collate, and publish statistical and other information relating to the work under its jurisdiction; investigate economic developments, and the extent and causes of unemployment and remedies therefor within and without the State, with the view of preparing for the information of the General Assembly such facts as in its opinion may make further legislation desirable. All information obtained by the North Carolina State Employment Service Division from workers, employers, applicants, or other persons, or groups of persons in the course of administering the State public employment service program shall be absolute privileged communications and shall not be disclosed directly or indirectly except as by regulations prescribed by the Commission. (1921, c. 131, s. 5; C. S., s. 7312(e); Ex. Sess. 1936, c. 1, s. 12; 1947, c. 326, s. 25.)

§ 96-24. Local offices; cooperation with United States service; financial aid from United States.

The Employment Service Division is authorized to enter into agreement with the governing authorities of any municipality, county, township, or school corporation in the State for such period of time as may be deemed desirable for the purpose of establishing and maintaining local free employment offices, and

for the extension of vocational guidance in cooperation with the United States Employment Service, and under and by virtue of any such agreement as aforesaid to pay, from any funds appropriated by the State for the purposes of this Article, any part or the whole of the salaries, expenses or rent, maintenance, and equipment of offices and other expenses. (1921, c. 131, s. 6; C. S., s. 7312(f); 1931, c. 312, s. 3; 1935, c. 106, s. 4; Ex. Sess. 1936, c. 1, s. 12.)

§ 96-25. Acceptance and use of donations.

It shall be lawful for the Employment Service Division to receive, accept, and use, in the name of the people of the State, or any community or municipal corporation, as the donor may designate, by gift or devise, any moneys, buildings, or real estate for the purpose of extending the benefits of this Article and for the purpose of giving assistance to handicapped citizens through vocational rehabilitation. (1921, c. 131, s. 7; C.S., s. 7312(g); 1931, c. 312, s. 3; Ex. Sess. 1936, c. 1, s. 12; 1979, c. 660, s. 28.)

Effect of Amendments. — The 1979 amendment substituted "handicapped citizens" for "deserving lamed or crippled boys and girls."

§ 96-26. Cooperation of towns, townships, and counties with Division.

It shall be lawful for the governing authorities of any municipality, county, township, or school corporation in the State to enter into cooperative agreement with the Employment Service Division and to appropriate and expend the necessary money upon such conditions as may be approved by the Employment Service Division and to permit the use of public property for the joint establishment and maintenance of such offices as may be mutually agreed upon, and which will further the purpose of this Article. (1921, c. 131, s. 8; C. S., s. 7312(h); 1931, c. 312, s. 3; 1935, c. 106, s. 5; Ex. Sess. 1936, c. 1, s. 12.)

§ 96-27. Method of handling employment service funds.

All federal funds received by this State under the Wagner-Peyser Act (48 Stat. 113; Title 29, U.S.C., section 49) as amended, and all State funds appropriated or made available to the Employment Service Division shall be paid into the Employment Security Administration Fund, and said moneys are hereby made available to the State employment service to be expended as provided in this Article and by said act of Congress. For the purpose of establishing and maintaining free public employment offices, said Division is authorized to enter into agreements with any political subdivision of this State or with any private, nonprofit organization, and as a part of any such agreement the Commission may accept moneys, services, or quarters as a contribution to the Employment Security Administration Fund. (1935, c. 106, s. 7; Ex. Sess. 1936, c. 1, s. 12; 1941, c. 108, s. 11; 1947, c. 598, s. 1.)

§ 96-28: Repealed by Session Laws 1951, c. 332, s. 17.

§ 96-29. Openings listed by State agencies.

Every State agency shall list every job opening occurring within the agency which the agency wishes filled, along with a brief description of the duties and

salary range, with the Employment Security Commission of North Carolina within 10 working days after the occurrence of the opening, and report to the Commission the filling of any such listed opening within five working days after the opening has been filled. (1973, c. 715, s. 1; c. 1341.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

March 15, 1981

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN
Attorney General of North Carolina

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